IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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 Respondents, **v.** **THE STATE OF CALIFORNIA; KAMALA D. HARRIS, in her official capacity as Attorney General for the State of California; AND THE CALIFORNIA DEPARTMENT OF JUSTICE,** Defendants and Appellants.	Case No. F062490

Fresno County Superior Court, Case No. 10CECG02116
The Honorable Jeff Hamilton, Judge

JOINT APPENDIX
VOLUME XIV
Pages JA004005-JA004200

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EXHIBIT

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

---oOo---

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE and PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; and STEVEN STONECIPHER, Plaintiffs and Petitioners, v. THE STATE OF CALIFORNIA; JERRY BROWN, in his official capacity as Attorney General for the State of California; THE CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-25, Defendants and Respondents.	No. 10CECG02116

---oOo---

THURSDAY, DECEMBER 16, 2010

---oOo---

DEPOSITION OF

STEPHEN HELSLEY

---oOo---

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Dawn McFarland

A Yeah, but when you put the word "caliber" in it, it's hard to skip by it.

Q I understand, but let's just strike my prior question and we'll just move on.

Based on your experience and expertise, would you agree that the .45 ACP cartridge is handgun ammunition?

A No.

Q Why not?

A A little story. The .45 ACP cartridge was developed in the early 1900s for some handguns that Browning was designing, and those served in World War I. And toward the end of World War I, John Thompson developed the Thompson submachine gun, which became a fairly big deal in law enforcement, came too late to use in the war, but it was used by our military to fight in Nicaragua, in Shanghai and a variety of places where the Marine Corps was. At the beginning of World War II, they geared up and produced, between the Thompson submachine gun, the Greiss gun that fired the same round and the Reising gun, something on the order of 3 million submachine guns and there were more .45 handguns produced than there were submachine guns, but the -- in terms of which consumes the most, the handgun was never a principal battle arm. It was a backup. And the submachine guns were, you know, airborne assault firearms. You know, they were used

extensively in the Pacific, so taking us through the Korean War and on into Vietnam, because those same guns served all through the Vietnam conflict, the -- there was tremendous amount of use of .45 ACP in long guns. And those guns were subsequently sold, given away to, you know, Vietnam, the Philippines, I don't know where all they went to, but there has been so much submachine gun use of .45 ACP over the century that I suppose if you researched it, you could get closer, but I don't think it's a given that the .45 ACP, given my perspective on worldwide and through time, has been fired more, say, in a handgun than it has in a submachine gun.

Q Putting aside the historical background and historic usage, in California today, would you say that the .45 ACP cartridge is more often used in a handgun or in a rifle?

MR. DALE: Objection. Incomplete hypothetical.

THE WITNESS: Well, there are rifles that use the .45 ACP cartridge.

Q BY MR. KRAUSE: Okay. ACP stands for Automatic Colt Pistol?

A Colt pistol, yes.

Q Okay. Can you identify what rifles chamber a .45 ACP cartridge?

A One of the guns is the Marlin Camp .45 that I

described that I own one of them and -- can't bring more to mind. There are just a few of them, but -- and what I don't know is I don't know the usage that the millions of submachine guns that are floating around the world that shoot that cartridge is in relationship to what we're doing here. Clearly, in this state, people can't have Thompson submachine guns, for the most part, unless DOJ, you know, decides to bless them with one, but move across the border and in Nevada you can own a Thompson gun if you want to and in 36 states, the Joe Six Pack can own a machine gun. So to be sure in my response, I would want to know -- I would want to talk to the BATFE folks and find out the number of licensed Thompson submachine guns that there are in the United States, because I -- I know they're -- I've fired quite a few of them myself, so -- and I know that there are stores in Las Vegas, for instance, that rent them. And there's a constant parade of tourists that are throwing down lots of bucks to shoot those guns, a lot of rounds being burned up. So I know that you're uncomfortable with my worldwide view, but even the national view, California is not representative of the nation in terms of, say, submachine guns.

Q How many .45 handguns are available in California that chamber the .45 ACP, to your knowledge?

A Not a clue. Not a clue.

Q More than a hundred?
A Now, do you mean different designs? Models?
Q Different manufacturers, different models. Any distinct handgun that chambers the .45 ACP.
A Well, the difficulty that I would have is I'd have to identify the universe and then run it against the approved for-sale list in this state because the manufacturers of gun X may not have submitted it to DOJ for the drop test and the other things that are required. So you can go to the -- you can go to the gun journals like the Gun Digest to see sort of what the universe is. If you have read the 2008 report from BATFE on gun production, you can look at the makers who make .45s by maker name, and it shows the exact number that they produced each year. As I mentioned before, you can't draw much in the way of conclusions from the DROS because, while .45 is up there at the top, you don't know if those are new sales or whether those are transfers and so you don't know what the universe is.
Q Okay. But for sale in California right now, how many rifles are there that chamber the .45 ACP round?
A Very few. I'm going to guess, perhaps, three or four, but that is a flat guess.
Q So despite knowing that there will be so few rifles that chamber this .45 ACP for sale in California

agree that the .45 GAP cartridge is handgun ammunition?

A I've never seen a GAP round. I've never seen a Glock chambered for a GAP round. I've read about them. I know of no long gun that's chambered for it.

Q Okay. So you have no reason to believe that it's not exclusively handgun ammunition?

A I do not.

Q I think we've covered the 9mm Luger, also known as the 9x19, also known as the 9mm Parabellum, but I guess let me ask again.

Based on your experience and expertise, would you agree that the 9mm Luger cartridge is handgun ammunition for purposes of the challenged statutes, meaning that it's used more often in a handgun than a rifle?

A Well, again, given my worldwide-through-time perspective, I would disagree with that because I assume that in the world, that cartridge is being used more in submachine guns than it is in handguns.

Q What if we changed the focus to the United States or California, would your opinion change?

A There -- there are still things that I wouldn't know, because the DROS sales information, as soft as it is, doesn't give you a real sense of -- well, we don't know anything about long guns at all from DROS and I don't know how many Marlin Camp 9s were made. I don't know how

many uppers for AR 15s were made that use the 9. I mean, on and on and on. I could -- I think it would just be irresponsible to say, "Oh, yeah." There are so many submachine guns in the United States and in the world and a lot in this state too that burn those rounds up that I think a study would probably conclude that it's more often used in long guns.

Q Worldwide?

A Yes. Possibly even in the United States, depending on the police use and military use. There are -- the military burns a lot of those in -- you know, with the SEALs and -- because most -- most shooters, you know, they buy a box, they go out and shoot once a year, two or three times a year, they may have a gun, some cartridges, but they don't put that many rounds through it. The world of submachine guns and training with those is you shoot a bunch. And so that's my sincere belief, that --

Q So do you interpret principally for use in a handgun to mean the number of rounds cycled through a particular type of weapon?

A It's that and it's the number of firearms for them. There are -- again, I -- I said in one of the things I wrote that to me, the ultimate way you determine whether something is for handgun or rifle is what you

A Yes.
Q Based on your experience and expertise, would you agree that the .40 S&W auto is a -- is handgun ammunition?
A Well, no. That's where more work would have to be done, because as I say in here on page 11 of the document filed on September the 29th, there's a list of the Beretta Storm, the Hi-Point, the Kel-Tec, the Olympic Arms, PC for carbine and those things and I don't think I could agree on that. I think one would need to know substantially more than we know.
Q How many long guns chamber the .40 S&W auto round?
A Well, from the list that I made is one, two, three, four, five -- looks like about six are the ones that I put down on the list here.
Q Do you have an estimate of how many handguns chamber the .40 S&W auto round?
A Ruger, Smith. No, I'd have to research that. A number of them. And there are various models of those.
Q Can you give me an estimate? More than 20?
A No, I can't.
Q Okay. Based on your experience and expertise, would you agree that the that ACP cartridge is handgun ammunition?
A Yeah, as I said before, I know of no long gun

that's chambered for that.

Q Okay. Same question as to the .32 ACP.

A I would say no. And that was the monologue I took you through on the VZ 61 Skorpion and the follow-ons to that. The .32 ACP cartridge has a tremendous following in submachine guns worldwide.

Q In California, however, what would your answer be?

A Well, I know --

MR. DALE: Objection. Incomplete hypothetical. Sorry. Sorry for the interjection.

THE WITNESS: I know of no long guns that are chambered for it. There are precious few handguns that are still being chambered for it.

Q BY MR. KRAUSE: So your conclusion that it is -- that the .32 ACP cartridge is not handgun ammunition is based on its use outside the United States?

A Yes.

Q Okay. Based on your experience and expertise, would you agree that the .357 S&W Magnum is handgun ammunition?

A No.

Q Why not?

A Well, 40 years ago if we'd had this discussion, virtually every police department and sheriff's department

would have carried one of those, a wheel gun of some sort. Now you'd be hard pressed to find one. There are a world of .38 and .357 revolvers floating around, but there's also a world of rifles that are chambered for them, including a CHP commemorative and all manner of stuff that comes from the Italians and these are part of the cowboy gun world.

Q And those are for sale in California?

A Yes. Yes. As a matter of fact, the principal distributor, EMF, is California based.

Q Do you have a rough estimate or -- of the number of long guns that can chamber the .357 S&W Magnum cartridge?

A No. I brought the Cowboy Chronicles along, and their ads, and there are four of them. And through the years, there have been -- the Israelis made one called the Desert -- no, they called it the Wolverine. Browning has made them. There have been a lot of them over the years. Whether they're still being sold, I don't know. They're still in circulation. But the principal ones that are for sale here now are the cowboy battalion ones.

Q Do you have an estimate of how many handguns can chamber the .357 S&W Magnum cartridge?

A You mean in models or in count?

Q What's -- you mean total number versus models?

A Yeah.
Q I don't expect you probably have a count, so maybe models.
A Through time, Smith & Wesson has had a lot of them. Colt has had some. Ruger has had quite a few. Rossi. I'm trying to think of who else comes to mind. There are a lot of models of .357s, be they Deringers or revolvers or single action, double action or -- that would require some study to count.
Q Okay. Based on your experience and expertise, would you agree that the .357 SIG, S-I-G, cartridge is handgun ammunition?
A With that cartridge, I have never seen a long gun that's chambered for it.
Q So you would agree that the .357 SIG is handgun ammunition?
A Yes.
Q Based on your experience and expertise, would you agree that the .44 S&W Special is handgun ammunition?
A No.
Q Why not?
A Well, again, we're into the same thing as with the .357. The .44 Special will work in a .44 Magnum. It's like the relationship between the .22 long rifle and the .22 long. All manner of .44 Special firearms that

will accept a .44 Special cartridge have been made and I -- I looked at the -- at the DROS stats on .44s and .454s and that's when I thought, you know, well, I don't know whether these are new sales or whether these are, you know, transfers. And there are quite a few -- the impression I have is there are quite a few. I haven't gone to the National Shooting Sports Foundation or various folks to find out if I can get gun production from Marlin, because they make them, and Browning made them. I have no idea what their sales are, but I know that there is an open question that until you resolve some counts to really know what's being sold and what's been sold over time.

Q Okay. All right. How about the .44 S&W American? Based on your experience, is that cartridge handgun ammunition?

A That's a vintage round.

Q Is it? Okay. Tell me about it.

When was it manufactured?

A Well, I want to say the .44 Smith & Wesson American is an antique round.

Q Okay. I've leave it at that. I saw it. I asked about it. I'll move on.

In your experience and expertise, would you agree that the .44 auto Mag cartridge is handgun ammunition?

A I've never seen that chambered in a long gun or

innovation for the Webley revolver and originated about 1868 to '70."

THE WITNESS: Did I pass?

MR. KRAUSE: You did. One thing I won't do is question your firearms knowledge.

MR. DALE: Is that a stipulation?

MR. KRAUSE: What is that, the expert designation? No. There is no dispute that he is an expert in ammunition in firearms.

Q BY MR. KRAUSE: Let's see. Let's turn to the next one. Based on your experience and expertise, would you agree that the .380 automatic Colt pistol cartridge is handgun ammunition?

A No.

Q Even though it has "pistol" in its title?

A Well, in the American title, it does.

Q Okay.

A It's also the .9 Kurz, the 9x17, the .9 Corto. It has a variety of names. No. That has -- that has been used extensively in the submachine guns in the third worlds as well and the things like the .32 and the .380 in my experience are firearms that don't get a whole lot of rounds put through them. They're, you know, below the bed or up in the closet sort of guns and, again, you'd -- to nail this down, you'd really want to look at the universe

of submachine guns, particularly the ones that flowed from the VZ 61 Skorpion, because there was a 64. There are all sorts of model numbers. And that cartridge was part of that development.

Q Okay. Focusing on California, how many long guns, to your knowledge, that can chamber a .380 ACP cartridge are for sale in California, if you know?

A The only non-handguns as we're describing them here that I'm aware of are machine pistols that wouldn't be in the civilian trade. The Military Armament Corporation, the MAC, it was called, had a .380 machine pistol, but beyond that, I'm not aware of a rifle that is chambered for that round.

Q Okay. So your conclusion that the .380 ACP cartridge is not handgun ammunition is based on --

A Across time, around the world.

Q Across time, around the world --

A Yeah.

Q -- foreign firearms?

A Yes.

Q Okay. Based on your experience and expertise, would you agree that the .454 Casull cartridge is handgun ammunition?

A That's chambered for rifles -- in rifles as well. That was one of the things that I really alerted to on the

DROS stats, the number of .454 sales. That seems inordinately high because that's a very expensive revolver and very unpleasant to shoot, and so I look at the numbers on your DROS stats and think, "This can't be. This -- this must include stuff that" -- so having said that and knowing that rifles are available chambered for it, I'd be reluctant to make the statement I've made on other cartridges until I know more about sales and what exists, because the .454 Casull is relatively new. As cartridges go, it's a .45 Long Colt on steroids with a stronger web in the case and my experience is that's a pretty small universe of handguns. And so some level of long gun sale would -- wouldn't seem to me to be real hard to match the handgun sales because it's such a niche firearm.

Q How -- what long guns, to your knowledge, can chamber the .454 Casull that are for sale in California?

A Most of the ones that I've been aware of are modifications that people have had done, not -- they -- they didn't buy a .454 Casull from Company A. They took a rifle that would accept it and had it rebarreled, rechambered for -- so that they could use it, say, with their Casull pistol or for whatever the reasons were, but most of the Casulls that I'm aware of are not factory produced.

Q Okay. But .454 Casull cartridges do fit into

handguns that are sold in California?

A Yes.

Q So your conclusion that the .454 Casull cartridge is not handgun ammunition is based upon sales and -- the existence of long guns outside of California or -- help me understand that.

A I'm not saying it's not. I'm saying that the data is insufficient to draw the conclusion. I'm -- I'm miffed by the DROS stats because of the numbers and thinking, "This can't be." This is -- so many Casulls being made, unless they're just -- the guns are recycling.

Q Somebody buys one and doesn't like it and moves it on. It's the same gun, but it's just passing around?

A So I'm not saying it's not. I'm saying the responsible approach would be to know more.

Q Okay. That's fair.

Based on your experience and expertise, would you agree that the .38 Special cartridge is handgun ammunition?

A Same thing with .357 Magnum. That's the .22 long rifle, .22 long. If you have a .357 long gun, you can shoot .38 Specials in it.

Q And in your experience, a lot of long guns chambering the .38 Special have been sold and are very popular?

A Most of them are chambered for .357 because that way you get both.

Q Okay.

A The -- in my experience, the firearms that I see .38 Specials and .357 Magnum both in handguns have just sort of dropped off the chart. I mean, they're still being made and they're still -- but as compared to 40 years ago, there's a world of difference.

Q But if you consider the historic implications and the high numbers that existed in the past, does that change your conclusion about the potential for .38 Special cartridges to be handgun ammunition?

A Well, as I said, I have a .357 model 19 and I have a .357 Ruger Security Six, and neither one of them has had a round through it in 15 years, so existence and use aren't necessarily the same thing. And so that's why I think you have to look to not just what's sold, but were these rounds being expended. And the cowboy thing, for instance, tremendous amount -- you can see in the ads how cartridge manufacturers have moved to cater to the cowboys with reduced loads, black powder loads designed specifically for the competitions that they have.

Q Isn't the .38 Special/.357 still pretty popular among people who purchase them for home defense?

A There is -- the -- I know that Smith & Wesson

of the World, I think, on page six in there, they say if they were really complete, I think they said there'd be three volumes instead of one. It's down the middle of the second column about why they chose things and why they didn't.

Q "The book has to be kept in balance to appeal to a general rather than a specific audience. Second, while most gun nuts are casual cartridge collectors, only a few shooters are average cartridge collectors."

A You're there. You're -- just --

Q "There are several reasons for" -- oh. "There must be hundreds of cartridges and variations, including (inaudible) military, European. Editorial constraints on the number of pages and content don't leave sufficient room to include everything in one volume."

A Keep going. I think there's one more closer where they say that multiple volumes would be required.

Q I'm not seeing it, but I'll take your word for it.

A Yeah.

Q Well, focusing, then, just back on the 9x19 cartridge, if the attorney general asked you, you know, "Mr. Helsley, the -- you know, in California, is -- you know, excluding use by law enforcement and the military, is the 9mm or 9x19 cartridge a handgun ammunition

cartridge," what would --

MR. DALE: Objection. Incomplete hypothetical.

Q BY MR. KRAUSE: What would your answer be?

A I -- I would say that I need more information. The information is probably available. Now that you've narrowed the world --

Q What information would you need?

A Firearm production sales, shipment of those cartridges to this state, closer look -- again, I have no idea what the DROS system could produce, but there are management tools that, to do it responsibly, you could use to assess that.

Q Well, again, turning back to long guns for sale in California that chamber the 9mm Parabellum round, how many of those exist or how many are for sale in California?

A I think that's the wrong question. It's how many have existed over time.

Q Well, it might be the wrong question, but it is my question.

A But it is your question. Okay. Okay. I'll -- okay. Relatively few, but those aren't the universe. They are what's currently being sold, but they're not necessarily all the types that consume.

Q But limiting it to California and looking at the

number of handguns that chamber the 9x19 round versus the number of long guns in California that chamber the 9x19 round, excluding law enforcement and the military, would you agree that the 9x19 cartridge is handgun ammunition?

MR. DALE: Objection. Assumes facts.

THE WITNESS: Well, when you throw in the exclusion, and we look at -- and, again, sales for a year -- it's not in sales. It's sales and transfers for a year. I would have to know, were the majority of those to law enforcement? Because you say, "Let's exclude law enforcement," but I assume that the data not in DROS but in total production of what comes to this state from the companies who produce it, they count the law enforcement guns, so I don't know what the universe is of when you exclude law enforcement 9s, if that's your question, and exclude the military 9s, I don't know what that leaves because I've never considered that.

Q BY MR. KRAUSE: Okay. So you just don't know?

A I don't know. And so since I don't know, to do a responsible job, I would have to know or at least reduce the -- reduce my doubt.

MR. KRAUSE: Okay. Anything else?

I think the deposition, then, is done. Thank you for --

THE WITNESS: My pleasure.

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 January 13, 2011, I served the attached

1) DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR AN EVIDENTIARY HEARING RE: QUALIFICATION OF EXPERT WITNESS BLAKE GRAHAM; (2) DECLARATION OF PETER KRAUSE

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

C.D. Michel
Clint B. Monfort
Sean A. Brady
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 January 13, 2011, at Sacramento, California.

Brenda Apodaca
Declarant

Signature

SA2010101624

STATE OF CALIFORNIA

DEPARTMENT OF JUSTICE

REQUEST FOR OVERNIGHT COURIER SERVICE (SACRAMENTO ONLY)

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DOCKET NO.: 00002-280-SA2000CX0000;

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SUPERIOR COURT OF CALIFORNI COUNTY OF FRESNO **Civil Department - Non-Limited** 1130 "O" Street Fresno, CA 93724-0002 (559)457-1900	*FOR IRT 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 01/18/11, 1st amended 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: **January 20, 2011** 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

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

Hearing Date: **JANUARY 18, 2011** Hearing Type: **Summary Judgment – 1st amended**

Department: **402** Judge/Temporary Judge: **Jeff Hamilton**

Court Clerk: M.Santana Reporter/Tape: S. McKennon

Appearing Parties:

Plaintiff: Defendant:

Counsel: C.D.Michel, Clint G. Monfort, Sean Brady Counsel: Peter A. Krause, Kimberly Graham

[X] **Court overrules objections. Court will issue a written decision. Plaintiff to prepare a Preliminary Injunction signed off by Defense by closing day 01/20/2010.**

[ ] Continued to [ ] Set for _____ at _____ Dept. _____ for _____

[ ] Submitted on points and authorities with/without argument. [X] **Matter is argued and submitted.**

[ ] Upon filing of points and authorities.

[ ] Motion is granted [ ] in part and denied in part. [ ] Motion is denied [X] **Plaintiff dismisses 2nd cause of Action without prejudice. Third cause of action is dismissed.**

[ ] 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 compiaint 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

SUPERIOR COURT OF CALIFORN' COUNTY OF FRESNO Civil Department - Non-Limited 1130 "O" Street Fresno, CA 93724-0002 (559)457-1900	FOR 'JRT 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 MARIA C. 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

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: **JANUARY 31, 2011** Hearing Type: **From Chambers**

Department: **402** Judge/Temporary Judge: **Jeff Hamilton**

Court Clerk: M.Santana Reporter/Tape: Not Reported

Appearing Parties:

Plaintiff: **Not Present** Defendant: **Not Present**

Counsel: Counsel:

☐ Off Calendar

☐ Continued to ☐ Set for _____ at _____ Dept. _____ for _____

☐ Submitted on points and authorities with/without argument. ☐ 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

☒ Other: See attached copy of Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion for Summary Adjudication

FILED

JAN 3 1 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

> situation constitutional problems may possibly arise as to the particular *application* of the statute."

(*Coffman Specialties, Inc. v. Department of Transportation* (2009) 176 Cal. App. 4th 1135, 1145.)

The Court evaluates the statute according to the following standards:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

(*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 567-68 [quoting *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-09].)

> The starting point of our analysis is "the strong presumption that legislative enactments 'must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [Citations.] A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.'"

(*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 568 [quoting *Walker v. Superior Court* (1988) 47 Cal. 3d 112, 143.)

Statutes Fail to Provide Adequate Notice or Fair Warning.

First, the Court must decide whether or not Penal Code §§ 12060, 12061, and 12318 are sufficiently definite to provide ordinary people and ammunition vendors adequate notice or fair warning of the conduct proscribed. In other words, would a person or ammunition vendor of ordinary intelligence understand what ammunition falls into the definition of "handgun ammunition" -

ammunition "principally for use in" pistols, revolvers, and other firearms with barrels less than 16 inches in length that cannot be interchanged with a barrel 16 inches in length or more, notwithstanding that the ammunition may also be used in some rifles, and excluding ammunition designed and intended to be used in an "antique firearm" and blanks - or does not fall within the provided definition of "handgun ammunition?"

> In considering whether a legislative proscription is sufficiently clear to satisfy the requirements of fair notice, "we look first to the language of the statute, then to its legislative history, and finally to California decisions construing the statutory language." [Citation.] We thus require citizens to apprise themselves not only of statutory language but also of legislative history, subsequent judicial construction, and underlying legislative purposes [Citation].

(*Walker v. Superior Court* (1988) 47 Cal. 3d 112, 143.)

The Court finds that the definition of "handgun ammunition" established in Penal Code §§ 12060(b) and 12318(b)(2) fails to provide adequate notice of the conduct proscribed to the people or handgun ammunition vendors of ordinary intelligence to whom the statutory scheme applies. Initially, the Court determines that there are no state or federal cases that construe or interpret the definition of "handgun ammunition" established in Penal Code §§ 12060(b) and 12318(b)(2).

Next, the Court looks to the legislative context, the legislative purpose, and the legislative history of Assembly Bill 962, the bill that enacted Sections 12060, 12061, and 12318. The Legislature enacted Sections 12060, 12061, and 12318 as part of the "Anti-Gang Neighborhood Protection Act of 2009." (Stats. 2009, ch. 628, § 1.) There is no legislative purpose clause or preamble in the "Anti-Gang Neighborhood Protection Act of 2009."

Additionally, there is no discussion in the legislative history of Assembly Bill 962 of exactly what types of ammunition, by caliber or by cartridge, were supposed to be included in the definition of "handgun ammunition." The Court notes that this lack of discussion is probably because most of the definition of "handgun ammunition" was taken from another statute already in effect (Penal Code § 12323(a)). However, due to the lack of a legislative purpose clause and lack of substantive discussions in the legislative history, Assembly Bill 926's legislative history does not help to clarify what ammunition the Legislature intended to fall into the definition of "handgun ammunition."

Finally, the Court considers the text of the definition of "handgun ammunition" itself and determines that the text of the definition of "handgun ammunition" established in Penal Code §§ 12060(b) and 12318(b)(2) fails to provide reasonable people or ammunition vendors with an objective standard that individuals or entities can use in order to determine what particular calibers or cartridges of ammunition are "principally for use in pistols, revolvers, and other firearms [with barrels of less than 16 inches, which are not interchangeable with barrels of 16 inches or more]," notwithstanding that the ammunition may also be used in rifles, and are thus regulated by Sections 12060, 12061, and 12318. In this case, it is not the definitions of the individual words themselves that cause the confusion. In fact, "pistol," "revolver," and "firearm" all have clear, ordinary, and common meanings. An average person can easily measure a barrel and determine if the barrel is less than 16 inches or not or, even if the barrel is less than 16 inches in length, if the barrel is

interchangeable with a barrel that is 16 inches in length or more. In addition, the definition of "principally" has a clear, ordinary, and common meaning -- "chiefly," "mainly," or "primarily." (Dictionary.com Unabridged [based on Collins English Dictionary (10th Ed., 2009)] <http://dictionary.reference.com/browse/principally> [as of January 28, 2011.].) "Primarily" is defined as "essentially" or "mostly", "chiefly" is defined as "essentially" or "mostly," and "mainly" is defined as "for the most part" or "to the greatest extent." (Dictionary.com Unabridged [based on Collins English Dictionary (10th Ed., 2009)] <http://dictionary.reference.com/browse/primarily>, <http://dictionary.reference.com/browse/chiefly>, and <http://dictionary.referencecom/browse/mainly> [as of January 28, 2011.] Based on these definitions, it appears relatively clear that "handgun ammunition" is ammunition that is for the most part or to the greatest extent used in pistols, revolvers, and firearms with a barrel length of less than 16 inches, even though the ammunition may also be used in rifles. In different terms, "handgun ammunition" is ammunition used in pistols, revolver, and firearms with a barrel length of less than 16 inches more than fifty percent of the time.

However, while the meanings of the individual words of the definition are clear, the text of the "handgun ammunition" definition provides no objective way or method for a person or a handgun ammunition vendor to determine if a particular ammunition caliber or cartridge is used more often, or used more than fifty percent of the time, or used for the most part in pistols,

revolvers, or firearms with barrels of less than 16 inches, even though the same ammunition caliber or cartridge may also be used in rifles. Sections 12060(b) and 12318(b)(2) do not state that particular calibers and/or cartridges of ammunition are "handgun ammunition" or provide that, in order to determine what "handgun ammunition" is, people and handgun ammunition vendors should look at regulations or a guide propounded by a government agency for a list of particular calibers and/or cartridges of ammunition that qualify. (*See Harrott v. County of Kings* (2001) 25 Cal. 4th 1138, 1152-53 [the California Supreme Court found that vagueness issues in the Roberti-Roos Assault Weapons Control Act of 1989 did not reach impermissible levels because ordinary citizens did not have to look at the language of the statute, but only had to consider the California Code of Regulations and an Identification Guide propounded by the Attorney General's office - objective uniform standards - to determine if an weapon was classified as an assault weapon].) Here, Penal Code §§ 12060, 12061, and 12318 do not permit any law enforcement agency to establish regulations or an identification guide to more narrowly define what ammunition is encompassed in the "handgun ammunition" definition.

The Court finds that the statutory language of the "handgun ammunition" definition encourages individual people and handgun ammunition vendors to consider their own experience, conduct, and/or actions in using or selling ammunition calibers and cartridges in handguns or rifles to determine if a particular ammunition caliber or cartridge is "handgun ammunition." One person might use one caliber of ammunition solely in rifles, while another person might only use that same caliber of ammunition in

handguns. If a person (Law Enforcement or citizen) or ammunition vendor is forced to consider and rely upon their own subjective experiences in order to determine what ammunition is "handgun ammunition," each person or ammunition vendor is likely to conceive of a definition of "handgun ammunition" that is in part, or to a great extent, different from any other person's or ammunition vendor's definition of "handgun ammunition."

Although DEFENDANTS assert that the ammunition vendor "profession" might have more specialized knowledge about ammunition use in handguns or rifles and that the Challenged Statutes only apply to handgun ammunition vendors, Penal Code § 12318's application is not limited to handgun ammunition vendors, but instead applies to all people or entities engaged in the "delivery or transfer of ownership of handgun ammunition" and all people or entities cannot be charged with any specialized knowledge of ammunition use in handguns or rifles. Therefore, the Court finds that the "handgun ammunition" definition established in Sections 12060(b) and 12318(b)(2) does not provide people, handgun ammunition vendors, or other entities with adequate notice or fair warning of what ammunition is "handgun ammunition" so that the people, handgun ammunition vendors, and other entities can have a reasonable opportunity to determine what conduct is prohibited by Sections 12060, 12061 and 12318.

Consequently, Penal Code §§ 12060, 12061 and 12318 fail to meet the first requirement for a constitutionally valid criminal statute -- that the statute be definite enough so that ordinary people can understand what conduct is prohibited. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

Standard for Enforcement is Non-Existent.

Second, the Court must decide whether or not Penal Code §§ 12060, 12061, and 12318 are sufficiently definite to provide "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].) In other words, is the definition of "handgun ammunition" in Penal Code §§ 12060(b) and 12318(b)(2) sufficiently definite enough to provide a standard or guidelines for the police and court to determine if a person, handgun ammunition vendor, or other entity has violated Sections 12060, 12061, and 12318 in order to prevent arbitrary and discriminatory enforcement?

The Court finds that the definition of "handgun ammunition" established in Penal Code §§ 12060(b) and 12318(b)(2) contains no objective standard or method for determining what ammunition is encompassed by the definition of "handgun ammunition" leaving the law enforcement officers with "virtually complete discretion" to determine whether or not a particular caliber and/or cartridge of ammunition is "handgun ammunition." (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.) Specifically, the full discretion accorded to the enforcing law enforcement officer to determine if the ammunition at issue is "handgun ammunition" or not "necessarily '[entrusts] lawmaking to the moment-to-moment judgment of the policeman on his beat." (*Kolender*, 461 U.S. at 360.) The Legislature has simply left it open to the personal judgment call and subjective understanding of each individual law enforcement officer to determine if a particular caliber and/or cartridge of ammunition is "handgun ammunition" under the definition in

Sections 12060(b) and 12318(b)(2) and to subjectively apply that subjective definition of "handgun ammunition" to each issue of an ammunition sale or transfer that comes to the attention of that law enforcement officer.

Take, for example, two different law enforcement officers, one a county sheriff and the other a city police officer, separately conducting investigations into .32 caliber and .44 caliber ammunition sales to people who gave the ammunition to a felon, which is a misdemeanor under Penal Code § 12317(a). One officer goes to an ammunition vendor where one of the ammunition sales occurred and requests to see the records of all "handgun ammunition" sales, which the vendor is required to keep pursuant to Section 12061(a)(3). The officer looks in the vendor's records and sees that there is a record of a "handgun ammunition" sale to the suspected individual for .32 caliber ammunition, but not for .44 caliber ammunition. Now, the officer knows that the individual under investigation purchased .44 caliber ammunition in the same transaction as the .32 caliber ammunition sale, but since the law enforcement officer does not believe that .44 caliber ammunition is ammunition "principally for use" in pistols, revolvers, and other firearms with barrels shorter than 16 inches or "handgun ammunition", the law enforcement officer does not arrest the vendor for committing misdemeanor violations of Penal Code § 12061(a)(3), which requires an ammunition vendor to keep records of all sales and transfers of "handgun ammunition" and Section 12061(a)(4), which provides that a vendor "shall not knowingly … fail to make a required entry in" the "handgun ammunition" records required by Section 12061(a)(3). Next, during

the course of his separate but parallel investigation, the other law enforcement officer goes to the same ammunition vendor, also requests to see the records, and notices in the records that there is a record of a "handgun ammunition" sale to his suspect for .32 caliber ammunition, but not for .44 caliber ammunition. Again, this second officer knows that his suspect purchased .44 caliber ammunition in the same transaction as the .32 caliber ammunition sale, but this time, since the second law enforcement officer believes that .44 caliber ammunition is ammunition "principally for use" in pistols, revolvers, and other firearms with barrels shorter than 16 inches or "handgun ammunition," the law enforcement officer arrests the ammunition vendor for misdemeanor violations of Penal Code § 12061(a)(3) and (a)(4).

In another twist, the two officers could be investigating improper sales and transfers of specific .44 caliber cartridge ammunition that an ammunition vendor does not keep records of because the vendor does not believe that the particular ammunition cartridge qualifies as "handgun ammunition." However, while one officer agrees with the vendor that the specific .44 caliber cartridge ammunition is not "handgun ammunition," the vendor is arrested by the other officer for misdemeanor violations of Section 12061(a)(3) and (a)(4) because the other officer disagrees with the vendor and believes that the specific .44 caliber cartridge ammunition is ammunition "principally for use" in a handgun. Because the language of the definition of "handgun ammunition" fundamentally requires each law enforcement officer to make a subjective determination as to whether or not the ammunition at issue is ammunition "principally for use" in a

handgun and then subjectively apply their own definition to the situation before them, the definition of "handgun ammunition" established by Section 12060(b) and 12318(b)(2) gives unlimited discretion to each individual law enforcement officer to determine arbitrarily if the ammunition at issue is "handgun ammunition" and to apply their particular classification of "handgun ammunition" or not to the specific issue before them.

The DEFENDANTS contend that there is no evidence that the DEFENDANTS will enforce the challenged definition arbitrarily and that, before enforcing the statutes, law enforcement will need probable cause to show that the ammunition at issue is used principally in handguns within the terms of the definition of "handgun ammunition." However, the DEFENDANTS appear to be misunderstanding the actual issue. This Court is not finding that the definition of "handgun ammunition" creates unconstitutional discretion in the law enforcement personnel to arrest people for violations of Sections 12061 and 12318 without probable cause that the ammunition at issue is "handgun ammunition" as defined by Sections 12060(b) and 12318(b)(2). Rather, the issue is that the actual definition of "handgun ammunition" is so vague that it does not establish an objective standard or method by which individual law enforcement officers can determine what ammunition is properly "handgun ammunition" as defined by Sections 12060(b) and 12318(b)(2).

The List.

DEFENDANTS' argue that the "list" of calibers and cartridges that their firearms and ammunition expert, Blake Graham, compiled is a list of calibers and cartridges that DEFENDANTS' consider to

be "handgun ammunition" within the definition established in Sections 12060(b) and 12318(b)(2); the Court determines that this "list" is not any limitation on the "vast amount of discretion" granted to law enforcement in the enforcement of Sections 12061 and 12318. (*See City of Chicago v. Morales* (1999) 527 U.S. 41, 63 [holding that a general order of the Chicago police department of internal rules limiting their enforcement of the statute at issue in that case to certain designated areas of the city was not a sufficient limitation on the vast amount of discretion granted to the police in their enforcement of the challenged statute].) Here, this "list" of the California Department of Justice is not a proper administrative regulation that limits the vast amount of discretion that law enforcement officers have to determine and enforce their subjective definition of "handgun ammunition," because nothing in Assembly Bill 962, which includes Sections 12060, 12061, and 12318, grants the California Department of Justice the authority to promulgate regulations limiting the discretion of law enforcement officers when it comes to what ammunition can be properly defined as "handgun ammunition."

Also, even if this "list" is evidence that the Department of Justice is internally limiting the discretion of the law enforcement officers that work for them, the Department of Justice is not the only law enforcement agency in California that will be enforcing Sections 12061 and 12318. In particular, Section 12061(a)(5) states that "handgun ammunition" records of ammunition vendors are subject to inspection by any peace officer employed by not only the Department of Justice, but also peace officers employed by a sheriff, a city police department, or district

attorney and Section 12061(a)(7) and (c)(1) makes it a misdemeanor for an ammunition vendor to refuse to permit a person authorized under Section 12061(a)(5) to examine "handgun ammunition" records. Therefore, more law enforcement agencies other than the Department of Justice are entitled to enforce Sections 12061 and 12318 and any internal policy limiting the discretion of Department of Justice's peace officers does not apply to any other type of law enforcement officer.

Due to the fact that the definition of "handgun ammunition" established in Sections 12060(b) and 12318(b)(2) improperly fails to contain any objective standard for determining what ammunition is included in the definition of "handgun ammunition" and encourages law enforcement officers to engage in the subjective understanding and application of the "handgun ammunition" definition when the law enforcement officers enforce Sections 12060, 12061 and 12318, the Court finds that the definition of "handgun ammunition" in Sections 12060(b) and 12318(b)(2) "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officers, against particular groups deems to merit their displeasure,' [Citation], and 'confers on police a virtually unrestrained power to arrest and charge persons with a violation.'" (*Kolender v. Lawson* (1983) 461 U.S. 352, 360.) Consequently, Penal Code §§ 12060, 12061, and 12318 fail to meet the second requirement for a constitutionally valid criminal statute - that the statute's definition of the criminal offense be definite enough to not encourage arbitrary and discriminatory enforcement. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

Since Penal Code §§ 12060, 12061, and 12318 fail to "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[,]" the Court finds that Penal Code §§ 12060, 12061, and 12318 are unconstitutionally vague on their face. (*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 567 [quoting *Walker v. Superior Court* (1988) 47 Cal. 3d 112, 141].) Therefore, the Court grants PLAINTIFFS' motion for summary adjudication of their first cause of action for declaratory and injunctive relief - due process vagueness - facial.

2. PLAINTIFF Herb Bauer Sporting Goods, Inc.'s Second Cause of Action for Declaratory and Injunctive Relief - As Applied Vagueness Challenge

PLAINTIFF Herb Bauer Sporting Goods, Inc. has filed a motion for summary judgment of the complaint and summary adjudication of its second cause of action for declaratory and injunctive relief - due process vagueness - as applied. In PLAINTIFF's second cause of action, the PLAINTIFF alleges that an actual controversy has arisen and now exists between PLAINTIFF and all DEFENDANTS because the PLAINTIFF contends that Penal Code § 12061(a)(1) and (a)(2) are unconstitutional in that they are impermissibly vague and the DEFENDANTS contend that the statutes are not impermissibly vague and 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 (4th ed.) § 809.) Injunctive relief is a type of damage or relief and is a derivative cause of action, not a stand-alone cause of action.

Penal Code § 12061(a)(1) and (a)(2) provide that:

> (a) A vendor shall comply with all of the following conditions, requirements and prohibitions:
>
> 1. A vendor shall not permit any employee who the vendor knows or reasonably should know is a person described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code to handle, sell, or deliver handgun ammunition in the course and scope of his or her employment.
>
> 2. A vendor shall not sell or otherwise transfer ownership of, offer for sale or otherwise offer to transfer ownership of, or display for sale or display for transfer of ownership of any handgun ammunition in a manner that allows that ammunition to be accessible to a purchaser or transferee without the assistance of the vendor or employee thereof.

Penal Code 12060(b) provides the definition of "handgun ammunition" as used in Section 12061(a)(1) and (a)(2). "Handgun ammunition" is defined as ammunition "principally for use in" pistols, revolvers, and other firearms with barrels less than 16 inches in length that cannot be interchanged with a barrel 16 inches in length or more, notwithstanding that the ammunition may also be used in some rifles, and excluding ammunition designed and intended to be used in an "antique firearm" and blanks.

In the second cause of action, PLAINTIFF makes an as-applied vagueness challenge to Penal Code § 12061(a)(1) and (a)(2) contending that, as applied to PLAINTIFF, Sections 12061(a)(1) and (a)(2) fail to provide notice to PLAINTIFF which calibers of ammunition are "handgun ammunition" as defined in Penal Code

section 12060(b) and the vague definition encourages arbitrary and discriminatory enforcement of the laws against PLAINTIFF in violation of the Due Process Clause of the Fourteenth Amendment. However, the Court denies the PLAINTIFFs' motion for summary judgment and the PLAINTIFF's motion for summary adjudication of its second cause of action because the PLAINTIFF has failed to establish the second element of a cause of action for declaratory relief - an actual controversy involving justiciable questions relating to the rights and obligations of a party.

> An as applied challenge may seek (1) relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied, or (2) an injunction against future application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past. It contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application derived the individual to whom it was applied of a protected right.

(*Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084.) However, the PLAINTIFF's only facts regarding any possible application of Section 12061(a)(1) and (a)(2) do not demonstrate that PLAINTIFF is seeking relief from the specific application of the statute against PLAINTIFF, which caused PLAINTIFF to be under an impermissible present restraint or disability due to the statute's application or that PLAINTIFF is seeking an injunction against future application of the statute in the allegedly impermissible manner in which the statute was applied in the past.

PLAINTIFF's Undisputed Material Fact No. 238 establishes that, on December 30, 2009, the California Department of Justice

published an "Information Bulletin" providing a brief overview of Assembly Bill 962, which included Penal Code § 12061(a)(1) and (a)(2). PLAINTIFF's Undisputed Material Fact No. 239 proves that Defendant California Department of Justice provided notice to all California firearm dealers, including PLAINTIFF, that Penal Code § 12061(a)(1) and (a)(2) took effect on, and has been in force since, January 1, 2010, effectively threatening all California firearm dealers with enforcement of Section 12061(a)(1) and (a)(2). (The Court assumes *arguendo* that providing notice of a law is effectively threatening enforcement of that law.) However, the PLAINTIFF has not provided any undisputed material facts demonstrating that the California Department of Justice, or any other Defendant, has actually ever enforced or applied Section 12061(a)(1) and/or (a)(2) against PLAINTIFF or anyone else in the past or at the present time. Since an as applied vagueness challenge in this case requires the Court to consider the facts of how the statute has been applied against the PLAINTIFF or someone else and the PLAINTIFF has failed to provide any facts demonstrating that Section 12061(a)(1) and/or (a)(2) has ever been applied to anyone, the PLAINTIFF has not established that there is an active controversy between PLAINTIFF and DEFENDANTS as to whether or not Section 12061(a)(1) and (a)(2) are impermissibly vague as applied to PLAINTIFF.

Therefore, the PLAINTIFF has failed to establish each element of a cause of action for declaratory relief. Consequently, the burden never shifts to the DEFENDANTS to establish that a triable issue of material fact exists. Accordingly, the Court denies the PLAINTIFFS' motion for summary judgment and PLAINTIFF Herb Bauer

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

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Attorneys for Plaintiffs/Petitioners

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. 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 **NOTICE OF ENTRY OF JUDGMENT**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Notice is hereby given that on February 23, 2011, the Fresno Superior Court, per Judge Jeffrey Y. Hamilton, entered judgment in the above-entitled proceeding. A true and accurate copy of the Judgment is attached hereto as Exhibit "A" and incorporated by reference hereto.

Date: February 28, 2011

MICHEL & ASSOCIATES, PC

C. D. Michel
Attorney for Plaintiffs

EXHIBIT A

FILED

FEB 22 2011

FRESNO COUNTY SUPERIOR COURT
By _____ DEPT. 402

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. 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 ~~[PROPOSED]~~ **JUDGMENT** Date: January 18, 2011 Time: 8:30 am Dept: 402 Judge: Hon. Jeffery Y. Hamilton Trial Date: January 18, 2011 Action Filed: June 17, 2010

JUDGMENT

On January 18, 2011, at 8:30 a.m., Plaintiffs' Motion for Summary Judgment or, in the Alternative, for Summary Adjudication came on regularly for hearing in Department 402 of this Court, the Honorable Jeffery Y. Hamilton, judge presiding. C. D. Michel, Clinton Monfort, and Sean Brady appeared on behalf of Plaintiffs, and Peter Krause and Kimberly Graham appeared on behalf of Defendants. At the hearing, Plaintiffs dismissed their second and third causes of action without prejudice, and the Court verbally denied Plaintiffs' motion for summary judgment, and granted in part and denied in part the motion for summary adjudication.

An Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion For Summary Adjudication having been entered on January 31, 2011, and an Order of Permanent Injunction having been entered on January 21, 2011:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiffs' second and third causes of action are dismissed without prejudice;

2. Judgment is entered in favor of Plaintiffs and against Defendants on Plaintiffs' First Cause of Action for Declaratory and Injunctive Relief - Due Process Vagueness - Facial, in accordance with the 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 which is attached hereto as Exhibit "A" and is incorporated herein by reference;

3. Defendants the State of California, Kamala D. Harris, in her official capacity as Attorney General of the State of California, and the California Department of Justice, and each of their agents, employees, representatives, successors in office, and all persons or entities acting in concert or in participation with them are permanently prohibited, enjoined, and restrained from taking any action to implement, enforce, or give effect to the versions of California Penal Code sections 12060, 12061, and 12318 in effect as of January 21, 2011, the date of this Court's Order of Permanent Injunction, a true and correct copy of which is attached hereto as Exhibit "B" and is incorporated herein by reference;

4. Plaintiffs shall recover their costs of suit ~~in the amount of $ _____~~ based on a memo of costs;

5. This Court's jurisdiction to determine whether Plaintiffs are entitled to recover

attorneys' fees and, if so, in what amount, shall be retained. Entitlement to and the appropriate amount of attorneys' fees will be determined on noticed motion to be submitted to the Court by plaintiffs in accordance with California Rule of Court rule 3.1702 and Code of Civil Procedure section 1021.5.

Dated: 2/22, 2011

JEFFREY Y. HAMILTON JR.

JEFFREY Y. HAMILTON
Judge of the Superior Court

APPROVED AS TO FORM:

Dated: February 15, 2011

MICHEL & ASSOCIATES, PC

C. D. Michel
Attorney for Plaintiffs Sheriff Clay Parker, Herb Bauer Sporting Goods, California Rifle and Pistol Association Foundation, Able's Sporting, Inc., RTG Sporting Collectibles, LLC, and Steven Stonecipher

Dated: February __, 2011

KAMALA D. HARRIS
Attorney General of California
ZACKERY P. MORAZZINI
Supervising Deputy Attorney General

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

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. 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 **[PROPOSED] JUDGMENT** Date: January 18, 2011 Time: 8:30 am Dept: 402 Judge: Hon. Jeffery Y. Hamilton Trial Date: January 18, 2011 Action Filed: June 17, 2010

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. 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 **[PROPOSED] JUDGMENT** Date: January 18, 2011 Time: 8:30 am Dept: 402 Judge: Hon. Jeffery Y. Hamilton Trial Date: January 18, 2011 Action Filed: June 17, 2010

JUDGMENT

On January 18, 2011, at 8:30 a.m., Plaintiffs' Motion for Summary Judgment or, in the Alternative, for Summary Adjudication came on regularly for hearing in Department 402 of this Court, the Honorable Jeffery Y. Hamilton, judge presiding. C. D. Michel, Clinton Monfort, and Sean Brady appeared on behalf of Plaintiffs, and Peter Krause and Kimberly Graham appeared on behalf of Defendants. At the hearing, Plaintiffs dismissed their second and third causes of action without prejudice, and the Court verbally denied Plaintiffs' motion for summary judgment, and granted in part and denied in part the motion for summary adjudication.

An Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion For Summary Adjudication having been entered on January 31, 2011, and an Order of Permanent Injunction having been entered on January 21, 2011:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiffs' second and third causes of action are dismissed without prejudice;

2. Judgment is entered in favor of Plaintiffs and against Defendants on Plaintiffs' First Cause of Action for Declaratory and Injunctive Relief - Due Process Vagueness - Facial, in accordance with the 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 which is attached hereto as Exhibit "A" and is incorporated herein by reference;

3. Defendants the State of California, Kamala D. Harris, in her official capacity as Attorney General of the State of California, and the California Department of Justice, and each of their agents, employees, representatives, successors in office, and all persons or entities acting in concert or in participation with them are permanently prohibited, enjoined, and restrained from taking any action to implement, enforce, or give effect to the versions of California Penal Code sections 12060, 12061, and 12318 in effect as of January 21, 2011, the date of this Court's Order of Permanent Injunction, a true and correct copy of which is attached hereto as Exhibit "B" and is incorporated herein by reference;

4. Plaintiffs shall recover their costs of suit in the amount of $ _____;

5. This Court's jurisdiction to determine whether Plaintiffs are entitled to recover

attorneys' fees and, if so, in what amount, shall be retained. Entitlement to and the appropriate amount of attorneys' fees will be determined on noticed motion to be submitted to the Court by plaintiffs in accordance with California Rule of Court rule 3.1702 and Code of Civil Procedure section 1021.5.

Dated: _____, 2011

JEFFREY Y. HAMILTON
Judge of the Superior Court

APPROVED AS TO FORM:

Dated: February 15, 2011

MICHEL & ASSOCIATES, PC

C. D. Michel
Attorney for Plaintiffs Sheriff Clay Parker, Herb Bauer Sporting Goods, California Rifle and Pistol Association Foundation, Able's Sporting, Inc., RTG Sporting Collectibles, LLC, and Steven Stonecipher

Dated: February __, 2011

KAMALA D. HARRIS
Attorney General of California
ZACKERY P. MORAZZINI
Supervising Deputy Attorney General

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

attorneys' fees and, if so, in what amount, shall be retained. Entitlement to and the appropriate amount of attorneys' fees will be determined on noticed motion to be submitted to the Court by plaintiffs in accordance with California Rule of Court rule 3.1702 and Code of Civil Procedure section 1021.5.

Dated: _____, 2011

JEFFREY Y. HAMILTON
Judge of the Superior Court

APPROVED AS TO FORM:

Dated: February __, 2011

MICHEL & ASSOCIATES, PC

C. D. Michel
Attorney for Plaintiffs Sheriff Clay Parker, Herb Bauer Sporting Goods, California Rifle and Pistol Association Foundation, Able's Sporting, Inc., RTG Sporting Collectibles, LLC, and Steven Stonecipher

Dated: February 15, 2011

KAMALA D. HARRIS
Attorney General of California
ZACKERY P. MORAZZINI
Supervising Deputy Attorney General

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

EXHIBIT A

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

> situation constitutional problems may possibly arise as to the particular *application* of the statute."

(*Coffman Specialties, Inc. v. Department of Transportation* (2009) 176 Cal. App. 4th 1135, 1145.)

The Court evaluates the statute according to the following standards:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

(*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 567-68 [quoting *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-09].)

> The starting point of our analysis is "the strong presumption that legislative enactments 'must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [Citations.] A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.'"

(*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 568 [quoting *Walker v. Superior Court* (1988) 47 Cal. 3d 112, 143.)

Statutes Fail to Provide Adequate Notice or Fair Warning.

First, the Court must decide whether or not Penal Code §§ 12060, 12061, and 12318 are sufficiently definite to provide ordinary people and ammunition vendors adequate notice or fair warning of the conduct proscribed. In other words, would a person or ammunition vendor of ordinary intelligence understand what ammunition falls into the definition of "handgun ammunition" -

ammunition "principally for use in" pistols, revolvers, and other firearms with barrels less than 16 inches in length that cannot be interchanged with a barrel 16 inches in length or more, notwithstanding that the ammunition may also be used in some rifles, and excluding ammunition designed and intended to be used in an "antique firearm" and blanks - or does not fall within the provided definition of "handgun ammunition?"

> In considering whether a legislative proscription is sufficiently clear to satisfy the requirements of fair notice, "we look first to the language of the statute, then to its legislative history, and finally to California decisions construing the statutory language." [Citation.] We thus require citizens to apprise themselves not only of statutory language but also of legislative history, subsequent judicial construction, and underlying legislative purposes [Citation].

(*Walker v. Superior Court* (1988) 47 Cal. 3d 112, 143.)

The Court finds that the definition of "handgun ammunition" established in Penal Code §§ 12060(b) and 12318(b)(2) fails to provide adequate notice of the conduct proscribed to the people or handgun ammunition vendors of ordinary intelligence to whom the statutory scheme applies. Initially, the Court determines that there are no state or federal cases that construe or interpret the definition of "handgun ammunition" established in Penal Code §§ 12060(b) and 12318(b)(2).

Next, the Court looks to the legislative context, the legislative purpose, and the legislative history of Assembly Bill 962, the bill that enacted Sections 12060, 12061, and 12318. The Legislature enacted Sections 12060, 12061, and 12318 as part of the "Anti-Gang Neighborhood Protection Act of 2009." (Stats. 2009, ch. 628, § 1.) There is no legislative purpose clause or preamble in the "Anti-Gang Neighborhood Protection Act of 2009."

Additionally, there is no discussion in the legislative history of Assembly Bill 962 of exactly what types of ammunition, by caliber or by cartridge, were supposed to be included in the definition of "handgun ammunition." The Court notes that this lack of discussion is probably because most of the definition of "handgun ammunition" was taken from another statute already in effect (Penal Code § 12323(a)). However, due to the lack of a legislative purpose clause and lack of substantive discussions in the legislative history, Assembly Bill 926's legislative history does not help to clarify what ammunition the Legislature intended to fall into the definition of "handgun ammunition."

Finally, the Court considers the text of the definition of "handgun ammunition" itself and determines that the text of the definition of "handgun ammunition" established in Penal Code §§ 12060(b) and 12318(b)(2) fails to provide reasonable people or ammunition vendors with an objective standard that individuals or entities can use in order to determine what particular calibers or cartridges of ammunition are "principally for use in pistols, revolvers, and other firearms [with barrels of less than 16 inches, which are not interchangeable with barrels of 16 inches or more]," notwithstanding that the ammunition may also be used in rifles, and are thus regulated by Sections 12060, 12061, and 12318. In this case, it is not the definitions of the individual words themselves that cause the confusion. In fact, "pistol," "revolver," and "firearm" all have clear, ordinary, and common meanings. An average person can easily measure a barrel and determine if the barrel is less than 16 inches or not or, even if the barrel is less than 16 inches in length, if the barrel is

interchangeable with a barrel that is 16 inches in length or more. In addition, the definition of "principally" has a clear, ordinary, and common meaning -- "chiefly," "mainly," or "primarily." (Dictionary.com Unabridged [based on Collins English Dictionary (10th Ed., 2009)] <http://dictionary.reference.com/browse/principally> [as of January 28, 2011.].) "Primarily" is defined as "essentially" or "mostly", "chiefly" is defined as "essentially" or "mostly," and "mainly" is defined as "for the most part" or "to the greatest extent." (Dictionary.com Unabridged [based on Collins English Dictionary (10th Ed., 2009)] <http://dictionary.reference.com/browse/primarily>, <http://dictionary.reference.com/browse/chiefly>, and <http://dictionary.referencecom/browse/mainly> [as of January 28, 2011.] Based on these definitions, it appears relatively clear that "handgun ammunition" is ammunition that is for the most part or to the greatest extent used in pistols, revolvers, and firearms with a barrel length of less than 16 inches, even though the ammunition may also be used in rifles. In different terms, "handgun ammunition" is ammunition used in pistols, revolver, and firearms with a barrel length of less than 16 inches more than fifty percent of the time.

However, while the meanings of the individual words of the definition are clear, the text of the "handgun ammunition" definition provides no objective way or method for a person or a handgun ammunition vendor to determine if a particular ammunition caliber or cartridge is used more often, or used more than fifty percent of the time, or used for the most part in pistols,

revolvers, or firearms with barrels of less than 16 inches, even though the same ammunition caliber or cartridge may also be used in rifles. Sections 12060(b) and 12318(b)(2) do not state that particular calibers and/or cartridges of ammunition are "handgun ammunition" or provide that, in order to determine what "handgun ammunition" is, people and handgun ammunition vendors should look at regulations or a guide propounded by a government agency for a list of particular calibers and/or cartridges of ammunition that qualify. (*See Harrott v. County of Kings* (2001) 25 Cal. 4th 1138, 1152-53 [the California Supreme Court found that vagueness issues in the Roberti-Roos Assault Weapons Control Act of 1989 did not reach impermissible levels because ordinary citizens did not have to look at the language of the statute, but only had to consider the California Code of Regulations and an Identification Guide propounded by the Attorney General's office - objective uniform standards - to determine if an weapon was classified as an assault weapon].) Here, Penal Code §§ 12060, 12061, and 12318 do not permit any law enforcement agency to establish regulations or an identification guide to more narrowly define what ammunition is encompassed in the "handgun ammunition" definition.

The Court finds that the statutory language of the "handgun ammunition" definition encourages individual people and handgun ammunition vendors to consider their own experience, conduct, and/or actions in using or selling ammunition calibers and cartridges in handguns or rifles to determine if a particular ammunition caliber or cartridge is "handgun ammunition." One person might use one caliber of ammunition solely in rifles, while another person might only use that same caliber of ammunition in

handguns. If a person (Law Enforcement or citizen) or ammunition vendor is forced to consider and rely upon their own subjective experiences in order to determine what ammunition is "handgun ammunition," each person or ammunition vendor is likely to conceive of a definition of "handgun ammunition" that is in part, or to a great extent, different from any other person's or ammunition vendor's definition of "handgun ammunition."

Although DEFENDANTS assert that the ammunition vendor "profession" might have more specialized knowledge about ammunition use in handguns or rifles and that the Challenged Statutes only apply to handgun ammunition vendors, Penal Code § 12318's application is not limited to handgun ammunition vendors, but instead applies to all people or entities engaged in the "delivery or transfer of ownership of handgun ammunition" and all people or entities cannot be charged with any specialized knowledge of ammunition use in handguns or rifles. Therefore, the Court finds that the "handgun ammunition" definition established in Sections 12060(b) and 12318(b)(2) does not provide people, handgun ammunition vendors, or other entities with adequate notice or fair warning of what ammunition is "handgun ammunition" so that the people, handgun ammunition vendors, and other entities can have a reasonable opportunity to determine what conduct is prohibited by Sections 12060, 12061 and 12318.

Consequently, Penal Code §§ 12060, 12061 and 12318 fail to meet the first requirement for a constitutionally valid criminal statute -- that the statute be definite enough so that ordinary people can understand what conduct is prohibited. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

Standard for Enforcement is Non-Existent.

Second, the Court must decide whether or not Penal Code §§ 12060, 12061, and 12318 are sufficiently definite to provide "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].) In other words, is the definition of "handgun ammunition" in Penal Code §§ 12060(b) and 12318(b)(2) sufficiently definite enough to provide a standard or guidelines for the police and court to determine if a person, handgun ammunition vendor, or other entity has violated Sections 12060, 12061, and 12318 in order to prevent arbitrary and discriminatory enforcement?

The Court finds that the definition of "handgun ammunition" established in Penal Code §§ 12060(b) and 12318(b)(2) contains no objective standard or method for determining what ammunition is encompassed by the definition of "handgun ammunition" leaving the law enforcement officers with "virtually complete discretion" to determine whether or not a particular caliber and/or cartridge of ammunition is "handgun ammunition." (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.) Specifically, the full discretion accorded to the enforcing law enforcement officer to determine if the ammunition at issue is "handgun ammunition" or not "necessarily '[entrusts] lawmaking to the moment-to-moment judgment of the policeman on his beat." (*Kolender*, 461 U.S. at 360.) The Legislature has simply left it open to the personal judgment call and subjective understanding of each individual law enforcement officer to determine if a particular caliber and/or cartridge of ammunition is "handgun ammunition" under the definition in

Sections 12060(b) and 12318(b)(2) and to subjectively apply that subjective definition of "handgun ammunition" to each issue of an ammunition sale or transfer that comes to the attention of that law enforcement officer.

Take, for example, two different law enforcement officers, one a county sheriff and the other a city police officer, separately conducting investigations into .32 caliber and .44 caliber ammunition sales to people who gave the ammunition to a felon, which is a misdemeanor under Penal Code § 12317(a). One officer goes to an ammunition vendor where one of the ammunition sales occurred and requests to see the records of all "handgun ammunition" sales, which the vendor is required to keep pursuant to Section 12061(a)(3). The officer looks in the vendor's records and sees that there is a record of a "handgun ammunition" sale to the suspected individual for .32 caliber ammunition, but not for .44 caliber ammunition. Now, the officer knows that the individual under investigation purchased .44 caliber ammunition in the same transaction as the .32 caliber ammunition sale, but since the law enforcement officer does not believe that .44 caliber ammunition is ammunition "principally for use" in pistols, revolvers, and other firearms with barrels shorter than 16 inches or "handgun ammunition", the law enforcement officer does not arrest the vendor for committing misdemeanor violations of Penal Code § 12061(a)(3), which requires an ammunition vendor to keep records of all sales and transfers of "handgun ammunition" and Section 12061(a)(4), which provides that a vendor "shall not knowingly ... fail to make a required entry in" the "handgun ammunition" records required by Section 12061(a)(3). Next, during

the course of his separate but parallel investigation, the other law enforcement officer goes to the same ammunition vendor, also requests to see the records, and notices in the records that there is a record of a "handgun ammunition" sale to his suspect for .32 caliber ammunition, but not for .44 caliber ammunition. Again, this second officer knows that his suspect purchased .44 caliber ammunition in the same transaction as the .32 caliber ammunition sale, but this time, since the second law enforcement officer believes that .44 caliber ammunition is ammunition "principally for use" in pistols, revolvers, and other firearms with barrels shorter than 16 inches or "handgun ammunition," the law enforcement officer arrests the ammunition vendor for misdemeanor violations of Penal Code § 12061(a)(3) and (a)(4).

In another twist, the two officers could be investigating improper sales and transfers of specific .44 caliber cartridge ammunition that an ammunition vendor does not keep records of because the vendor does not believe that the particular ammunition cartridge qualifies as "handgun ammunition." However, while one officer agrees with the vendor that the specific .44 caliber cartridge ammunition is not "handgun ammunition," the vendor is arrested by the other officer for misdemeanor violations of Section 12061(a)(3) and (a)(4) because the other officer disagrees with the vendor and believes that the specific .44 caliber cartridge ammunition is ammunition "principally for use" in a handgun. Because the language of the definition of "handgun ammunition" fundamentally requires each law enforcement officer to make a subjective determination as to whether or not the ammunition at issue is ammunition "principally for use" in a

handgun and then subjectively apply their own definition to the situation before them, the definition of "handgun ammunition" established by Section 12060(b) and 12318(b)(2) gives unlimited discretion to each individual law enforcement officer to determine arbitrarily if the ammunition at issue is "handgun ammunition" and to apply their particular classification of "handgun ammunition" or not to the specific issue before them.

The DEFENDANTS contend that there is no evidence that the DEFENDANTS will enforce the challenged definition arbitrarily and that, before enforcing the statutes, law enforcement will need probable cause to show that the ammunition at issue is used principally in handguns within the terms of the definition of "handgun ammunition." However, the DEFENDANTS appear to be misunderstanding the actual issue. This Court is not finding that the definition of "handgun ammunition" creates unconstitutional discretion in the law enforcement personnel to arrest people for violations of Sections 12061 and 12318 without probable cause that the ammunition at issue is "handgun ammunition" as defined by Sections 12060(b) and 12318(b)(2). Rather, the issue is that the actual definition of "handgun ammunition" is so vague that it does not establish an objective standard or method by which individual law enforcement officers can determine what ammunition is properly "handgun ammunition" as defined by Sections 12060(b) and 12318(b)(2).

The List.

DEFENDANTS' argue that the "list" of calibers and cartridges that their firearms and ammunition expert, Blake Graham, compiled is a list of calibers and cartridges that DEFENDANTS' consider to

be "handgun ammunition" within the definition established in Sections 12060(b) and 12318(b)(2); the Court determines that this "list" is not any limitation on the "vast amount of discretion" granted to law enforcement in the enforcement of Sections 12061 and 12318. (*See City of Chicago v. Morales* (1999) 527 U.S. 41, 63 [holding that a general order of the Chicago police department of internal rules limiting their enforcement of the statute at issue in that case to certain designated areas of the city was not a sufficient limitation on the vast amount of discretion granted to the police in their enforcement of the challenged statute].) Here, this "list" of the California Department of Justice is not a proper administrative regulation that limits the vast amount of discretion that law enforcement officers have to determine and enforce their subjective definition of "handgun ammunition," because nothing in Assembly Bill 962, which includes Sections 12060, 12061, and 12318, grants the California Department of Justice the authority to promulgate regulations limiting the discretion of law enforcement officers when it comes to what ammunition can be properly defined as "handgun ammunition."

Also, even if this "list" is evidence that the Department of Justice is internally limiting the discretion of the law enforcement officers that work for them, the Department of Justice is not the only law enforcement agency in California that will be enforcing Sections 12061 and 12318. In particular, Section 12061(a)(5) states that "handgun ammunition" records of ammunition vendors are subject to inspection by any peace officer employed by not only the Department of Justice, but also peace officers employed by a sheriff, a city police department, or district

attorney and Section 12061(a)(7) and (c)(1) makes it a misdemeanor for an ammunition vendor to refuse to permit a person authorized under Section 12061(a)(5) to examine "handgun ammunition" records. Therefore, more law enforcement agencies other than the Department of Justice are entitled to enforce Sections 12061 and 12318 and any internal policy limiting the discretion of Department of Justice's peace officers does not apply to any other type of law enforcement officer.

Due to the fact that the definition of "handgun ammunition" established in Sections 12060(b) and 12318(b)(2) improperly fails to contain any objective standard for determining what ammunition is included in the definition of "handgun ammunition" and encourages law enforcement officers to engage in the subjective understanding and application of the "handgun ammunition" definition when the law enforcement officers enforce Sections 12060, 12061 and 12318, the Court finds that the definition of "handgun ammunition" in Sections 12060(b) and 12318(b)(2) "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officers, against particular groups deems to merit their displeasure,' [Citation], and 'confers on police a virtually unrestrained power to arrest and charge persons with a violation.'" (*Kolender v. Lawson* (1983) 461 U.S. 352, 360.) Consequently, Penal Code §§ 12060, 12061, and 12318 fail to meet the second requirement for a constitutionally valid criminal statute - that the statute's definition of the criminal offense be definite enough to not encourage arbitrary and discriminatory enforcement. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

Since Penal Code §§ 12060, 12061, and 12318 fail to "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[,]" the Court finds that Penal Code §§ 12060, 12061, and 12318 are unconstitutionally vague on their face. (*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 567 [quoting *Walker v. Superior Court* (1988) 47 Cal. 3d 112, 141].) Therefore, the Court grants PLAINTIFFS' motion for summary adjudication of their first cause of action for declaratory and injunctive relief - due process vagueness - facial.

2. PLAINTIFF Herb Bauer Sporting Goods, Inc.'s Second Cause of Action for Declaratory and Injunctive Relief - As Applied Vagueness Challenge

PLAINTIFF Herb Bauer Sporting Goods, Inc. has filed a motion for summary judgment of the complaint and summary adjudication of its second cause of action for declaratory and injunctive relief - due process vagueness - as applied. In PLAINTIFF's second cause of action, the PLAINTIFF alleges that an actual controversy has arisen and now exists between PLAINTIFF and all DEFENDANTS because the PLAINTIFF contends that Penal Code § 12061(a)(1) and (a)(2) are unconstitutional in that they are impermissibly vague and the DEFENDANTS contend that the statutes are not impermissibly vague and 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 (4th ed.) § 809.) Injunctive relief is a type of damage or relief and is a derivative cause of action, not a stand-alone cause of action.

Penal Code § 12061(a)(1) and (a)(2) provide that:

> (a) A vendor shall comply with all of the following conditions, requirements and prohibitions:
>
> 1. A vendor shall not permit any employee who the vendor knows or reasonably should know is a person described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code to handle, sell, or deliver handgun ammunition in the course and scope of his or her employment.
>
> 2. A vendor shall not sell or otherwise transfer ownership of, offer for sale or otherwise offer to transfer ownership of, or display for sale or display for transfer of ownership of any handgun ammunition in a manner that allows that ammunition to be accessible to a purchaser or transferee without the assistance of the vendor or employee thereof.

Penal Code 12060(b) provides the definition of "handgun ammunition" as used in Section 12061(a)(1) and (a)(2). "Handgun ammunition" is defined as ammunition "principally for use in" pistols, revolvers, and other firearms with barrels less than 16 inches in length that cannot be interchanged with a barrel 16 inches in length or more, notwithstanding that the ammunition may also be used in some rifles, and excluding ammunition designed and intended to be used in an "antique firearm" and blanks.

In the second cause of action, PLAINTIFF makes an as-applied vagueness challenge to Penal Code § 12061(a)(1) and (a)(2) contending that, as applied to PLAINTIFF, Sections 12061(a)(1) and (a)(2) fail to provide notice to PLAINTIFF which calibers of ammunition are "handgun ammunition" as defined in Penal Code

section 12060(b) and the vague definition encourages arbitrary and discriminatory enforcement of the laws against PLAINTIFF in violation of the Due Process Clause of the Fourteenth Amendment. However, the Court denies the PLAINTIFFs' motion for summary judgment and the PLAINTIFF's motion for summary adjudication of its second cause of action because the PLAINTIFF has failed to establish the second element of a cause of action for declaratory relief - an actual controversy involving justiciable questions relating to the rights and obligations of a party.

> An as applied challenge may seek (1) relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied, or (2) an injunction against future application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past. It contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application derived the individual to whom it was applied of a protected right.

(*Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084.) However, the PLAINTIFF's only facts regarding any possible application of Section 12061(a)(1) and (a)(2) do not demonstrate that PLAINTIFF is seeking relief from the specific application of the statute against PLAINTIFF, which caused PLAINTIFF to be under an impermissible present restraint or disability due to the statute's application or that PLAINTIFF is seeking an injunction against future application of the statute in the allegedly impermissible manner in which the statute was applied in the past.

PLAINTIFF's Undisputed Material Fact No. 238 establishes that, on December 30, 2009, the California Department of Justice

published an "Information Bulletin" providing a brief overview of Assembly Bill 962, which included Penal Code § 12061(a)(1) and (a)(2). PLAINTIFF's Undisputed Material Fact No. 239 proves that Defendant California Department of Justice provided notice to all California firearm dealers, including PLAINTIFF, that Penal Code § 12061(a)(1) and (a)(2) took effect on, and has been in force since, January 1, 2010, effectively threatening all California firearm dealers with enforcement of Section 12061(a)(1) and (a)(2). (The Court assumes *arguendo* that providing notice of a law is effectively threatening enforcement of that law.) However, the PLAINTIFF has not provided any undisputed material facts demonstrating that the California Department of Justice, or any other Defendant, has actually ever enforced or applied Section 12061(a)(1) and/or (a)(2) against PLAINTIFF or anyone else in the past or at the present time. Since an as applied vagueness challenge in this case requires the Court to consider the facts of how the statute has been applied against the PLAINTIFF or someone else and the PLAINTIFF has failed to provide any facts demonstrating that Section 12061(a)(1) and/or (a)(2) has ever been applied to anyone, the PLAINTIFF has not established that there is an active controversy between PLAINTIFF and DEFENDANTS as to whether or not Section 12061(a)(1) and (a)(2) are impermissibly vague as applied to PLAINTIFF.

Therefore, the PLAINTIFF has failed to establish each element of a cause of action for declaratory relief. Consequently, the burden never shifts to the DEFENDANTS to establish that a triable issue of material fact exists. Accordingly, the Court denies the PLAINTIFFS' motion for summary judgment and PLAINTIFF Herb Bauer

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

Entered by:

TITLE OF CASE:
Sherrif Clay Parker vs. State of California

LAW AND MOTION MINUTE ORDER

Case Number:
10CECG02116 JH

Hearing Date: JANUARY 31, 2011
Department: 402
Court Clerk: M.Santana

Hearing Type: **From Chambers**
Judge/Temporary Judge: **Jeff Hamilton**
Reporter/Tape: Not Reported

Appearing Parties:
Plaintiff: **Not Present**
Counsel:

Defendant: **Not Present**
Counsel:

☐ Off Calendar

☐ Continued to ☐ Set for _____ at _____ Dept. _____ for _____

☐ Submitted on points and authorities with/without argument. ☐ 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

☒ Other: See attached copy of Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion for Summary Adjudication

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

situation constitutional problems may possibly arise as to the particular *application* of the statute."

(*Coffman Specialties, Inc. v. Department of Transportation* (2009) 176 Cal. App. 4th 1135, 1145.)

The Court evaluates the statute according to the following standards:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

(*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 567-68 [quoting *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-09].)

> The starting point of our analysis is "the strong presumption that legislative enactments 'must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [Citations.] A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.'"

(*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 568 [quoting *Walker v. Superior Court* (1988) 47 Cal. 3d 112, 143.)

Statutes Fail to Provide Adequate Notice or Fair Warning.

First, the Court must decide whether or not Penal Code §§ 12060, 12061, and 12318 are sufficiently definite to provide ordinary people and ammunition vendors adequate notice or fair warning of the conduct proscribed. In other words, would a person or ammunition vendor of ordinary intelligence understand what ammunition falls into the definition of "handgun ammunition" -

ammunition "principally for use in" pistols, revolvers, and other firearms with barrels less than 16 inches in length that cannot be interchanged with a barrel 16 inches in length or more, notwithstanding that the ammunition may also be used in some rifles, and excluding ammunition designed and intended to be used in an "antique firearm" and blanks - or does not fall within the provided definition of "handgun ammunition?"

> In considering whether a legislative proscription is sufficiently clear to satisfy the requirements of fair notice, "we look first to the language of the statute, then to its legislative history, and finally to California decisions construing the statutory language." [Citation.] We thus require citizens to apprise themselves not only of statutory language but also of legislative history, subsequent judicial construction, and underlying legislative purposes [Citation].

(*Walker v. Superior Court* (1988) 47 Cal. 3d 112, 143.)

The Court finds that the definition of "handgun ammunition" established in Penal Code §§ 12060(b) and 12318(b)(2) fails to provide adequate notice of the conduct proscribed to the people or handgun ammunition vendors of ordinary intelligence to whom the statutory scheme applies. Initially, the Court determines that there are no state or federal cases that construe or interpret the definition of "handgun ammunition" established in Penal Code §§ 12060(b) and 12318(b)(2).

Next, the Court looks to the legislative context, the legislative purpose, and the legislative history of Assembly Bill 962, the bill that enacted Sections 12060, 12061, and 12318. The Legislature enacted Sections 12060, 12061, and 12318 as part of the "Anti-Gang Neighborhood Protection Act of 2009." (Stats. 2009, ch. 628, § 1.) There is no legislative purpose clause or preamble in the "Anti-Gang Neighborhood Protection Act of 2009."

Additionally, there is no discussion in the legislative history of Assembly Bill 962 of exactly what types of ammunition, by caliber or by cartridge, were supposed to be included in the definition of "handgun ammunition." The Court notes that this lack of discussion is probably because most of the definition of "handgun ammunition" was taken from another statute already in effect (Penal Code § 12323(a)). However, due to the lack of a legislative purpose clause and lack of substantive discussions in the legislative history, Assembly Bill 926's legislative history does not help to clarify what ammunition the Legislature intended to fall into the definition of "handgun ammunition."

Finally, the Court considers the text of the definition of "handgun ammunition" itself and determines that the text of the definition of "handgun ammunition" established in Penal Code §§ 12060(b) and 12318(b)(2) fails to provide reasonable people or ammunition vendors with an objective standard that individuals or entities can use in order to determine what particular calibers or cartridges of ammunition are "principally for use in pistols, revolvers, and other firearms [with barrels of less than 16 inches, which are not interchangeable with barrels of 16 inches or more]," notwithstanding that the ammunition may also be used in rifles, and are thus regulated by Sections 12060, 12061, and 12318. In this case, it is not the definitions of the individual words themselves that cause the confusion. In fact, "pistol," "revolver," and "firearm" all have clear, ordinary, and common meanings. An average person can easily measure a barrel and determine if the barrel is less than 16 inches or not or, even if the barrel is less than 16 inches in length, if the barrel is

interchangeable with a barrel that is 16 inches in length or more. In addition, the definition of "principally" has a clear, ordinary, and common meaning -- "chiefly," "mainly," or "primarily." (Dictionary.com Unabridged [based on Collins English Dictionary (10th Ed., 2009)] <http://dictionary.reference.com/browse/principally> [as of January 28, 2011.].) "Primarily" is defined as "essentially" or "mostly", "chiefly" is defined as "essentially" or "mostly," and "mainly" is defined as "for the most part" or "to the greatest extent." (Dictionary.com Unabridged [based on Collins English Dictionary (10th Ed., 2009)] <http://dictionary.reference.com/browse/primarily>, <http://dictionary.reference.com/browse/chiefly>, and <http://dictionary.referencecom/browse/mainly> [as of January 28, 2011.] Based on these definitions, it appears relatively clear that "handgun ammunition" is ammunition that is for the most part or to the greatest extent used in pistols, revolvers, and firearms with a barrel length of less than 16 inches, even though the ammunition may also be used in rifles. In different terms, "handgun ammunition" is ammunition used in pistols, revolver, and firearms with a barrel length of less than 16 inches more than fifty percent of the time.

However, while the meanings of the individual words of the definition are clear, the text of the "handgun ammunition" definition provides no objective way or method for a person or a handgun ammunition vendor to determine if a particular ammunition caliber or cartridge is used more often, or used more than fifty percent of the time, or used for the most part in pistols,

revolvers, or firearms with barrels of less than 16 inches, even though the same ammunition caliber or cartridge may also be used in rifles. Sections 12060(b) and 12318(b)(2) do not state that particular calibers and/or cartridges of ammunition are "handgun ammunition" or provide that, in order to determine what "handgun ammunition" is, people and handgun ammunition vendors should look at regulations or a guide propounded by a government agency for a list of particular calibers and/or cartridges of ammunition that qualify. (*See Harrott v. County of Kings* (2001) 25 Cal. 4th 1138, 1152-53 [the California Supreme Court found that vagueness issues in the Roberti-Roos Assault Weapons Control Act of 1989 did not reach impermissible levels because ordinary citizens did not have to look at the language of the statute, but only had to consider the California Code of Regulations and an Identification Guide propounded by the Attorney General's office - objective uniform standards - to determine if an weapon was classified as an assault weapon].) Here, Penal Code §§ 12060, 12061, and 12318 do not permit any law enforcement agency to establish regulations or an identification guide to more narrowly define what ammunition is encompassed in the "handgun ammunition" definition.

The Court finds that the statutory language of the "handgun ammunition" definition encourages individual people and handgun ammunition vendors to consider their own experience, conduct, and/or actions in using or selling ammunition calibers and cartridges in handguns or rifles to determine if a particular ammunition caliber or cartridge is "handgun ammunition." One person might use one caliber of ammunition solely in rifles, while another person might only use that same caliber of ammunition in

handguns. If a person (Law Enforcement or citizen) or ammunition vendor is forced to consider and rely upon their own subjective experiences in order to determine what ammunition is "handgun ammunition," each person or ammunition vendor is likely to conceive of a definition of "handgun ammunition" that is in part, or to a great extent, different from any other person's or ammunition vendor's definition of "handgun ammunition."

Although DEFENDANTS assert that the ammunition vendor "profession" might have more specialized knowledge about ammunition use in handguns or rifles and that the Challenged Statutes only apply to handgun ammunition vendors, Penal Code § 12318's application is not limited to handgun ammunition vendors, but instead applies to all people or entities engaged in the "delivery or transfer of ownership of handgun ammunition" and all people or entities cannot be charged with any specialized knowledge of ammunition use in handguns or rifles. Therefore, the Court finds that the "handgun ammunition" definition established in Sections 12060(b) and 12318(b)(2) does not provide people, handgun ammunition vendors, or other entities with adequate notice or fair warning of what ammunition is "handgun ammunition" so that the people, handgun ammunition vendors, and other entities can have a reasonable opportunity to determine what conduct is prohibited by Sections 12060, 12061 and 12318.

Consequently, Penal Code §§ 12060, 12061 and 12318 fail to meet the first requirement for a constitutionally valid criminal statute -- that the statute be definite enough so that ordinary people can understand what conduct is prohibited. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

Standard for Enforcement is Non-Existent.

Second, the Court must decide whether or not Penal Code §§ 12060, 12061, and 12318 are sufficiently definite to provide "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].) In other words, is the definition of "handgun ammunition" in Penal Code §§ 12060(b) and 12318(b)(2) sufficiently definite enough to provide a standard or guidelines for the police and court to determine if a person, handgun ammunition vendor, or other entity has violated Sections 12060, 12061, and 12318 in order to prevent arbitrary and discriminatory enforcement?

The Court finds that the definition of "handgun ammunition" established in Penal Code §§ 12060(b) and 12318(b)(2) contains no objective standard or method for determining what ammunition is encompassed by the definition of "handgun ammunition" leaving the law enforcement officers with "virtually complete discretion" to determine whether or not a particular caliber and/or cartridge of ammunition is "handgun ammunition." (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.) Specifically, the full discretion accorded to the enforcing law enforcement officer to determine if the ammunition at issue is "handgun ammunition" or not "necessarily '[entrusts] lawmaking to the moment-to-moment judgment of the policeman on his beat." (*Kolender*, 461 U.S. at 360.) The Legislature has simply left it open to the personal judgment call and subjective understanding of each individual law enforcement officer to determine if a particular caliber and/or cartridge of ammunition is "handgun ammunition" under the definition in

Sections 12060(b) and 12318(b)(2) and to subjectively apply that subjective definition of "handgun ammunition" to each issue of an ammunition sale or transfer that comes to the attention of that law enforcement officer.

Take, for example, two different law enforcement officers, one a county sheriff and the other a city police officer, separately conducting investigations into .32 caliber and .44 caliber ammunition sales to people who gave the ammunition to a felon, which is a misdemeanor under Penal Code § 12317(a). One officer goes to an ammunition vendor where one of the ammunition sales occurred and requests to see the records of all "handgun ammunition" sales, which the vendor is required to keep pursuant to Section 12061(a)(3). The officer looks in the vendor's records and sees that there is a record of a "handgun ammunition" sale to the suspected individual for .32 caliber ammunition, but not for .44 caliber ammunition. Now, the officer knows that the individual under investigation purchased .44 caliber ammunition in the same transaction as the .32 caliber ammunition sale, but since the law enforcement officer does not believe that .44 caliber ammunition is ammunition "principally for use" in pistols, revolvers, and other firearms with barrels shorter than 16 inches or "handgun ammunition", the law enforcement officer does not arrest the vendor for committing misdemeanor violations of Penal Code § 12061(a)(3), which requires an ammunition vendor to keep records of all sales and transfers of "handgun ammunition" and Section 12061(a)(4), which provides that a vendor "shall not knowingly ... fail to make a required entry in" the "handgun ammunition" records required by Section 12061(a)(3). Next, during

the course of his separate but parallel investigation, the other law enforcement officer goes to the same ammunition vendor, also requests to see the records, and notices in the records that there is a record of a "handgun ammunition" sale to his suspect for .32 caliber ammunition, but not for .44 caliber ammunition. Again, this second officer knows that his suspect purchased .44 caliber ammunition in the same transaction as the .32 caliber ammunition sale, but this time, since the second law enforcement officer believes that .44 caliber ammunition is ammunition "principally for use" in pistols, revolvers, and other firearms with barrels shorter than 16 inches or "handgun ammunition," the law enforcement officer arrests the ammunition vendor for misdemeanor violations of Penal Code § 12061(a)(3) and (a)(4).

In another twist, the two officers could be investigating improper sales and transfers of specific .44 caliber cartridge ammunition that an ammunition vendor does not keep records of because the vendor does not believe that the particular ammunition cartridge qualifies as "handgun ammunition." However, while one officer agrees with the vendor that the specific .44 caliber cartridge ammunition is not "handgun ammunition," the vendor is arrested by the other officer for misdemeanor violations of Section 12061(a)(3) and (a)(4) because the other officer disagrees with the vendor and believes that the specific .44 caliber cartridge ammunition is ammunition "principally for use" in a handgun. Because the language of the definition of "handgun ammunition" fundamentally requires each law enforcement officer to make a subjective determination as to whether or not the ammunition at issue is ammunition "principally for use" in a

handgun and then subjectively apply their own definition to the situation before them, the definition of "handgun ammunition" established by Section 12060(b) and 12318(b)(2) gives unlimited discretion to each individual law enforcement officer to determine arbitrarily if the ammunition at issue is "handgun ammunition" and to apply their particular classification of "handgun ammunition" or not to the specific issue before them.

The DEFENDANTS contend that there is no evidence that the DEFENDANTS will enforce the challenged definition arbitrarily and that, before enforcing the statutes, law enforcement will need probable cause to show that the ammunition at issue is used principally in handguns within the terms of the definition of "handgun ammunition." However, the DEFENDANTS appear to be misunderstanding the actual issue. This Court is not finding that the definition of "handgun ammunition" creates unconstitutional discretion in the law enforcement personnel to arrest people for violations of Sections 12061 and 12318 without probable cause that the ammunition at issue is "handgun ammunition" as defined by Sections 12060(b) and 12318(b)(2). Rather, the issue is that the actual definition of "handgun ammunition" is so vague that it does not establish an objective standard or method by which individual law enforcement officers can determine what ammunition is properly "handgun ammunition" as defined by Sections 12060(b) and 12318(b)(2).

The List.

DEFENDANTS' argue that the "list" of calibers and cartridges that their firearms and ammunition expert, Blake Graham, compiled is a list of calibers and cartridges that DEFENDANTS' consider to

be "handgun ammunition" within the definition established in Sections 12060(b) and 12318(b)(2); the Court determines that this "list" is not any limitation on the "vast amount of discretion" granted to law enforcement in the enforcement of Sections 12061 and 12318. (*See City of Chicago v. Morales* (1999) 527 U.S. 41, 63 [holding that a general order of the Chicago police department of internal rules limiting their enforcement of the statute at issue in that case to certain designated areas of the city was not a sufficient limitation on the vast amount of discretion granted to the police in their enforcement of the challenged statute].) Here, this "list" of the California Department of Justice is not a proper administrative regulation that limits the vast amount of discretion that law enforcement officers have to determine and enforce their subjective definition of "handgun ammunition," because nothing in Assembly Bill 962, which includes Sections 12060, 12061, and 12318, grants the California Department of Justice the authority to promulgate regulations limiting the discretion of law enforcement officers when it comes to what ammunition can be properly defined as "handgun ammunition."

Also, even if this "list" is evidence that the Department of Justice is internally limiting the discretion of the law enforcement officers that work for them, the Department of Justice is not the only law enforcement agency in California that will be enforcing Sections 12061 and 12318. In particular, Section 12061(a)(5) states that "handgun ammunition" records of ammunition vendors are subject to inspection by any peace officer employed by not only the Department of Justice, but also peace officers employed by a sheriff, a city police department, or district

attorney and Section 12061(a)(7) and (c)(1) makes it a misdemeanor for an ammunition vendor to refuse to permit a person authorized under Section 12061(a)(5) to examine "handgun ammunition" records. Therefore, more law enforcement agencies other than the Department of Justice are entitled to enforce Sections 12061 and 12318 and any internal policy limiting the discretion of Department of Justice's peace officers does not apply to any other type of law enforcement officer.

Due to the fact that the definition of "handgun ammunition" established in Sections 12060(b) and 12318(b)(2) improperly fails to contain any objective standard for determining what ammunition is included in the definition of "handgun ammunition" and encourages law enforcement officers to engage in the subjective understanding and application of the "handgun ammunition" definition when the law enforcement officers enforce Sections 12060, 12061 and 12318, the Court finds that the definition of "handgun ammunition" in Sections 12060(b) and 12318(b)(2) "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officers, against particular groups deems to merit their displeasure,' [Citation], and 'confers on police a virtually unrestrained power to arrest and charge persons with a violation.'" (*Kolender v. Lawson* (1983) 461 U.S. 352, 360.) Consequently, Penal Code §§ 12060, 12061, and 12318 fail to meet the second requirement for a constitutionally valid criminal statute - that the statute's definition of the criminal offense be definite enough to not encourage arbitrary and discriminatory enforcement. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

Since Penal Code §§ 12060, 12061, and 12318 fail to "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[,]" the Court finds that Penal Code §§ 12060, 12061, and 12318 are unconstitutionally vague on their face. (*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 567 [quoting *Walker v. Superior Court* (1988) 47 Cal. 3d 112, 141).) Therefore, the Court grants PLAINTIFFS' motion for summary adjudication of their first cause of action for declaratory and injunctive relief - due process vagueness - facial.

2. PLAINTIFF Herb Bauer Sporting Goods, Inc.'s Second Cause of Action for Declaratory and Injunctive Relief - As Applied Vagueness Challenge

PLAINTIFF Herb Bauer Sporting Goods, Inc. has filed a motion for summary judgment of the complaint and summary adjudication of its second cause of action for declaratory and injunctive relief - due process vagueness - as applied. In PLAINTIFF's second cause of action, the PLAINTIFF alleges that an actual controversy has arisen and now exists between PLAINTIFF and all DEFENDANTS because the PLAINTIFF contends that Penal Code § 12061(a)(1) and (a)(2) are unconstitutional in that they are impermissibly vague and the DEFENDANTS contend that the statutes are not impermissibly vague and 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 (4th ed.) § 809.) Injunctive relief is a type of damage or relief and is a derivative cause of action, not a stand-alone cause of action.

Penal Code § 12061(a)(1) and (a)(2) provide that:

> (a) A vendor shall comply with all of the following conditions, requirements and prohibitions:
>
> 1. A vendor shall not permit any employee who the vendor knows or reasonably should know is a person described in Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code to handle, sell, or deliver handgun ammunition in the course and scope of his or her employment.
>
> 2. A vendor shall not sell or otherwise transfer ownership of, offer for sale or otherwise offer to transfer ownership of, or display for sale or display for transfer of ownership of any handgun ammunition in a manner that allows that ammunition to be accessible to a purchaser or transferee without the assistance of the vendor or employee thereof.

Penal Code 12060(b) provides the definition of "handgun ammunition" as used in Section 12061(a)(1) and (a)(2). "Handgun ammunition" is defined as ammunition "principally for use in" pistols, revolvers, and other firearms with barrels less than 16 inches in length that cannot be interchanged with a barrel 16 inches in length or more, notwithstanding that the ammunition may also be used in some rifles, and excluding ammunition designed and intended to be used in an "antique firearm" and blanks.

In the second cause of action, PLAINTIFF makes an as-applied vagueness challenge to Penal Code § 12061(a)(1) and (a)(2) contending that, as applied to PLAINTIFF, Sections 12061(a)(1) and (a)(2) fail to provide notice to PLAINTIFF which calibers of ammunition are "handgun ammunition" as defined in Penal Code

section 12060(b) and the vague definition encourages arbitrary and discriminatory enforcement of the laws against PLAINTIFF in violation of the Due Process Clause of the Fourteenth Amendment. However, the Court denies the PLAINTIFFs' motion for summary judgment and the PLAINTIFF's motion for summary adjudication of its second cause of action because the PLAINTIFF has failed to establish the second element of a cause of action for declaratory relief - an actual controversy involving justiciable questions relating to the rights and obligations of a party.

> An as applied challenge may seek (1) relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied, or (2) an injunction against future application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past. It contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application derived the individual to whom it was applied of a protected right.

(*Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084.) However, the PLAINTIFF's only facts regarding any possible application of Section 12061(a)(1) and (a)(2) do not demonstrate that PLAINTIFF is seeking relief from the specific application of the statute against PLAINTIFF, which caused PLAINTIFF to be under an impermissible present restraint or disability due to the statute's application or that PLAINTIFF is seeking an injunction against future application of the statute in the allegedly impermissible manner in which the statute was applied in the past.

PLAINTIFF's Undisputed Material Fact No. 238 establishes that, on December 30, 2009, the California Department of Justice

published an "Information Bulletin" providing a brief overview of Assembly Bill 962, which included Penal Code § 12061(a)(1) and (a)(2). PLAINTIFF's Undisputed Material Fact No. 239 proves that Defendant California Department of Justice provided notice to all California firearm dealers, including PLAINTIFF, that Penal Code § 12061(a)(1) and (a)(2) took effect on, and has been in force since, January 1, 2010, effectively threatening all California firearm dealers with enforcement of Section 12061(a)(1) and (a)(2). (The Court assumes *arguendo* that providing notice of a law is effectively threatening enforcement of that law.) However, the PLAINTIFF has not provided any undisputed material facts demonstrating that the California Department of Justice, or any other Defendant, has actually ever enforced or applied Section 12061(a)(1) and/or (a)(2) against PLAINTIFF or anyone else in the past or at the present time. Since an as applied vagueness challenge in this case requires the Court to consider the facts of how the statute has been applied against the PLAINTIFF or someone else and the PLAINTIFF has failed to provide any facts demonstrating that Section 12061(a)(1) and/or (a)(2) has ever been applied to anyone, the PLAINTIFF has not established that there is an active controversy between PLAINTIFF and DEFENDANTS as to whether or not Section 12061(a)(1) and (a)(2) are impermissibly vague as applied to PLAINTIFF.

Therefore, the PLAINTIFF has failed to establish each element of a cause of action for declaratory relief. Consequently, the burden never shifts to the DEFENDANTS to establish that a triable issue of material fact exists. Accordingly, the Court denies the PLAINTIFFS' motion for summary judgment and PLAINTIFF Herb Bauer

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 CALIFOR[illegible] • COUNTY OF FRESNO Civil Department - Non-Limited 1130 "O" Street Fresno, CA 93724-0002 (559)457-1900	FO[illegible]OURT 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

BGN-06 REV-00 CLERK'S CERTIFICATE OF MAILING

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:

C. D. Michel
Michel & Associates
180 East Ocean Blvd. Suite 200
Long Beach, CA 90802

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 B

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Clinton B. Monfort - SBN 255609
Sean A. Brady - SBN 262007
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Fax: (562) 216-4445
cmichel@michellawyers.com

Attorneys for Plaintiffs/Petitioners

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER,

Plaintiffs and Petitioners,

vs.

THE STATE OF CALIFORNIA; JERRY BROWN, IN HIS 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

~~[PROPOSED]~~ ORDER OF PERMANENT INJUNCTION

FILED BY FAX

On January 18, 2011, the Court granted Plaintiffs' motion for summary adjudication as to their first cause of action challenging certain California Penal Code sections on facial vagueness grounds. In furtherance of that ruling, the following injunctive relief is hereby GRANTED:

APPLICABILITY

The provisions of this injunction are applicable to defendants the State of California, Kamala D. Harris, in her official capacity as Attorney General of the State of California, and the

California Department of Justice, and to each of their agents, employees, representatives, successors in office, and all persons or entities acting in concert or in participation with them (hereinafter "enjoined parties").

EFFECTIVE DATE

The provisions of this injunction shall take effect on February 1, 2011, and shall remain permanently in effect, or until such other Orders are made by this Court.

CONDUCT ENJOINED

IT IS ORDERED that the enjoined parties are hereby permanently prohibited, enjoined, and restrained from taking any action to implement, enforce, or give effect to the versions of California Penal Code sections 12060, 12061, and 12318 in effect as of the date of this Injunction.

RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that jurisdiction is retained by this Court for the purpose of enabling the parties to apply for such further orders and directions as may be necessary and appropriate for the interpretation or construction of this Order, and for the enforcement or compliance herewith.

Date: January 20, 2011

MICHEL & ASSOCIATES, PC

C. D. Michel
Attorney for Plaintiffs

Date: January 20, 2011

OFFICE OF THE ATTORNEY GENERAL

Peter A. Krause
Attorney for Defendants

IT IS SO ORDERED.

Dated: 1/21/2011

JEFFREY Y. HAMILTON JR.

Honorable Judge Jeffrey Y. Hamilton
Judge of the Superior Court

California Department of Justice, and to each of their agents, employees, representatives, successors in office, and all persons or entities acting in concert or in participation with them (hereinafter "enjoined parties").

EFFECTIVE DATE

The provisions of this injunction shall take effect on February 1, 2011, and shall remain permanently in effect, or until such other Orders are made by this Court.

CONDUCT ENJOINED

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RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that jurisdiction is retained by this Court for the purpose of enabling the parties to apply for such further orders and directions as may be necessary and appropriate for the interpretation or construction of this Order, and for the enforcement or compliance herewith.

Date: January 20, 2011

MICHEL & ASSOCIATES, PC

C. D. Michel
Attorney for Plaintiffs

Date: January 20, 2011

OFFICE OF THE ATTORNEY GENERAL

Peter A. Krause
Attorney for Defendants

IT IS SO ORDERED.

Dated: ____, ____

Honorable Judge Jeffrey Y. Hamilton
Judge of the Superior Court

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 20, 2011, I served the foregoing document(s) described as

[*PROPOSED*] ORDER OF PERMANENT INJUNCTION

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy thereof enclosed in sealed envelope(s) addressed as follows:

Kamala Harris
Attorney General of California
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General
1300 I Street, Suite 125
Sacramento, CA 94244-2550

X (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 20, 2011, at Long Beach, California.

— (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.

— (VIA FACSIMILE TRANSMISSION) As follows: The facsimile machine I used complies with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, copies of which is attached to this declaration.
Executed on January 20, 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

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 February 18, 2011, I served the foregoing document(s) described as

[PROPOSED] JUDGMENT

on the interested parties in this action by placing
[ ] the original
[X] 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
1300 I Street, Suite 125
Sacramento, CA 94244-2550

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Executed on February 18, 2011, at Long Beach, California.

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Executed on February 18, 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

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 February 28, 2011, I served the foregoing document(s) described as

NOTICE OF ENTRY OF JUDGMENT DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION

on the interested parties in this action by placing
[ ] the original
[X] 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
1300 I Street, Suite 125
Sacramento, CA 94244-2550

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Executed on February 28, 2011, at Long Beach, California.

__ (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.

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Executed on February 28, 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

MC-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):	FOR COURT USE ONLY
C. D. Michel S.B.N. - 144258 Clinton B. Monfort S.B.N. - 255609 Michel & Associates, P.C. 180 E. Ocean Blvd., Suite 200 Long Beach, CA 90802 TELEPHONE NO: (562) 216-4444 FAX NO: (562) 216-4445 ATTORNEY FOR (Name): Plaintiffs	
INSERT NAME OF COURT, JUDICIAL DISTRICT AND BRANCH COURT, IF ANY: Fresno County Superior Court 1130 O Street Fresno, CA 93721	
PLAINTIFF: Sheriff Clay Parker, et al. DEFENDANT: The State of California, et al.	
MEMORANDUM OF COSTS (SUMMARY)	CASE NUMBER: 10CECG02116

The following costs are requested:

		TOTALS
1. Filing and motion fees	1. $	895.00
2. Jury fees	2. $	0.00
3. Jury food and lodging	3. $	0.00
4. Deposition costs	4. $	8,331.96
5. Service of process	5. $	781.04
6. Attachment expenses	6. $	0.00
7. Surety bond premiums	7. $	0.00
8. Witness fees	8. $	0.00
9. Court-ordered transcripts	9. $	0.00
10. Attorney fees *(enter here if contractual or statutory fees are fixed without necessity of a court determination; otherwise a noticed motion is required)*	10. $	0.00
11. Models, blowups and photocopies of exhibits	11. $	0.00
12. Court reporter fees as established by statute	12. $	121.50
13. Other Travel re: Motion for Preliminary Injunction & MSJ Hearings	13. $	1,226.13
TOTAL COSTS	$	11,355.63

I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

Date: March 10, 2011

C. D. Michel
(TYPE OR PRINT NAME)

(SIGNATURE)

(Proof of service on reverse)

SHORT TITLE: Parker v. California	CASE NUMBER 10CECG02116

MEMORANDUM OF COSTS (WORKSHEET)

1 Filing and motion fees

	Paper filed	Filing fee
a.	Complaint	$ 355.00
b.	Motion for Preliminary Injunction	$ 40.00
c.	Motion for Summary Judgment	$ 500.00
d.		$ 0.00
e.		$ 0.00
f.		$ 0.00

g. [ ] Information about additional filing and motion fees is contained in Attachment 1g.

1. $ 895.00

2 Jury fees

	Date	Fee & mileage
a.		$ 0.00
b.		$ 0.00
c.		$ 0.00
d.		$ 0.00

e. [ ] Information about additional jury fees is contained in Attachment 2e.

TOTAL 2. $ 0.00

3. Juror food: $ 0.00 and lodging: $ 0.00 TOTAL 3. $ 0.00

4. Deposition costs

	Name of deponent	Taking	Transcribing	Travel	Video-taping	Subtotals
a.	Blake Graham	$ 0.00	$ 4,395.13	$ 0.00	$ 0.00	$ 4,395.13
b.	Stephen Helsley	$ 0.00	$ 1,258.53	$ 1,164.87	$ 0.00	$ 2,423.40
c.	Steven Stonecipher	$ 0.00	$ 174.45	$ 644.37	$ 0.00	$ 818.82
d.	Clay Parker	$ 0.00	$ 372.66	$ 0.00	$ 0.00	$ 372.66

e. [X] Information about additional deposition costs is contained in Attachment 4e.

TOTAL 4 $ 8,331.96

(Continued on reverse)

SHORT TITLE Parker v. California	CASE NUMBER 10CECG02116

5. **Service of process**

	Name of person served	Public officer	Registered process	Publication	Other *(specify)*
a.	State of California	$ 0.00	$ 92.00	$ 0.00	$ 0.00
b.	Edmund G. Brown	$ 0.00	$ 34.28	$ 0.00	$ 0.00
c.	California DOJ	$ 0.00	$ 34.28	$ 0.00	$ 0.00

d. [X] Information about additional costs for service of process is contained in Attachment 5d.

TOTAL 5. $ 781.04

6. **Attachment expenses** *(specify)*: . . . . . 6. $ 0.00

N/A

7. **Surety bond premiums** *(itemize bonds and amounts)*: . . . . . 7. $ 0.00

N/A

8. a. **Ordinary witness fees**

	Name of witness	Daily fee	Mileage	Total
(1)		0.00 days at 0.00 $/day	0.00 miles at 0.00 ¢/mile	$ 0.00
(2)		0.00 days at 0.00 $/day	0.00 miles at 0.00 ¢/mile	$ 0.00
(3)		0.00 days at 0.00 $/day	0.00 miles at 0.00 ¢/mile	$ 0.00
(4)		0.00 days at 0.00 $/day	0.00 miles at 0.00 ¢/mile	$ 0.00
(5)		0.00 days at 0.00 $/day	0.00 miles at 0.00 ¢/mile	$ 0.00

(6) [ ] Information about additional ordinary witness fees is contained in Attachment 8a(6).

SUBTOTAL 8a. $ 0.00

(Continued on next page)

SHORT TITLE Parker v. California	CASE NUMBER 10CECG02116

MEMORANDUM OF COSTS (WORKSHEET) *(Continued)*

8. b. **Expert fees** *(per Code of Civil Procedure section 998)*

	Name of witness				Fee
(1)		0.00	hours at $ 0.00	/hr	$ 0.00
(2)		0.00	hours at $ 0.00	/hr	$ 0.00
(3)		0.00	hours at $ 0.00	/hr	$ 0.00
(4)		0.00	hours at $ 0.00	/hr	$ 0.00

(5) ☐ Information about additional expert witness fees is contained in Attachment 8b(5).

SUBTOTAL 8b. $ 0.00

c. **Court-ordered expert fees**

	Name of witness				Fee
(1)		0.00	hours at $ 0.00	/hr	$ 0.00
(2)		0.00	hours at $ 0.00	/hr	$ 0.00

(3) ☐ Information about additional court-ordered expert witness fees is contained in Attachment 8c(3).

SUBTOTAL 8c. $ 0.00

TOTAL (8a, 8b, & 8c) 8. $ 0.00

9. **Court-ordered transcripts** *(specify)*: . . . . . 9. $ 0.00

10. **Attorney fees** *(enter here if contractual or statutory fees are fixed without necessity of a court determination; otherwise a noticed motion is required)*: . . . . . 10 $ 0.00

11. **Models, blowups, and photocopies of exhibits** *(specify)*: . . . . . 11. $ 0.00

12. **Court reporter fees** *(as established by statute)*

a. *(Name of reporter)*: Suzanne McKennon Fees: $ 121.50

b. *(Name of reporter)*: Fees: $ 0.00

c. ☐ Information about additional court reporter fees is contained in Attachment 12c.

TOTAL 12. $ 121.50

13. ☒ **Other** *(specify)*: Travel re: Motion for Preliminary Injunction and MSJ hearings. . . . 13. $ 1,226.13

TOTAL COSTS . . . . . $ 11,355.62

(Additional information may be supplied on the reverse)

SHORT TITLE: Parker v. California	CASE NUMBER 10CECG02116

MEMORANDUM OF COSTS (WORKSHEET) *(Continued)*

5d. Service of Process

State of California	Registered Process Server	249.99
Edmund G. Brown	Registered Process Server	185.24
California DOJ	Registered Process Server	185.24

SHORT TITLE: Parker v. California	CASE NUMBER 10CECG02116

MEMORANDUM OF COSTS (WORKSHEET) *(Continued)*

4. **Deposition costs (continued)**

Name of deponent	Taking	Transcribing	Travel	Video-taping	Subtotals
Barry Bauer	$ 0.00	$ 321.95	$ 0.00	$ 0.00	$ 321.95
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00

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 March 11, 2011, I served the foregoing document(s) described as

MEMORANDUM OF COSTS (SUMMARY/WORKSHEET)

on the interested parties in this action by placing
[ ] the original
[X] 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
1300 I Street, Suite 125
Sacramento, CA 94244-2550

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Executed on March 11, 2011, at Long Beach, California.

— (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on March 11, 2011, at Long Beach, California.

— (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.
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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

KAMALA D. HARRIS
Attorney General of California
ZACKERY P. MORAZZINI
Supervising Deputy Attorney General
PETER A. KRAUSE
Deputy Attorney General
State Bar No. 185098
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5328
Fax: (916) 324-8835
E-mail: Peter.Krause@doj.ca.gov
Attorneys for Defendants and Respondents State of California, Kamala D. Harris, and the California Department of Justice

Exempt from fees pursuant to Government Code § 6103

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

THE STATE'S NOTICE OF MOTION AND MOTION TO TAX COSTS

BY FAX

Date: May 3, 2011
Time: 3:30 p.m.
Dept: 402
Judge: Hon. Jeffrey Hamilton
Action Filed: June 17, 2010

FAX FILE

NOTICE OF MOTION AND MOTION TO TAX COSTS

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORDS:

PLEASE TAKE NOTICE THAT, on May 3, 2011 at 3:30 p.m., or as soon thereafter as the matter may be heard in Department 402 of the above-entitled Court, located at 1130 O Street, Fresno, California 93721, defendants and respondents the State of California, Attorney General Kamala D. Harris, and the California Department of Justice (collectively, the "State") will, and hereby do, move for an order taxing the costs claimed by plaintiffs and petitioners Clay Parker, Herb Bauer Sporting Goods, California Rifle and Pistol Association, Able's Sporting, Inc., RTG Sporting Collectibles, LLC, and Steven Stonecipher ("Plaintiffs").

This Motion is brought pursuant to Code of Civil Procedure section 1033.5 and rule 3.1700(b) of the California Rules of Court, on the grounds that the following items of costs claimed in Plaintiffs' Memorandum of Costs were unnecessary, excessive, or unrecoverable:

1. Item No. 1. The Court should disallow recovery of the $40.00 filing fee associated with Plaintiffs' preliminary injunction motion, which motion was voluntarily withdrawn by Plaintiffs at the November 17, 2010 hearing.

2. Item No. 4. The Court should tax Plaintiffs' deposition costs. Because the Court ruled that the case presented a pure question of law, depositions were not reasonably necessary to the conduct of the litigation. Moreover, the amounts sought for travel for multiple attorneys and expedited transcription and overnight mail costs are unreasonable and excessive.

3. Item No. 5. The Court should tax the service of process costs claimed in Attachment 5(d) as ambiguous, unsupported, and/or unrecoverable.

4. Item No. 12. The Court should disallow recovery of the court reporter fees sought because they are not allowable under Code of Civil Procedure section 1033.5(b)(5).

5. Item No. 13. The Court should tax Plaintiffs' motion-related travel costs because such costs are not recoverable, and because Plaintiffs withdrew one of the two motions.

This Motion is based upon this Notice, the Memorandum of Points and Authorities and Declaration of Peter A. Krause filed concurrently herewith, all pleadings, records, and files

herein, those matters of which the Court may take judicial notice, and upon such oral argument as may be made at the hearing on this matter.

Dated: April 1, 2011

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
ZACKERY P. MORAZZINI
Supervising Deputy Attorney General

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

SA2010101624

KAMALA D. HARRIS
Attorney General of California
ZACKERY P. MORAZZINI
Supervising Deputy Attorney General
PETER A. KRAUSE
Deputy Attorney General
State Bar No. 185098
1300 I Street, Suite 125
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Telephone: (916) 324-5328
Fax: (916) 324-8835
E-mail: Peter.Krause@doj.ca.gov

Attorneys for Defendants and Respondents State of California, Kamala D. Harris, and the California Department of Justice

Exempt from fees pursuant to Government Code § 6103

FILED
APR 01 2011
FRESNO COUNTY SUPERIOR COURT
By _____
TLC - DEPUTY

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

APPENDIX OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF THE STATE'S MOTION TO TAX COSTS

BY FAX

Date: May 3, 2011
Time: 3:30 p.m.
Dept: 402
Judge: Hon. Jeffrey Hamilton
Action Filed: June 17, 2010

FAX FILE

Pursuant to California Rules of Court, rule 3.1113(i), defendants State of California, the California Department of Justice, and Attorney General Kamala D. Harris respectfully lodge with the Court copies of the non-California authorities cited in the State's Memorandum of Points and Authorities in Support of its Motion to Tax Costs.

Exhibit A: *Altsman v. Kelly, et al.* (Pa. 1939) 9 A.2d 423.

Exhibit B: *Hammons v. Table Mountain Ranches Owners Assoc.* (Wy. 2003) 72 P.3d 1153.

Dated: April 1, 2011

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
ZACKERY P. MORAZZINI
Supervising Deputy Attorney General

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

SA2010101624

Exhibit A

9 A.2d 423
336 Pa. 481, 9 A.2d 423
(Cite as: 336 Pa. 481, 9 A.2d 423)

C

Supreme Court of Pennsylvania.
ALTSMAN
v.
KELLY et al. (three cases).
Appeal of EXHIBITORS SERVICE CO.
Appeal of KELLY.

Nov. 27, 1939.

Appeals Nos. 253-255, March term, 1939, from judgment of Court of Common Pleas, Allegheny County, at No. 2898 April term, 1937; Thomas M. Marshall, Judge.

Three actions in trespass by Irene E. Altsman against Raymond P. Kelly and Exhibitors Service Company for injuries received by plaintiff when struck by truck driven by the defendant Raymond P. Kelly and owned by the corporate defendant. Judgment for plaintiff on a verdict for $16,000, and the defendants appeal.

Affirmed.

West Headnotes

[1] Automobiles 48A ⚿244(6)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak241 Evidence
48Ak244 Weight and Sufficiency
48Ak244(2) Negligence
48Ak244(6) k. Injuries to Persons on Foot. Most Cited Cases

Automobiles 48A ⚿244(35)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak241 Evidence
48Ak244 Weight and Sufficiency
48Ak244(35) k. Speed and Control. Most Cited Cases

Evidence justified judgment against truck owner and truck driver for injuries received by pedestrian when struck by truck at intersection on ground that truck driver crossed intersection at speed in excess of 30 miles an hour, went through red traffic signal, was driving to left of the regular traffic lane, failed to observe presence of pedestrian rightfully on crosswalk in time to avoid striking her, and swerved truck suddenly in her direction.

[2] Automobiles 48A ⚿160(3)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak160 Persons on Foot in General
48Ak160(3) k. Lights, Signals, and Lookouts. Most Cited Cases

Automobiles 48A ⚿168(6)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak168 Excessive Speed, Control, and Racing
48Ak168(6) k. Intersections and Crossings. Most Cited Cases

On approaching intersection, truck driver had duty to maintain high degree of vigilance to anticipate presence of pedestrians within intersection and to have truck under such control that he could stop at shortest possible notice or alter its direction in order to avoid striking persons committed to the crossing.

[3] Automobiles 48A ⚿160(4)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak160 Persons on Foot in General
48Ak160(4) k. Crossing Street or Way. Most Cited Cases

Automobiles 48A ⚷217(5)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak202 Contributory Negligence
48Ak217 Persons Crossing Highway
48Ak217(5) k. Duty to Stop, Look, and Listen. Most Cited Cases

A pedestrian crossing intersection with the green traffic light in his favor does not have an absolute right of way for the full distance of the crossing, and must continually be on guard for his safety.

[4] Automobiles 48A ⚷160(4)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak160 Persons on Foot in General
48Ak160(4) k. Crossing Street or Way. Most Cited Cases

A pedestrian crossing intersection in crosswalk with traffic light in her favor had superior right of way over truck approaching from her right where traffic light remained in favor of pedestrian until truck struck her.

[5] Automobiles 48A ⚷240(2)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak236 Pleading
48Ak240 Issues, Proof, and Variance
48Ak240(2) k. Evidence Admissible Under Pleading. Most Cited Cases

In action for injuries received by pedestrian when struck by truck at intersection, admission of testimony with respect to truck driver's disregard of red traffic signal at intersection under general allegation of statement of claim was not error as against contention that charge of negligence should have been specifically pleaded, since evidence was relevant not only as to truck driver's negligence, but also with respect to question of contributory negligence.

[6] Automobiles 48A ⚷217(5)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak202 Contributory Negligence
48Ak217 Persons Crossing Highway
48Ak217(5) k. Duty to Stop, Look, and Listen. Most Cited Cases

Automobiles 48A ⚷245(72)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(67) Contributory Negligence
48Ak245(72) k. Persons on Foot in General. Most Cited Cases

Although a pedestrian is required to exercise continued vigilance in crossing a street, he is not required to look constantly for approaching traffic, but just where he should look depends on shifting conditions and is fact question, especially where pedestrian is invited to cross by a favorable traffic signal.

[7] Automobiles 48A ⚷245(72)

48A Automobiles
48AV Injuries from Operation, or Use of High-

way
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(67) Contributory Negligence
48Ak245(72) k. Persons on Foot in General. Most Cited Cases

A pedestrian who entered crosswalk at intersection when traffic signal was in her favor was not negligent as matter of law in proceeding toward opposite corner after seeing approaching truck, since pedestrian had right to rely on assumption that truck driver would not ignore traffic signal or pedestrian's rightful presence on the crosswalk.

[8] Automobiles 48A ⚖245(6)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(2) Care Required and Negligence
48Ak245(6) k. Persons on Foot. Most Cited Cases

Automobiles 48A ⚖245(72)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(67) Contributory Negligence
48Ak245(72) k. Persons on Foot in General. Most Cited Cases

In action against truck driver and truck owner for injuries received by pedestrian when struck by truck at intersection which pedestrian entered after looking carefully in both directions and in reliance on favorable traffic signal, questions of truck driver's negligence and pedestrian's contributory negligence were for jury.

[9] Judgment 228 ⚖564(1)

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k564 Finality of Determination
228k564(1) k. In General. Most Cited Cases

By filing a motion to remove a nonsuit, the plaintiff submits the legal sufficiency of his case to the court in banc with the same effect as though the defendant had demurred to the evidence, and the determination of the motion is a "final judgment" and unless plaintiff appeals therefrom and secures its reversal the judgment is a bar to a second suit against the defendant on the same cause of action.

[10] Judgment 228 ⚖570(4)

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k570 Judgment on Discontinuance, Dismissal, or Nonsuit
228k570(4) k. Involuntary Dismissal or Nonsuit in General. Most Cited Cases

The effect of the withdrawal of a motion to remove a nonsuit was to place the record where it stood prior to the filing of the motion as though it had not been made and left on the record merely the entry of the nonsuit, the mere existence of which unaccompanied by refusal of the court in banc to take it off could not have the effect of "res judicata" as to a second suit.

[11] Judgment 228 ⚖570(4)

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k570 Judgment on Discontinuance, Dismissal, or Nonsuit
228k570(4) k. Involuntary Dismissal or Nonsuit in General. Most Cited Cases

The mere entry of a nonsuit does not bar the

right to bring a subsequent action.

[12] Judgment 228 ⇐570(4)

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k570 Judgment on Discontinuance, Dismissal, or Nonsuit
228k570(4) k. Involuntary Dismissal or Nonsuit in General. Most Cited Cases

In action for injuries, refusal to admit in evidence on issue of res judicata, record of prior action on same cause of action wherein trial judge entered compulsory nonsuit at conclusion of plaintiff's testimony and plaintiff filed motion to remove nonsuit which was argued before court in banc but, before decision was rendered, order granting leave to withdraw motion to remove nonsuit was granted, was not error.

[13] Evidence 157 ⇐207(1)

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k206 Judicial Admissions
157k207 In General
157k207(1) k. In General. Most Cited Cases

In action for injuries, record of prior action on same cause of action in which trial court entered compulsory nonsuit and plaintiff filed motion to remove nonsuit which motion was withdrawn by leave of court was properly rejected as an "admission," since discontinuance does not constitute either an adjudication of the party's right of action or an acknowledgment that the claim is not good in law.

[14] Pretrial Procedure 307A ⇐517.1

307A Pretrial Procedure
307AIII Dismissal
307AIII(A) Voluntary Dismissal
307Ak517 Effect
307Ak517.1 k. In General. Most Cited Cases
(Formerly 307Ak517, 128k42 Dismissal and Nonsuit)

In action for injuries, contention that order granting leave to withdraw and discontinue motion to take off nonsuit in prior action on same cause of action was invalid because it was granted by trial judge alone, was not available, since if defendants believed discontinuance to have been irregular they should have petitioned court in prior action to strike it off, and could not attack its validity collaterally in subsequent action.

[15] Appeal and Error 30 ⇐1069.3

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)19 Conduct and Deliberations of Jury
30k1069.3 k. Recalling Jury and Further Instructions. Most Cited Cases
(Formerly 30k1069(3))

In action for injuries, that additional instructions were given by trial court to jury at their written request in absence of counsel for parties was not harmful to defendant so as to warrant granting of new trial, where in open court and in presence of all parties and counsel trial judge again instructed jury in response to question which it had asked, and defendants were given full opportunity to suggest corrections.

482** ****424** Argued before KEPHART, C. J., and SCHAFFER, MAXEY, LINN, STERN, and BARNES, JJ.483** E. O. Golden, of Kittanning, and A. E. Kountz and Kountz & Fry, all of Pittsburgh, for appellants.

Bloom & Bloom, of Washington, Arnold J. Lange, of Pittsburgh, and George I. Bloom, of Washington, for appellee.

BARNES, Justice.

On March 2, 1936, about eleven o'clock in the evening, plaintiff, while crossing the intersection of Fifth and Bellefield Avenues, in the City of Pittsburgh, was struck and severely injured by an automobile truck owned by the defendant company, and operated by its employee, the individual defendant. Fifth Avenue, a main thoroughfare for traffic, with double street car tracks thereon, runs approximately east and west at the place where the accident occurred, and is intersected diagonally by Bellefield Avenue, which extends generally north and south. The crosswalk for pedestrians from the southwest to the northwest corners of the intersection is upon an angle toward the east, and is 71 feet in length, although Fifth Avenue is only 48 feet from curb to curb. The double tracks, totaling 14 feet 4 inches in width, are 21 feet from the south curb, and approximately 13 feet from the north curb of Fifth Aven- ue.

The plaintiff testified that she had been a passenger on an eastbound Fifth Avenue trolley car, and had alighted ***484** therefrom when the car made its stop at Bellefield Avenue. She then walked to the southwest corner, where she waited until the trolley car passed, and the traffic light turned green for Bellefield Avenue. After looking to the left and observing that there was no oncoming traffic, she looked to her right or east, where she had a view for a distance of 320 feet to the point where Fifth Avenue curves toward the east, and there likewise the way was clear of vehicles. She started across the intersection to the northwest corner. As she neared the first rail of the trolley tracks, she looked again, ****425** and this time she noticed automobile headlights approaching from her right, about 300 feet distant. She continued to advance, directing her attention to the crosswalk upon which she was walking, which was rough and slippery from a recent rain, and at the same time watching for traffic upon Fifth Avenue.

She further testified that when she was between the second and third rails of the tracks she glanced again to the right and saw the defendant's truck bearing down upon her about 19 feet away, traveling west on Fifth Avenue. She thrust herself forward in an effort to escape injury, but the truck suddenly swerved and struck her with such force that she was hurled twenty feet from the place of impact. The truck was running upon the first or south rail of the tracks, over which plaintiff had just passed, and was, in consequence, upon the left or wrong side of Fifth Avenue, according to the direction in which it was proceeding.

Two disinterested witnesses corroborated plaintiff's testimony that the traffic light was green for Bellefield Avenue, and in plaintiff's favor, from the time she left the southwest curb until she was struck. It turned red for Bellefield Avenue almost immediately after the accident. These witnesses also said that at the time she was struck, plaintiff was walking upon the usual pedestrian crossing from the southwest to the northwest corners of the intersection. One of the witnesses, who ***485** was operating her car on Fifth Avenue in the same direction as and immediately behind defendant's truck, stated that the light did not turn green for Fifth Avenue traffic until her own car reached the intersection. She said that just prior thereto the truck had passed her upon the left at a time when she was driving astride the north rail on Fifth Avenue. Her speed was then thirty to thirty-five miles an hour, and she testified that the truck had overtaken and passed her, continuing ahead at a greater speed.

As a result of the injuries received the plaintiff is permanently disabled, and prevented from engaging in any gainful occupation. After trial in the court below the case was submitted to the jury which rendered a verdict for plaintiff. Defendants' motions for new trial and for judgment non obstante veredicto were overruled by the court in banc, and judgment having been entered upon the verdict, these appeals followed.

The defendants' contentions are (1) that there is insufficient evidence of negligence on the part of the driver of the truck to entitle plaintiff to recover;

(2) that plaintiff was guilty of contributory negligence.

[1][2] A review of the record convinces us that the charge of negligence against the defendants is fully sustained by the evidence. The jury was justified in finding that the defendant driver crossed the intersection at a speed in excess of thirty miles an hour, that he went through a red light, that he was driving to the left of the regular traffic lane, that he failed to observe the presence of pedestrian rightfully on the crosswalk in time to avoid striking her, and that he swerved the truck suddenly in her direction. On approaching the crossing it was his duty, as we have so often said, to maintain a high degree of vigilance, to anticipate the presence of pedestrians within the intersection and to have his car under such control that he could stop at the shortest possible notice, or alter its direction, in order to avoid striking persons committed to the crossing. ***486** Newman v. Protective M. S. Co., 298 Pa. 509, 148 A. 711; Ferguson v. Chris, 314 Pa. 164, 170 A. 131; Goodall v. Hess, 315 Pa. 289, 172 A. 693; MacDougall v. American Ice Co., 317 Pa. 222, 176 A. 428; Smith v. Wistar, 327 Pa. 419, 194 A. 486; Smith v. Shatz, 331 Pa. 453, 200 A. 620.

[3][4] While a pedestrian crossing an intersection with a green traffic light in his favor does not have an absolute right of way for the full distance of the crossing, and must continually be upon guard for his safety, Schroeder v. Pittsburgh Rys. Co., 311 Pa. 398, 165 A. 733; Jones v. Pittsburgh Rys. Co., 312 Pa. 450, 167 A. 332; Dando v. Brobst, 318 Pa. 325, 177 A. 831, here no testimoney was offered to support the defendants' contention that the plaintiff failed to exercise the degree of watchfulness required of pedestrians under such circumstances, or that she carelessly stepped into the path of approaching danger. Under the facts here appearing, the plaintiff had the superior right of way, for the traffic light was in her favor until the vehicle struck her. Maselli v. Stephens, 331 Pa. 491, 495, 200 A. 590.

[5] Defendants objected to the admission of any testimony with respect to the disregard by the driver of the truck of the red traffic signal at the intersection, under the general allegations of plaintiff's statement of claim. They assert that this ****426** charge of negligence should have been specifically pleaded, if it were to proved. We find no merit in this contention. The averments of the statement are sufficiently broad to include this evidence, and it was not error to permit it to be introduced. McNulty v. Joseph Horne Co., 298 Pa. 244, 148 A. 105. See also Nark v. Horton Motor Lines, Inc., 331 Pa. 550, 1 A.2d 655; Lynch v. Bornot, Inc., 120 Pa.Super. 242, 182 A. 49. It was relevant not only as to defendants' negligence, but also with respect to the question of plaintiff's contributory negligence, for the presence of a traffic signal has an important bearing upon the pedestrian's duty of care. See Newman v. Protective M. S. Co., supra, 298 Pa. at page 512, 148 A. at page 711.

[6] Under the evidence plaintiff cannot be held contributorily negligent as a matter of law. It is clear from the record that she looked carefully before entering upon ***487** the crossing, that she proceeded across in reliance upon a favorable traffic signal, that she kept to the crosswalk, and that she looked at least twice again as she advanced to the opposite side. While a pedestrian is required to exercise continued vigilance in crossing a street, he is not required to look constantly for approaching traffic. Healy v. Shedaker, 264 Pa. 512, 107 A. 842. 'Just where he should look depends upon shifting conditions and is a question of fact rather than of law'. Mackin v. Patterson, 270 Pa. 107, 110, 112 A. 738, 740. And especially is this so when the pedestrian is invited to cross by a favorable traffic signal. Newman v. Protective M. S. Co., supra, 298 Pa. at page 512, 148 A. at page 711.

[7][8] Moreover, it does not appear from the evidence that plaintiff was negligent in proceeding toward the opposite corner after seeing the truck approaching. Lamont v. Adams Express Co., 264 Pa. 17, 107 A. 373. She had the right to rely upon the assumption that the operator of the truck would

not ignore the traffic signal, and her own rightful presence upon the crosswalk. Villiger v. Yellow Cab Co. of Pittsburgh, 309 Pa. 213, 163 A. 537; Smith v. Wister, supra. Clearly this was a case for the jury to determine whether the driver exercised the degree of care required of him at a street crossing, and whether any lack of care on the part of plaintiff contributed to the accident. Gilles v. Leas, 282 Pa. 318, 127 A. 774. The jury having determined both questions in favor of plaintiff, we see no reason to disturb its findings.

A further question remains for discussion. Prior to bringing the present suit plaintiff sued the defendants upon the same cause of action to recover damages for the same injuries. In the trial of the first suit, at the conclusion of plaintiff's testimony, the trial judge entered a compulsory nonsuit. Thereafter the plaintiff filed a motion to remove the nonsuit, which was argued before the court in banc. Before a decision was rendered, however, plaintiff's attorney at the time, who is now deceased, presented an application to withdraw the motion to take off the nonsuit, and an order granting***488** leave to do so was signed 'By the Court'. The costs in that proceeding were paid and the following day the present suit was instituted.

At the trial of this case the defendants offered in evidence the entire record of the former suit on the ground that it constituted a bar to the present suit under the doctrine of res judicata, and that, in any event, it was proper evidence as an admission by the plaintiff, that by not pressing the motion to take off the nonsuit, the action of the trial judge in the first case was proper. Both offers were rejected by the trial judge, and the evidence was not received.

[9] By filing a motion to remove a nonsuit, the plaintiff submits the legal sufficiency of his case to the court in banc, with the same effect as though the defendant had demurred to the evidence. Its determination is a final judgment, and unless the plaintiff appeals therefrom and secures its reversal, that judgment is bar to a second suit against the defendant upon the same cause of action. Finch v. Conrade's Ex'r, 154 Pa. 326, 328, 26 A. 368; Scanlon v. Suter, 158 Pa. 275, 27 A. 963; Hartman v. Pittsburgh Incline Plane Co., 159 Pa. 442, 28 A. 145; Fine v. Soifer, 288 Pa. 164, 135 A. 742.

[10] This well settled rule is without application to the question here presented, because the motion to remove the nonsuit was withdrawn before it was acted upon by the court in banc. The effect of the withdrawal of the motion was to place the record where it stood prior to the filing of the motion,-as though it had not been made. Farne v. Penna. Lighting Co., 275 Pa. 444, 119 A. 537. In other words, it left upon ****427** the record merely the entry of a compulsory nonsuit, the existence of which, unaccompanied by a refusal of the court in banc to take it off, could not have the effect of res judicata as to a second suit. Bliss v. Phila. Rapid Trans. Co., 73 Pa. Super. 173. See also Bournonville v. Goodall, 10 Pa. 133; Fitzpatrick v. Riley, 163 Pa. 65, 29 A. 783.

[11][12][13] ***489** The mere entry of a nonsuit does not bar the right to bring a subsequent action. Bournonville v. Goodall, supra; Cleary v. Quaker City Cab Co., 285 Pa. 241, 132 A. 185; Fine v. Soifer, supra. Accordingly, as the record in the first case is devoid of any judgment that operates as a bar to the institution of this suit by the plaintiff, it contained nothing that was relevant in support of the defendants' plea of res adjudicata. Therefore the action of the trial judge in refusing its admission was proper. As a discontinuance does not constitute either an adjudication by an appropriate tribunal, of a party's right of action or an acknowledgment that the claim is not good in law, Sweigart v. Frey, 8 Serg. & R. 299, it was proper here to reject the record as an admission.

[14] Finally, it is urged by defendants in this connection that the order granting leave to withdraw and discontinue the motion to take off the nonsuit was invalied because it was granted by the trial judge alone. Defendants assert that once the motion to withdraw was submitted to the court in

banc, it could be withdrawn and discontinued only with the consent of that body, and the order of a single judge was accordingly insufficient and invalied. This contention, however, is not supported by the record. It appears that the order was signed 'By the Court', and there is no indication upon its face that it was improperly entered. If the defendants believed the discontinuance to have been irregular, they should have petitioned the court below, in the first suit, to strike it off. They cannot attack its validity collaterally in the present case. In Lindsay v. Dutton, 217 Pa. 148, at page 149, 66 A. 250, at page 251, we said: 'If the discontinuance was improperly or illegally entered the defendant should have applied to the court to strike it off. So long as the record of that case shows that the suit has been discontinued, we must, in this action, treat it as having been regularly and legally done.'

[15] There is no merit in defendants' complaint that they were prejudiced because certain additional instructions ***490** were given by the trial judge to the jury, at their written request, in the absence of counsel for the parties. Thereafter, in open court, and in the presence of all parties and counsel, the trial judge again instructed the jury in response to the question which it had asked. It clearly appears that defendants were given full opportunity to suggest corrections or modifications with respect to the additional charge. Under these circumstances no harm was done defendants and we find nothing to warrant the granting of a new trial for such reason. Cunningham v. Patton, 6 Pa. 355; Allegro v. Rural Valley Mut. Fire Ins. Co., 268 Pa. 333, 112 A. 140. See also Noreika v. Penna. Indemnity Corp., 135 Pa.Super. 474, 5 A.2d 619.

The assignments of error are overruled and the judgment is affirmed.

Pa. 1939
Altsman v. Kelly
336 Pa. 481, 9 A.2d 423

END OF DOCUMENT

Exhibit B

72 P.3d 1153, 115 A.L.R.5th 777, 2003 WY 85
(Cite as: 72 P.3d 1153)

H

Supreme Court of Wyoming.
Joseph R. HAMMONS and Darlene S. Hammons, Appellants (Plaintiffs),
v.
TABLE MOUNTAIN RANCHES OWNERS ASSOCIATION, INC., a Wyoming Corporation, Appellee (Defendant).

No. 01-151.
July 15, 2003.

After lot owners application to place modular home in subdivision was denied by subdivision's architectural control committee, lot owners brought declaratory judgment action seeking determination that covenants were invalid and they were entitled to have plans approved. The District Court, Laramie County, Nicholas G. Kalokathis, J., invalidated covenants, but ruled that committee acted reasonably in denying plans. Lot owners appealed. The Supreme Court, Kautz, District Judge, held that: (1) committee did not abandon covenants by allowing other prefabricated homes, and (2) architectural control committee acted reasonably when it denied lot owners' application to build modular home.

Affirmed.

West Headnotes

[1] Covenants 108 ⇐72.1

108 Covenants
108II Construction and Operation
108II(D) Covenants Running with the Land
108k72 Release or Discharge from Liability on Real Covenants
108k72.1 k. In General. Most Cited Cases

Covenants 108 ⇐103(3)

108 Covenants
108III Performance or Breach
108k103 Covenants as to Use of Property
108k103(3) k. Waiver of Breach. Most Cited Cases

Homeowners association did not abandon, or lose right to enforce, aesthetic provision in covenants prohibiting prefabricated homes because other prefabricated homes were built in subdivision, where purpose of protecting and enhancing value of property in subdivision by excluding certain prefabricated homes remained viable; a number of lots remained undeveloped, and manner in which those remaining lots were developed could have significant impact on value of existing homes.

[2] Appeal and Error 30 ⇐170(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k170 Nature or Subject-Matter of Issues or Questions
30k170(1) k. In General. Most Cited Cases

Issue of composition of subdivision's architectural control committee was not jurisdictional, and thus appellate court would not consider issue raised for first time on appeal.

[3] Appeal and Error 30 ⇐169

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 k. Necessity of Presentation in General. Most Cited Cases

The Supreme Court will ordinarily entertain only arguments raised in the court below.

[4] Appeal and Error 30 ⇐169

30 Appeal and Error
30V Presentation and Reservation in Lower

Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 k. Necessity of Presentation in General. Most Cited Cases
Exceptions to the rule that the Supreme Court will ordinarily entertain only arguments raised in the court below exist if the argument is jurisdictional, or if it is of such a fundamental nature that it must be considered.

[5] Motions 267 ⇐34

267 Motions
267k34 k. Countermanding, Withdrawal, or Abandonment. Most Cited Cases
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.

[6] Covenants 108 ⇐51(2)

108 Covenants
108II Construction and Operation
108II(C) Covenants as to Use of Real Property
108k51 Buildings or Other Structures or Improvements
108k51(2) k. Buildings in General. Most Cited Cases
Trial court's finding that architectural control committee of subdivision acted reasonably when it denied lot owners' application to build modular home on lot was not clearly erroneous, in light of evidence that vast majority of other homes in subdivision were not modulars, witnesses established that additional modulars would negatively impact value of existing homes and would change nature of subdivision, and committee did not single out lot owners for rejection, but consistently denied applications to erect modular homes.

[7] Covenants 108 ⇐49

108 Covenants
108II Construction and Operation
108II(C) Covenants as to Use of Real Property
108k49 k. Nature and Operation in General. Most Cited Cases
Covenants are contractual in nature and are to be interpreted in accordance with the principles of contract law.

***1153** Alexander K. Davison and Wendy J. Curtis of Patton & Davison, Cheyenne, Wyoming, Representing Appellants. Argument by Mr. Davison.

Julie Nye Tiedeken of Tiedeken Law Offices, Cheyenne, Wyoming, Representing Appellee.

Before HILL, C.J., and LEHMAN [FN*], KITE, and VOIGT, JJ., and KAUTZ, D.J.

FN* Chief Justice at time of oral argument.

***1154** KAUTZ, District Judge.

[¶ 1] This case considers whether an "Architectural Control Committee" properly denied Appellants', Joseph R. Hammons and Darlene S. Hammons (the Hammons), application to place a modular home in Table Mountain Ranches, a subdivision in Laramie County. The district court determined that covenants, which specifically excluded modulars in Table Mountain Ranches, were invalidly adopted. However, it found that prior covenants, still in effect, authorized rejection of the Hammons' plans on "aesthetic" grounds. The district court also found that the Architectural Control Committee acted reasonably in denying the plans.

[¶ 2] We conclude that the district court properly applied the law and that sufficient evidence supports its findings and conclusions. We affirm the trial court's declaratory judgment.

ISSUES

[¶ 3] The Hammons list these issues:

1. Did the District Court properly apply Wyoming Law of Aesthetic Covenants when determining that the decision of the Board of Table Moun-

tain Ranches was reasonable?

2. Is the District Court's reliance upon the testimony of the architectural control committee clearly erroneous considering its order invalidating the 1998 covenants?

The Appellee, Table Mountain Ranches Owners Association, Inc. (TMROA) rephrases the issues as follows:

Issue 1 Did the Trial Court properly hold that the original purpose of the covenants can still be accomplished and thus the covenants have not been abandoned?

Issue 2 Did the Trial Court properly hold that the actions of the Architectural Control Committee in disapproving the Hammons' proposed home was reasonable and made in good faith?

Issue 3 a) Since the membership of the Architectural Control Committee was not raised in front of the Trial Court, should it be considered by the Supreme Court on appeal?

b) Did the Trial Court properly hold that the decision of the Architectural Control Committee would have been the same under the 1973 version of the covenants and should stand even though the 1998 covenants were found to be invalid?

FACTS

[¶ 4] Table Mountain Ranches is a subdivision in Laramie County. In 1973 its developers filed a declaration of protective covenants. They made minor adjustments to those covenants in 1974 and 1977. (The 1973 covenants with the 1974 and 1977 amendments are referred to herein as the 1977 covenants). The 1977 covenants created an Architectural Control Committee (A.C.C.), whose declared purpose was

[t]o assure, through intelligent architectural control of building design, placement and construction, that Table Mountain Ranches shall become and remain an attractive community, and to uphold and enhance property values.

The A.C.C. consisted of three members. The subdivider appointed one member, and owners of complete dwellings in the subdivision selected the other two. After 90% of the tracts in the subdivision were sold, the "homeowners group" selected all three A.C.C. members. Initially, a three-member A.C.C. functioned. At some point, however, the Homeowner's Association Board assumed the role of the A.C.C.

[¶ 5] The covenants required that lot owners submit their plans and obtain written approval from the A.C.C. before they build. The A.C.C. had broad latitude in deciding what plans to approve or disapprove under the 1977 covenants. Those covenants stated, "[d]isapproval of plans and specifications may be based on any grounds including purely aesthetic grounds."

[¶ 6] Initially, the A.C.C. excluded prefabricated buildings except for "Boise Cascade Homes." The evidence established that Boise Cascades more resembled stick-built homes than prefabricated homes. Through 1993 the A.C.C. excluded modular homes. From 1994 to 1996 the A.C.C. napped rather than enforced the covenants of the subdivision*1155 and permitted prefabricated homes by failing to consider or respond to applications. After this lapse, the subdivision contained 107 undeveloped lots, 57 stick-built homes, and 11 prefabricated homes. In 1996, a more vigilant A.C.C. assumed the helm. Since then, it has consistently disapproved prefab homes with rectangular low-pitched roofs. It took legal action and forced the removal of a "double-wide" or modular prefabricated home.

[¶ 7] In 1998, the TMROA attempted to amend the covenants of the subdivision. For purposes of this case, the 1998 covenants contained two significant changes. First, they gave the TMROA board the role of the A.C.C. This change reflected the practice that had been followed for some time. Second, the 1998 covenants added this language:

"No mobile, manufactured, modular or site built homes resembling basic rectangular low pitch roof double wide manufactured or modular homes will be authorized."

[¶ 8] The Hammons bought two lots in the Table Mountain subdivision in 1995. On May 3, 1999, they sought approval for a prefabricated home. The A.C.C. denied approval twice, once after some members viewed a sample home, citing aesthetic grounds. Thereafter, the Hammons filed this case. Their complaint alleged that the 1998 amendments to the covenants were invalid, and that their plans would have been approved under the 1977 covenants.

PROCEDURAL HISTORY

[¶ 9] The Hammons sued for declaratory judgment. They sought (1) a declaration that the 1998 covenants were invalid, (2) a declaration that they were entitled to have their home plans approved, irrespective of which covenants governed, and (3) damages. The trial court invalidated the 1998 covenants, held that the 1977 covenants had not been abandoned, and held that under them, the A.C.C. acted reasonably and within their authority in denying the Hammons' plans.

[¶ 10] Inspired by the trial court's invalidation of the 1998 covenants, the Hammons asked the trial court to amend its Findings and Conclusions. They argued that because it invalidated the 1998 covenants, the court should also have disregarded the testimony of the Board as to whether the Hammons' home would have been disapproved under the older covenants. The Hammons asserted that because the 1977 covenants provided a different A.C.C. membership than the 1998 covenants, the TMROA could not speak as the A.C.C. under the older covenants. Several TMROA board members testified that they would not approve the Hammons' plans under either set of covenants.

[¶ 11] TMROA submitted a judgment under W.R.C.P. 58, to which the Hammons filed an objection, restating the grounds from their motion to amend. The trial court considered the motions on March 1, 2001, and entered the declaratory judgment without the Hammons' proposed amendments. The Hammons then filed both a Rule 50(b) motion and a motion nominally based on Rules 59(a)(6) and (e). However, in a strange turn, they withdrew those motions and timely filed this appeal.

STANDARD OF REVIEW

[¶ 12] The district court's decisions as to whether the covenants were abandoned, and whether the board acted reasonably, combine questions of law and fact. Questions of law are reviewed *de novo*. *Stansbury v. Heiduck*, 961 P.2d 977, 978 (Wyo.1998). A district court's findings of fact will be upheld unless the findings are clearly erroneous. *Mathis v. Wendling*, 962 P.2d 160, 163 (Wyo.1998) . A finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Springer v. Blue Cross and Blue Shield of Wyoming*, 944 P.2d 1173, 1176 (Wyo.1997) (citing *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 538 (Wyo.1993)).

ANALYSIS

Were the Covenants Governing the Table Mountain Ranches Subdivision Abandoned?

[1] [¶ 13] The Hammons claim that TMROA lost the right to enforce, or abandoned,***1156** the "aesthetic" provision in the 1977 covenants because other prefabricated homes were built in the subdivision.

[¶ 14] A protective covenant is abandoned by failure to enforce that covenant when the covenant is violated, the violations are ignored or acquiesced to, and the violations are

> ... so great, or so fundamental or radical as to neutralize the benefits of the restriction to the point of defeating the purpose of the covenant. In other words, the violations must be so substantial as to support a finding that the usefulness of the covenant has been destroyed, or that the covenant

has become valueless and onerous to the property owners.

Keller v. Branton, 667 P.2d 650, 654 (Wyo.1983) (citing *Riley v. Stoves*, 22 Ariz.App. 223, 526 P.2d 747, 68 A.L.R.3d 1229 (1974)). The trial court properly utilized the standard from *Keller* in deciding the abandonment issue.

[¶ 15] The purpose and benefit of the "aesthetic" provision in the 1977 covenants is specified in the covenants themselves. The covenants specifically state that their intent is to "protect and enhance the value, desirability and attractiveness" of the subdivision.

[¶ 16] The record contains considerable evidence indicating that the purpose of protecting and enhancing the value of property in the subdivision by excluding certain prefabricated homes remains viable. Although 11 prefabricated homes now exist there, there are 57 stick-built homes and the balance of the 217 lots are undeveloped. The evidence indicated that the manner in which those remaining lots are developed could have a significant impact on the value of the existing homes. The trial court recognized this evidence and held that the "aesthetic" covenant was not abandoned. We find that this decision is supported by evidence and not "clearly erroneous."

Should this Court Consider Membership of the A.C.C. When that Issue Was Not Presented to the Trial Court Until After the Trial Court's Decision?

[2][3][4] [¶ 17] This Court will ordinarily entertain only arguments raised in the court below. *Cooper v. Town of Pinedale*, 1 P.3d 1197, 1208 (Wyo.2000). Exceptions to this rule exist if the argument is jurisdictional, or if it is "of such a fundamental nature that it must be considered." *Id.* (citing *WW Enterprises v. City of Cheyenne*, 956 P.2d 353, 356 (Wyo.1998) and *Bredthauer v. TSP*, 864 P.2d 442, 447 (Wyo.1993)).

[¶ 18] The Hammons did not allege in their complaint that the selection of A.C.C. members under the 1977 covenants was invalid. They did not assert that if the 1998 covenants were improperly adopted, the court should order a different committee to review the Hammons' plans. The Hammons did not present this issue to the trial court, and the trial court did not consider it. They asked only for a declaration that their plans should be approved under the 1973 covenants.

[¶ 19] The issue about composition of the A.C.C. is not jurisdictional. It is not so "fundamental" that it must be considered. The Hammons did not raise this issue until after the trial court decided the case. This Court will not consider the issue now.

[¶ 20] The Hammons imply that it is logically impossible for the trial court to invalidate the 1998 covenants, but then to consider testimony from the A.C.C. formed under the 1998 covenants. That testimony indicated that the 1998 A.C.C. would not approve the Hammons' plans even under the 1977 covenants. The evidence established, however, that the composition of the A.C.C. under the 1998 covenants was the same as had been put in practice before the 1998 amendments. The Hammons did not assert that the A.C.C. membership was invalid before the 1998 amendments, and we will not consider that issue now.

[5] [¶ 21] After the trial court issued its decision, the Hammons attempted to raise their questions about the A.C.C. membership through motions. Then they withdrew their motions.[FN1] Those motions did not timely raise ***1157** an issue that should have been presented before trial. A motion to alter or amend "cannot be used to raise arguments which could, and should, have been made before judgment issued." *Beyah v. Murphy*, 825 F.Supp. 213, 214 (E.D.Wis.1993); *F.D.I.C. v. World University Inc.*, 978 F.2d 10, 16 (1st Cir.1992). Further, Appellants withdrew the motions. 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. *In re Stoute*, 91

A.D.2d 1043, 458 N.Y.S.2d 640, 641 (1983); *People v. Steinhoff*, 38 Mich.App. 135, 195 N.W.2d 780, 781 (1972); 56 Am.Jur.2d *Motions, Rules, and Orders* § 32 (2000).

> FN1. The withdrawal of the Hammons' post-trial motions is not a direct issue in this case. We note, however, that the Hammons incorrectly believed they could not appeal while a motion was pending. The Hammons relied on *Rutledge v. Vonfeldt*, 564 P.2d 350 (Wyo.1977) for this belief. We decided *Rutledge* before adopting the Wyoming Rules of Appellate Procedure. WRAP 2.04 solves the Hammons' concerns under *Rutledge* by preserving the effect of a premature notice of appeal.

Did the Trial Court Properly Hold that the Actions of the Architectural Control Committee in Disapproving the Hammons' Proposed Home was Reasonable and Made In Good Faith?

[6][7] [¶ 22] Covenants "are contractual in nature and are to be interpreted in accordance with the principles of contract law." *McHuron v. Grand Teton Lodge Company*, 899 P.2d 38, 40 (Wyo.1995) (citing *Kindler v. Anderson*, 433 P.2d 268 (Wyo.1967)). The district court invalidated the 1998 covenants because of procedural defects in the amendment process. Neither side appealed that ruling. Consequently, the prior covenants remained effective. They said:

> Authority: ***No structure,*** including walls and fences ***shall be*** erected, converted, ***placed,*** added to or altered ***on any lot until the construction plans, specification*** (to include samples of exterior materials and colors to be used) ***and a plan showing the location of the structure have been approved in writing by the Architectural Control Committee.*** Consideration will be given to quality of workmanship and materials, harmony of external design with existing structure, location with respect to other structures (actual and planned), topography and to finished grade elevation. ***Disapproval of plans and specifications may be based on any grounds including purely aesthetic grounds.*** Structural color schemes will be compatible with the natural environment of the subdivision. Natural or earth colors will be required. [Emphasis added.]

[¶ 23] "Aesthetic grounds," should not be a *carte blanche* for arbitrary use of power by a homeowners' association. By that same token, courts should not be arbiters of taste. The majority approach in other states requires decisions under a consent-to-build covenant to be reasonable, *e.g., Riss v. Angel*, 131 Wash.2d 612, 934 P.2d 669, 678 (1997); *Trieweiler v. Spicher*, 254 Mont. 321, 838 P.2d 382, 385 (1992) (citing nine cases from eight states); *see also McHuron*, 899 P.2d at 43-44 (Golden, C.J., dissenting) (discussing the reasonableness approach). We adopt the requirement of reasonableness, even if the covenants do not specifically impose such a requirement.

[¶ 24] The trial court properly reviewed the A.C.C.'s denial of the Hammons' plans to determine if that decision was reasonably made. The trial court's finding of reasonableness was a finding of fact. *Trieweiler*, 838 P.2d at 385. That finding of fact will be upheld unless it is clearly erroneous. *Mathis*, 962 P.2d at 163. Such error is absent here.

[¶ 25] The district court found that, "[t]he decision of the A.C.C. was not based upon caprice, but was a good faith attempt to carry out the original intent of the developers of the subdivision." The court then went on to discuss the incompatibility between the Hammons' proposed prefabricated home and the character of the subdivision. There was evidence directly supporting the trial court's finding. A vast majority of the other homes in the subdivision were not modulars. Witnesses established that additional modulars would negatively impact the value of existing homes and would change the nature of the subdivision. The A.C.C. did not single out the Hammons for rejection, but consistently denied applications to erect modular homes. ***1158** This Court will not substitute its judgment on the value of this evidence for that of

the A.C.C. or the trial court. The trial court's finding of reasonableness was not clearly erroneous. We affirm the trial court's finding that the A.C.C. acted reasonably.

[¶ 26] The Hammons argue that the district court improperly employed a test that balanced their interests against TMROA's interests when it determined reasonableness. Although the district court's decision letter stated that "their (Hammons') plight ... must be ... ***weighed*** against the aspirations of the homeowners ..." and found in favor of TMROA "after ***weighing*** the factors," it did not employ a balancing of interests test. The "weighing" language does not demonstrate a balancing test, but only shows the trial court's serious consideration of the positions taken by each side. The district court's decision letter properly addresses the legal standard for enforceability of an aesthetic covenant. It discusses evidence that supports reasonableness in the A.C.C.'s decision.

CONCLUSION

[¶ 27] Sufficient evidence supports the trial court's findings that the aesthetic covenant was not abandoned, and that the A.C.C. of TMROA acted reasonably when it denied the Hammons' application to install a modular home. The Hammons did not claim that the A.C.C. membership was improper in the trial court, and this Court will not consider that new issue now. The judgment of the district court is affirmed.

Wyo.,2003.
Hammons v. Table Mountain Ranches Owners Ass'n, Inc.
72 P.3d 1153, 115 A.L.R.5th 777, 2003 WY 85

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Exempt from fees pursuant to Government Code § 6103

FILED
APR 01 2011
FRESNO COUNTY SUPERIOR COURT
By _____ TLC - DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

SHERIFF CLAY PARKER, et al. 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) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE STATE'S MOTION TO TAX COSTS; and** **(2) DECLARATION OF PETER A. KRAUSE IN SUPPORT THEREOF** ***BY FAX*** Date: May 3, 2011 Time: 3:30 p.m. Dept: 402 Judge: Hon. Jeffrey Hamilton Action Filed: June 17, 2010

Defendants State of California, Attorney General Kamala D. Harris, and the California Department of Justice, and (collectively, the "State") respectfully file this memorandum in support of their motion to tax the costs claimed by plaintiffs Clay Parker, Herb Bauer Sporting Goods, Inc., the California Rifle and Pistol Association Foundation, Able's Sporting, Inc., RTG Collectibles, LLC, and Steven Stonecipher (collectively, "Plaintiffs").

FAX FILE

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INTRODUCTION

Plaintiffs obtained summary adjudication on one cause of action in their complaint and voluntarily dismissed the other two. They now request $11,355.63 in litigation costs from the State. A review of the costs that Plaintiffs seek, however, reveals that they are unnecessary, unsupported, excessive, or simply unrecoverable as a matter of law. The Court should tax Plaintiffs' costs to a reasonable level.

First, the Court should tax the filing fee associated with Plaintiffs' preliminary injunction motion, which motion was deemed defective by the Court and *withdrawn* by Plaintiffs in the face of certain denial. Plaintiffs' deposition costs also should be disallowed. The Court declined to consider any evidence on summary judgment and ruled that the case presented a pure question of law, thus Plaintiffs' deposition costs do not meet the standard of being reasonably necessary to the litigation. Should the Court exercise its discretion to allow Plaintiffs to recover some deposition costs, the State should not bear the cost of rush transcripts. Plaintiffs put off discovery until the eleventh hour and readily accepted the truncated briefing schedule that made expedited transcription necessary – a schedule that inured only to Plaintiffs' benefit. The State likewise should not have to pay deposition-related travel costs for three attorneys from the same law firm, two of whom were mere spectators at the proceedings.

Plaintiffs' vaguely-identified service of process costs should be itemized, substantiated, and taxed to a reasonable amount. And finally, Plaintiffs seek court reporter fees and motion-related travel costs that simply are not recoverable under the code. For these reasons, the State respectfully requests that the Court grant its motion and tax Plaintiffs' costs.

FACTUAL AND PROCEDURAL HISTORY

On June 17, 2010, Plaintiffs filed a complaint against the State alleging that three statutes adopted as part of Assembly Bill 962 were void for vagueness under the due process clause of the Fourteenth Amendment. (Complaint, ¶¶ 1-2.) The complaint 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 Plaintiffs' complaint 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., ¶ 2.) At the November 17, 2010 hearing, however, the Court told Plaintiffs that 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. "A.") At the case management conference held the same day, the Court proposed a summary judgment hearing on January 18, 2011, with an opening brief due from Plaintiffs on December 4, 2010 – dates which Plaintiffs readily accepted because the hearing would take place before the effective date of the challenged statutes. (*Id.*)

On December 1 and 2, 2010, Plaintiffs deposed Special Agent Supervisor Blake Graham, who verified the State's written discovery responses. (Krause Decl., ¶ 3.) On December 7, 2010, Plaintiffs filed a Motion for Summary Judgment or, in the Alternative, Summary Adjudication, along with eleven supporting declarations, almost sixty exhibits, and 240 undisputed facts. (*Id.*) 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.*) One of those depositions, that of Herb Bauer Sporting Goods, was taken to flesh out the company's as-applied vagueness cause of action; a claim that ultimately was dismissed by Plaintiffs. (*Id.*)

Plaintiffs' summary judgment motion was heard on January 18, 2011. (Krause Decl., ¶ 4.) The Court verbally granted summary adjudication Plaintiffs' first cause of action, and Plaintiffs voluntarily dismissed the second and third. (*Id.*) On January 31, the Court issued an Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion for Summary Adjudication. (*Id.* & Exh. "B" thereto.) On February 23, 2011, the Court entered Judgment in favor of Plaintiffs on the first cause of action in the Complaint. (*Id.*) Plaintiffs served Notice of Entry of Judgment on March 2, 2011. (*Id.*) On March 11, 2011, Plaintiffs served their Memorandum of Costs. (*Id.*) Plaintiffs' cost bill claims a total of $11,355.63 in costs under the following five categories: (1) Filing Fees, (2) Deposition Costs, (3) Service of Process, (4) Court Reporter Fees, and (5) Other.

///

MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL STANDARD GOVERNING RECOVERY OF COSTS.

The right to recover litigation costs is determined entirely by statute. (*Sanchez v. Bay Shores Medical Group* (1999) 75 Cal.App.4th 946, 948.) "[I]n the absence of an authorizing statute, no costs can be recovered by either party." (*Davis v. KGO–TV, Inc.* (1998) 17 Cal.4th 436, 439.) Under Code of Civil Procedure section 1033.5,[1] recoverable costs must be reasonable in amount and reasonably necessary to the conduct of the litigation, rather than merely beneficial to its preparation. (§ 1033.5(c)(2), (c)(3).) Costs fall into two categories: those recoverable as a matter of right, and those recoverable at the discretion of the court. (*Perkos Enters. Inc. v. RRNS Enters.* (1992) 4 Cal.App.4th 238, 242.)

Where, as here, a plaintiff obtains non-monetary relief, i.e., declaratory or injunctive relief, an award of costs is discretionary. (§ 1032(a)(4) ["When any party recovers other than monetary relief . . . the court, in its discretion, may allow costs or not"]; *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1141-1142; *United States Golf Ass'n v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 625 [court properly exercised discretion in denying costs to either party].) Although the burden is on the objecting party to show that claimed costs are unreasonable or unnecessary, items that are properly objected to are put in issue, and the burden of proof then shifts to the party claiming them as costs. (*Ladas v. California State Auto. Ass'n.* (1993) 19 Cal.App.4th 761, 774.)

II. BECAUSE PLAINTIFFS WITHDREW THEIR PRELIMINARY INJUNCTION MOTION RATHER THAN ALLOW IT TO BE DENIED, THE COURT SHOULD DISALLOW RECOVERY OF THE MOTION FEE [ITEM NO. 1(D)].

Although recovery of filing fees is permitted under section 1033.5(a)(1), section 1033.5(c)(2) authorizes courts to disallow recovery of a motion fee if it determines that it was not reasonably necessary to the litigation. (*Perkos Enterps.*, 4 Cal.App.4th at p. 245 ["the intent and effect of section 1033.5, subdivision (c)(2) is to authorize a trial court to disallow recovery of costs, including filing fees, when it determines the costs were incurred unnecessarily"].)

---

[1] All statutory references are to the Code of Civil Procedure.

Plaintiffs seek recovery of a $40.00 fee paid to file their Motion for Preliminary Injunction. But Plaintiffs voluntarily *withdrew* that motion (which the Court deemed defective and unsupported) on November 17, 2010 rather than allow it to be denied. (Krause Decl., ¶ 2.) 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 it had not been made. (*Hammons v. Table Mountain Ranches Owners Ass'n, 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].)

The State should not be made to bear the cost of filing a preliminary injunction motion that was withdrawn before it was decided – by definition such a cost is not reasonably necessary to the litigation because it is as if the motion "had not been made." The State therefore requests that the Court tax the $40.00 motion filing fee.

III. PLAINTIFFS' DEPOSITION COSTS [ITEM NO. 4] ARE UNRECOVERABLE AND EXCESSIVE.

A. The Court Should Exercise its Discretion to Deny Recovery of Deposition Costs Given its Ruling that the Case Presented a Pure Question of Law.

Plaintiffs seek deposition-related costs of $8,331.96. Although section 1033.5(a)(3) permits the recovery of costs for "[t]aking, video recording, and transcribing necessary depositions," the necessity for a deposition and related expenditures is a question for the trial court's sound discretion. (*County of Kern v. Ginn* (1983) 146 Cal.App.3d 1107, 1113.)

Here, according to the Court, the depositions for which Plaintiffs seek recovery were not necessary to the Court's determination of whether the challenged definition was facially vague. In its Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion for Summary Adjudication, the Court noted that it "determines the issue of whether or not a statute is facially vague as a matter of law," and that a "facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself." (Krause Decl., Exh. "B," pp. 3: 3-4, 5:16-17.) Hence, *the Court* found that depositions were not necessary to the litigation when it declined to consider any evidence in connection with Plaintiffs' summary judgment motion.

Because the deposition costs for which plaintiffs seek recovery were not reasonably necessary to the conduct of the litigation, the Court should deny Plaintiffs' deposition costs and tax the full amount sought - $8,331.94.

B. The Deposition Costs That Plaintiffs Seek are Excessive.

1. Plaintiffs seek unnecessary and excessive travel expenses.

Should the Court exercise its discretion to award some deposition costs, it should tax the amounts sought to a reasonable level. Plaintiffs seek $1,164.87 and $644.37 in travel expenses, respectively, for three attorneys to attend the depositions of Stephen Helsley and Steven Stonecipher. (Krause Decl., ¶ 3.) There was no reason to have three attorneys from the same firm present at the depositions, much less for requiring the State to reimburse Plaintiffs for these expenses. Having two additional lawyers travel from Los Angeles to Fresno for depositions simply to watch the proceedings is the sort of duplication that is frowned upon by the courts. (See *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819 [downward adjustment in attorneys' fees award warranted for duplication of efforts when one counsel made bulk of presentation at hearings and others merely affirmed concurrence].)

Furthermore, it is unclear what type of travel expenses are even being requested. Plaintiffs' Memorandum of Costs does not show whether plaintiffs are seeking travel costs permitted under section 1033.5(a)(3), or if they are also seeking costs not statutorily allowed, such as meals. (See *Ladas*, 19 Cal.App.4th at pp. 774-775 [meal expenses cannot be justified as necessary to the conduct of the litigation since attorneys have to eat, whether they are conducting litigation or not]; *Gorman v. Tassajara* (2009) 178 Cal.App.4th 44 [expert deposition fees are not recoverable under section 1033.5(a)(3)].)

For the foregoing reasons, the Court should require Plaintiffs at a minimum to substantiate their claimed costs and reduce the cost of the travel expenses by two-thirds.

2. The Court should deny recovery of costs for expedited transcripts.

Plaintiffs seek $4,395.13 in transcription costs for the deposition of Special Agent Supervisor Blake Graham, and $1258.53 for the deposition of Stephen Helsley, but fail to provide any detail on these expenditure or an explanation why the claimed costs are so high. The State

suspects that Plaintiffs are seeking costs of expedited transcription and overnight shipping; the Court should exercise its discretion to disallow these costs under the circumstances of this case.

Although standard transcription fees for necessary depositions are recoverable, the extra cost for expediting transcripts are only allowed in the exercise of the trial court's discretion. (*Hsu v. Semiconductor Sys. Inc.* (2005) 126 Cal.App.4th 1330, 1342.) Here, expediting the Graham and Helsley transcripts was not necessary to the conduct of the litigation because, as explained above, the Court found depositions to be irrelevant to its analysis of the legal issues in the case. Furthermore, as the State has maintained throughout this litigation, the opinion of experts has little to no relevance to the legal question of whether or not a statute is vague. (*People v. Torres* (1995) 33 Cal.App.4th 37, 45-46; *County of Yolo v. Los Rios Community College Dist.* (1992) 5 Cal.App.4th 1242, 1257 [opinion evidence about the meaning of a statute from an expert has long been held inadmissible].)

Plaintiffs might argue that expedited transcripts were necessary in light of the abbreviated summary judgment briefing schedule that the Court set at the November 17, 2010 case management conference. (Krause Decl., ¶¶ 2-3.) This argument, however, rests upon the false premise that Plaintiffs could not have filed their summary judgment motion sooner, and that they were forced to accept a briefing schedule that gave them only two weeks to file their opening brief. Neither proposition is true.

Plaintiffs filed their complaint in June 2010, but opted not to take any discovery or file a summary judgment motion. Instead, they filed a preliminary injunction motion that ended up being withdrawn. Plaintiffs then expressly *agreed* to the Court's proposed briefing schedule in order to have their summary judgment motion heard before the challenged statutes took effect on February 1, 2011. (Krause Decl., ¶ 2.) Plaintiffs had to understand that this shortened schedule would mean that any depositions they chose to take would have to be completed and transcribed under very tight timeframes. The State should not bear the cost of rush transcript and overnight mail costs when it was Plaintiffs who delayed seeking discovery and agreed to a truncated hearing and briefing schedule that inured to their benefit. Should the Court allow recovery of any depositions costs, the transcription costs Plaintiffs seek should be taxed to a reasonable amount.

IV. THE SERVICE OF PROCESS FEES [ITEM NO. 5] ARE EXCESSIVE AND UNSUPPORTED.

Plaintiffs seek $781.04 for service of process costs, but fail to identify what documents were served or even on what dates. Of this amount, a reasonable cost of $160.56 appears to be for service of the complaint on the three defendants. (See Memorandum of Costs, Item Nos. 5(a)-5(c).) But Attachment 5d to the cost memorandum seeks another $620.47 in "Registered Process Server" costs. Because Plaintiffs fail to provide any detail about these purported costs, the State can only speculate that they comprise overnight mail fees for service of motions or other pleadings. But service costs are only allowed if they are necessary and reasonable. (§ 1033.5(c)(2).)

Because of the ambiguity regarding what pleadings were served and when, Plaintiffs' alleged service costs should be itemized, substantiated, and taxed to an amount reasonable for the service of the complaint upon the defendants. (See *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 132 [since the "memorandum of costs does not state how the subpoenas were served, it cannot be determined from the face of the cost bill whether the items are proper. The verified cost bill was therefore insufficient, [the prevailing party] had the burden to establish the necessity and reasonableness of the service costs, but did not do so"].)

V. THE COST OF HEARING TRANSCRIPTS [ITEM NO. 12] ARE NOT RECOVERABLE.

Plaintiffs seek $121.50 in court reporter fees, presumably for a copy of the transcript of the January 18, 2011 summary judgment hearing. But transcripts of court proceedings not ordered by the court are not allowed under section 1033.5(b)(5). (See *Walton v. Bank of Cal., Nat'l Ass'n* (1963) 218 Cal.App.2d 527 [since there was no order from the court requiring the preparation of the transcript, court should disallowed the transcript fee].) Because this transcript was not ordered by the Court, the Court should tax this claimed cost.

VI. TRAVEL COSTS FOR MOTION HEARINGS [ITEM NO. 13] ARE NOT RECOVERABLE.

Finally, Plaintiffs seek $1,226.00 in purported costs for travel relating to their withdrawn preliminary injunction motion, as well as the January 18, 2011 summary judgment hearing. Such costs, even if they were reasonable, are not recoverable under section 1033.5. (*Ladas,* 19 Cal.App.4th at p. 775 ["The only travel expenses authorized by section 1033.5 are those to attend

depositions"].) Plaintiffs chose to file their complaint in the County of Fresno rather than a jurisdiction closer to their attorneys (or instead choosing counsel located in Fresno). As such, the Court should tax the cost of motion-related travel for Plaintiffs' attorneys.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that the Court grant this motion and tax Plaintiffs' claimed costs as requested above.

Dated: April 1, 2011

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
ZACKERY P. MORAZZINI
Supervising Deputy Attorney General

PETER A. KRAUSE
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.

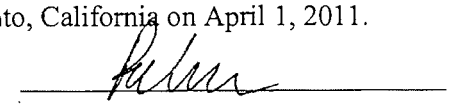
2. The State answered Plaintiffs' complaint and verified petition for writ of mandate on August 4, 2010. On September 7, 2010, Plaintiffs filed a Motion for Preliminary Injunction. After several continuances, the Court scheduled Plaintiffs' preliminary injunction motion for hearing on November 17, 2010. At the hearing, the Court informed Plaintiffs that 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 "A".) 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 4, 2010. (The State extended this date at Plaintiffs' request to December 7.) Plaintiffs' counsel accepted these dates in order to have the motion heard prior to the challenged statutes' February 1, 2011 effective date.

3. 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.

4. 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 of the January 31, 2011 Order are attached hereto as Exhibit "B.") On February 23, 2011, the Court entered Judgment in favor of Plaintiffs on the first cause of action in the Complaint. Plaintiffs served Notice of Entry of Judgment on March 2, 2011. On March 11, 2011, Plaintiffs served their Memorandum of Costs.

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 April 1, 2011.



Peter A. Krause

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Exhibit A

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 Civil Department, Central Division 2317 Tuolumne Street Fresno, CA 93721 (559) 497-4100	COUNTY OF FRESNO	FOR 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 B

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
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. 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** **PLAINTIFFS' OPPOSITION TO DEFENDANTS' NOTICE OF MOTION AND MOTION TO TAX COSTS** Date: May 3, 2011 Time: 3:30 p.m. Location: Dept. 402 Judge: Hon. Jeffrey Y. Hamilton Action Filed: June 17, 2010

Plaintiffs Sheriff Clay Parker, Herb Bauer Sporting Goods, California Rifle & Pistol Association, Able's Sporting Goods, Inc., RTG Sporting Collectibles, LLC, and Steven Stonecipher (collectively, "Plaintiffs") submit this Memorandum of Points and Authorities, together with the Notice of Lodgment and the Declarations of C.D. Michel and Clinton B. Monfort in opposition to Defendants the State of California, Kamala D. Harris, and the California Department of Justice (collectively, "Defendants") Motion to Tax Costs.

INTRODUCTION

None of the costs Plaintiffs seek were unnecessarily incurred. In fact, Defendants' own conduct was primarily responsible for the course this litigation ultimately took. They should not be permitted to come back now and claim that Plaintiffs' actions were unreasonable.

Plaintiffs' Motion for Preliminary Injunction, for example, would have been avoided altogether had Defendants agreed to move forward with cross-motions for summary judgment at an early stage in the litigation. Absent agreement, Plaintiffs were forced to seek preliminary injunction to protect their interests. Thus, even though the motion was ultimately withdrawn, it was "reasonably necessary" when filed, and its impact on the course of this action is undeniable.

The Court should also allow Plaintiffs to recover the full amount of their deposition-related costs. From the parties' "pre-trial vantage point," depositions were necessary to the conduct of this litigation. And Plaintiffs' attendance at four depositions compelled by Defendants cannot be said to have been "unreasonable." Specifically, the Court should allow Plaintiffs to recover the cost of rush transcripts – the need for which lays squarely at Defendants' feet. Finally, the appearance of three attorneys on Plaintiffs' behalf was reasonable under the circumstances.

Further, the Court should exercise its discretion to award Plaintiffs their motion-related travel costs, which are neither expressly recoverable nor expressly disallowed, and which were necessarily incurred in the course of litigating this action.

Defendants' Motion to Tax Costs should thus be denied. As the prevailing party, Plaintiffs are entitled to recover those reasonable costs of litigation expressly and impliedly authorized by statute. Aside from $979.89, relating to items Plaintiffs hereby withdraw, the Court should award Plaintiffs their costs in the amount of $10,375.73, which represent recoverable costs actually and reasonably incurred in the prosecution of this action.

FACTUAL AND PROCEDURAL HISTORY

On June 16, 2010, Plaintiffs Sheriff Clay Parker, et al., filed a Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate challenging the validity of Penal Code sections 12060, 12061, and 12318 (the "Challenged Provisions"). (Decl. of Clinton B. Monfort Supp. Opp. to Mot. to Tax Costs ["CBM Decl."], ¶ 2.)

Defendants filed their Answer to Plaintiffs' Complaint on August 2, 2010, having been granted an extension of time by Plaintiffs. (CBM Decl., ¶¶ 3-4.)

Early on, Plaintiffs recognized this case likely turned on a question of law and requested that Defendants agree to a briefing schedule by which cross-motions for summary judgment could be heard and decided well in advance of the February 1, 2011 effective date of the Challenged Provisions. (CBM Decl., ¶ 5.) Plaintiffs sought speedy resolution of their claims to increase the likelihood that a final decision would be rendered before the Challenged Provisions took effect and because thier immediate business decisions relied heavily on whether those sections could be enforced. (CBM Decl., ¶ 5.) Citing the need to conduct written discovery and depose Plaintiffs' witnesses, Defendants denied Plaintiffs' requests. (CBM Decl., ¶ 5.)

In light of Defendants' refusal, Plaintiffs prepared to file a Motion for Preliminary Injunction to protect their interests in the face of the great likelihood their claims would not be heard before February 1, 2011. (CBM Decl., ¶5.) Out of professional courtesy, Plaintiffs postponed the filing of their Motion for Preliminary Injunction to accommodate opposing counsel's scheduled vacation from August 27, 2010, to September 7, 2010. (CBM Decl. ¶ 6.)

On August 19, 2010, the sponsor of the Challenged Provisions, Assemblyman Kevin de León, amended then pending Assembly Bill 2358 in a last minute attempt to correct the vagueness of the Challenged Provisions. (CBM Decl., ¶ 7.) This event led Plaintiffs to again postpone filing their Motion for Preliminary Injunction until it could be determined whether and how the bill would impact Plaintiffs' arguments in this case. (CBM Decl., ¶ 7.)

On September 7, 2010, Plaintiffs moved for a preliminary injunction to enjoin the enforcement of the Challenged Provisions. (CBM Decl., ¶ 8.) On November 17, 2010, Plaintiffs withdrew that motion and the parties, with the participation of the Court, negotiated a briefing schedule by which summary judgment could be heard and, if necessary, a trial could be held before February 1, 2011. (CBM Decl., ¶ 10.)

Indeed, this was the course of action Plaintiffs initially requested and would have pursued had Defendants agreed. (CBM Decl., ¶ 5.)

On December 1 and 2, 2010, Plaintiffs deposed Defendants' expert witness, Special Agent Supervisor Blake Graham. (CBM Decl., ¶ 12.) Plaintiffs determined the need to depose Mr. Graham only after Defendants' delayed response to Plaintiffs' written discovery requests, claiming that a list of ammunition calibers was commonly understood to meet the statutory definition of "handgun ammunition." (CBM Decl., ¶ 11.) Through December 2010, Defendants took the depositions of Plaintiffs' witnesses, Stephen Helsley, Sheriff Clay Parker, Steven Stonecipher, and Barry Bauer. (CBM Decl., ¶ 13.)

At the hearing on Plaintiffs' summary judgment motion, the Court granted summary adjudication as to Plaintiffs' first cause of action, and Plaintiffs voluntarily dismissed the second and third claims.. (CBM Decl., ¶ 15.) On January 31, 2011, the Court issued its Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion for Summary Adjudication. (CBM Decl., ¶ 15.) Judgment as to the first cause of action was entered in Plaintiffs' favor on February 23, 2011. (CBM Decl., ¶ 15.) Plaintiffs served Notice of Entry of Judgment on March 2, 2011. (CBM Decl., ¶ 15.)

Plaintiffs filed their Memorandum of Costs on March 11, 2011, setting forth total costs of $11,355.63, distributed among five categories: (1) $895.00 for filing fees; (2) $8,331.96 for deposition costs; (3) $781.04 for service of process; (4) $121.50 for court reporter fees; and (3) $1,226.13 for travel expenses related to the hearings on Plaintiffs' motions. (Pls.' Mem. of Costs (Summary).) Defendants brought this Motion to Tax Costs on April 1, 2011. (CBM Decl., ¶ 15.)

Plaintiffs now respectfully request this Court deny the bulk of Defendants' motion and award Plaintiffs the costs requested in their Memorandum.

ARGUMENT

I. LEGAL STANDARD

California Code of Civil Procedure section 1033.5 sets forth the costs recoverable by the prevailing party in a civil action. Among those allowable items are filing and motion fees, deposition costs (including travel-related expenses), and service of process fees. (Code Civ. Proc., § 1033.5, subdivs. (a)(1), (a)(3), (a)(4).) Recovery of those enumerated costs is limited only by the requirements that the costs recovered must have been "reasonably necessary" to the litigation and reasonable in

amount. (*Thon v. Thompson* (1994) 29 Cal.App.4th 1546, 1548.) Determination of whether a cost is "reasonable" rests solely within the trial court's discretion. (*Id.*)

II. AT THE TIME OF ITS FILING, THE MOTION FOR PRELIMINARY INJUNCTION WAS REASONABLY NECESSARY TO THE CONDUCT OF THE LITIGATION; THE COURT SHOULD ALLOW RECOVERY OF THE FILING FEE [ITEM NO. 1(D)]

Section 1033.5, subdivision (a)(1) expressly provides that "filing, motion and jury fees" are allowable as costs under Section 1032. While Plaintiffs agree that recovery of such costs may be disallowed if the Court determines the costs were "incurred unnecessarily," *Perkos Enterprises, Inc. v. RRNS Enterprises* (1992) 4 Cal.App.4th 238, 245, it cannot be said that Plaintiffs' Motion for Preliminary Injunction was not "reasonably necessary" to this litigation. Under the circumstances of this case, Plaintiffs' motion was more than "necessary," it was essential.

It was, in fact, Defendants' own litigation tactics that drove Plaintiffs to file that motion. Had Defendants agreed to file cross-motions for summary judgment early in this litigation to dispose of the issues before February 1, 2011 (as Plaintiffs requested), Plaintiffs would have had no need to seek preliminary injunction to protect their interests. (CBM Decl., ¶ 5.)

And even though Plaintiffs withdrew their motion at the November 17th hearing, the filing and consideration of that motion alone led the Court to invite Plaintiffs to withdraw their motion in favor of an extremely expedited briefing schedule for summary judgment, with hearing and decision to be had before the Challenged Provisions were set to take effect. (CBM Decl., ¶ 10.) This was exactly what Plaintiffs required in order to protect their interests – and it was precisely the course of action Plaintiffs requested and would have pursued had Defendants agreed. (CBM Decl., ¶ 5.) In light of this outcome, it cannot be said that Plaintiffs' withdrawal truly left the record "as though [the motion] had not been made." (Defs.' Mem. Supp. Mot. to Tax Costs ["Defs.' Mot."], at 4:6-7, 4:11 (quoting *Hammons v. Table Mountain Ranches Owners Assn., Inc.* (Wyo. 2003) 72 P.3d 1153, 1157).)

Because Defendants' own tactics left Plaintiffs with little choice but to pursue preliminary injunction, and because it was that motion that convinced the Court to decide Plaintiffs' claims before the effective date of the Challenged Provisions, the motion was "reasonably necessary" to the conduct of this litigation, and the associated filing fees were not "incurred unnecessarily." As such, the Court should allow Plaintiffs to recover the $40.00 filing fee.

III. THE COURT SHOULD AWARD PLAINTIFFS THEIR DEPOSITION COSTS [ITEM NO. 4], AS THEY ARE BOTH REASONABLE IN AMOUNT AND REASONABLY NECESSARY TO THE CONDUCT OF THE LITIGATION

A. The Court Should Award Plaintiffs Their Deposition Costs Because, at the Time They Were Incurred, Plaintiffs Knew Not Yet Whether Depositions Would Be Relied on by the Court in Rendering Its Decision

Section 1033.5, subdivision (a)(3) expressly authorizes the recovery of the taking, video recording, and transcribing [of] necessary depositions" and "travel expenses to attend depositions." Like other costs recoverable under section 1033.5, deposition-related costs must also be "reasonably necessary" to the conduct of the litigation. (Code Civ. Proc., § 1033.5, subd. (b)(2).) The Court should determine the "necessity" of a deposition "from the pretrial vantage point of a litigant," and not from some point after the decision has been rendered – hindsight being 20/20. (*Brake v. Beech Aircraft Corp.* (1986) 184 Cal.App.3d 930, 940; see also *Moss v. Underwriters' Report* (1938) 12 Cal.2d 266, 275-276 (court affirmed costs associated with deposition testimony not even offered at trial, stating "the fact that the plaintiff did not offer [the depositions] as evidence upon the trial does not necessarily indicate that he could have safely proceeded to trial without them.").) Because the deposition expenses are expressly authorized by law and were "reasonably necessary" at the time they were incurred, the Court should exercise its discretion to allow Plaintiffs to recover the associated costs.

Defendants insist that Plaintiffs' request for deposition costs should be denied because the opinions of the parties' experts and lay witnesses "were not necessary to the Court's [ultimate] determination of whether the challenged definition was facially vague." (Defs.' Mot. to Tax Costs 4.) In essence, Defendants' argument transforms the standard for recovering costs from requiring that costs incurred be reasonably necessary *to the conduct of the litigation* to a requirement that they be necessary to the *court's ultimate determination on the issues*.

From the start, Plaintiffs repeatedly asked Defendants to move forward with cross-motions for summary judgment, believing the determination of their claims hinged on a question of law. (CBM Decl., ¶ 5.) It was Defendants who first suggested the need to conduct discovery and depose Plaintiffs' expert before bringing such a motion. (CBM Decl., ¶ 5.) And once Defendants provided a list of ammunition their own expert thought met the statutory definition of "handgun ammunition," Plaintiffs were left with little choice but to take the witness's deposition to determine the basis for that list.

(CBM Decl., ¶ 11.) From Plaintiffs' "pretrial vantage point," knowing not what the Court would ultimately find helpful in making its determination, it was both "reasonable" and "necessary" for Plaintiffs to depose Defendants' expert.

The costs of defending the depositions of Plaintiffs' witnesses were also "reasonably necessary." Defendants cannot require the deposition of four of Plaintiffs' witnesses and then claim it was unnecessary for Plaintiffs to incur the costs associated with attending and defending them. And Defendants tacitly admit that, from their own "pretrial vantage point," it was unknown whether the Court would find factual matters to be relevant – hence, the taking of those four depositions. (See Decl. of Peter A. Krause Supp. Mot. to Tax Costs ["Krause Decl."] ¶ 3.) Plaintiffs fail to see how Defendants can claim it was reasonably necessary for them to *take* the depositions of Plaintiffs' witnesses, but it was not so necessary for Plaintiffs to *attend* them.

Because the taking and defending of depositions was "reasonably necessary" to the conduct of the litigation, the Court should exercise its discretion to award Plaintiffs the full amount of deposition costs sought – $8,331.96.

B. Plaintiffs' Deposition Costs Are Reasonable and Should Be Awarded in Full

1. Defendants Make a Bald Assertion that Plaintiffs Seek Unnecessary and Excessive Travel Costs

Under the circumstances of this case, the Court should award Plaintiffs all deposition-related travel expenses sought, for they were neither unnecessary nor excessive.

Defendants argue that "there was no reason to have three attorneys from the same firm present at the depositions" and that "having two additional lawyers travel from Los Angeles to Fresno for deposition *simply to watch* the proceedings is the sort of duplication that is frowned upon by the courts." (Defs.' Mot., at 5:9-13.) But aside from the fact that three attorneys attended these depositions, Defendants' argument has little basis in reality.

Contrary to Defendants' assertions, Plaintiffs' counsel were not there "simply to watch." While Mr. Dale, a senior associate and well-seasoned litigator, was primarily responsible for defending the depositions, it was imperative that Plaintiffs send Mr. Brady, their attorney most qualified to weigh in on the highly technical ammunition issues at the center of this controversy. (CBM Decl., ¶ 14.) And

Mr. Monfort is the attorney primarily responsible for conducting this litigation. (CBM Decl., ¶ 14.) Without attending these depositions, it would have been virtually impossible for him to efficiently and fully prepare the remainder of his case. As such, the Court should allow Plaintiffs to recover the costs of sending three attorneys to defend the depositions of Mr. Helsley and Mr. Stonecipher.

If, however, the Court finds that it was "unnecessary" for any one of the junior associates to attend these depositions, Plaintiffs request the Court reduce their recovery by only 1/3 (not 2/3, as Defendants request) because it was reasonable to send at least two attorneys – one senior attorney to conduct the defense and one junior associate primarily responsible for this progress of this case.[1]

Furthermore, Plaintiffs seek only the costs of lodging and transportation to and from the depositions of Stephen Helsley and Steven Stonecipher. (Decl. of C.D. Michel Supp. Opp. Mot. to Tax Costs ["CDM Decl."], ¶¶ 4-8; Ex. B.) This includes airfare and cab fees to and from Sacramento for the deposition of Mr. Helsley, and lodging in Fresno and mileage to and from the deposition of Mr. Stonecipher.[2] (CDM Decl., ¶¶ 4-8; Ex. B.) Plaintiffs do not, as Defendants suggest, seek recovery of travel costs not statutorily permitted, including the costs of meals or expert deposition fees. (CDM Decl., ¶ 4-8; Ex. B.)

Based on the foregoing, Plaintiffs request this Court deny Defendants' request, allowing Plaintiffs to recover the full amount of deposition-related travel costs requested. Alternatively, Plaintiffs ask the Court to reduce Plaintiffs' recovery only to 2/3 of the amount requested, as it would have been reasonable to send two attorneys to defend Defendants' depositions.

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[1] It is interesting to note that, at the deposition of their expert, Defendants had two attorneys appear on their behalf – Peter Krause and Kimberly Graham. (CBM Decl., ¶ 12.) It's a mystery how Defendants could find it reasonable to send two attorneys to defend the deposition of their expert, but deny Plaintiffs the same.

[2] Travel costs for the deposition of Mr. Stonecipher were also associated with the deposition of Barry Bauer. Plaintiffs' attorneys traveled to Fresno both for the deposition of Mr. Stonecipher on December 13, 2010 and for deposition of Mr. Bauer on December 14, 2010.

2. Under the Circumstances, the Court Should Allow Plaintiffs to Recover the Cost of Expedited Deposition Transcripts

Defendants rightly assume that the transcription costs for the depositions of Blake Graham and Stephen Helsley include the costs of expedited transcription and overnight shipping. (CDM Decl., ¶ 9; Ex. C.) And Defendants correctly assert that the costs of expedited transcription is recoverable at the court's discretion. (Defs.' Mot., at 6:3-5 (citing *Hsu v. Semiconductor Systems, Inc.* (2005) 126 Cal.App.4th 1330, 1342.) But Defendants fail when they again hang their hat on the argument that these depositions were not "reasonably necessary" because the Court did not ultimately rely on this testimony to determine the legal issues of this case. As described above, Plaintiffs' taking of Mr. Graham's deposition was necessary from Plaintiffs' "pre-trial vantage point," as they could not know, at that point, whether the Court would ultimately require factual evidence to reach its decision. And the defense of Mr. Helsley's deposition was "reasonably necessary" because Defendants themselves compelled it – they cannot come back now and claim it was unnecessary for Plaintiffs' counsel to attend.

Defendants further argue that it was the fault of Plaintiffs that expedited transcription was required, claiming that Plaintiffs delayed filing a motion for summary judgment or taking *any* discovery. (Defs.' Mot., at 6:19-20.) What Defendants fail to disclose is that, in the summer of 2010, Plaintiffs requested that the parties move forward with cross-motions for summary judgment so that Plaintiffs' claims could be heard and decided well before the Challenged Provisions' effective date. (CBM Decl., ¶ 5.) Defendants refused, citing the need to conduct discovery and depose Plaintiffs' expert witness. (CBM Decl., ¶ 5.) It was thus Defendants' litigation strategy that delayed summary judgment and necessitated Plaintiffs' Motion for Preliminary Injunction.

Far from waiting until the "eleventh hour," Plaintiffs propounded written discovery on Defendants as early as October 7, 2011, and responses were expected on or before November 11, 2010. (CBM Decl., ¶ 9.) But Defendants requested an extension of time, which Plaintiffs granted out of professional courtesy. (CBM Decl., ¶ 9.) On November 23, 2010 – some six days *after* the expedited summary judgment briefing schedule was set and only ten days before Plaintiffs' motion was initially due – Defendants responded to Plaintiffs' written discovery. (CBM Decl., ¶ 11.) Their responses

included a list of ammunition calibers commonly understood to be "handgun ammunition" under the Challenged Provisions. (CBM Decl., ¶ 11.) Having reviewed Defendants' responses, Plaintiffs for the first time recognized the need to depose Defendants' expert to examine the basis for that list. (CBM Decl., ¶ 11.) Plaintiffs thus accepted the Court's shortened briefing schedule, unaware that deposition would be required.

And even though they first cited the need to depose Plaintiffs' expert witness on August 5, 2010, they delayed doing so until December 16, 2010. (CBM Decl., ¶¶ 5, 13.) In this respect, it was Defendants, not Plaintiffs, who made it necessary for Plaintiffs to seek expedited transcription.

Because Plaintiffs could not know (and, in fact, did not know) of the need to take a deposition until after they reviewed Defendants' delayed discovery responses, and because Defendants failed to take Plaintiffs' expert's deposition until mid-December, Plaintiffs should recover the full cost of obtaining expedited deposition transcripts.

IV. PLAINTIFFS' WITHDRAW THEIR REQUEST FOR $620.47 IN SERVICE OF PROCESS FEES, BUT REQUEST RECOVERY OF THE REMAINING $160.56 AS DEFENDANTS CONCEDE IT WAS A REASONABLE COST [ITEM NO. 5]

In preparing their Memorandum of Costs, Plaintiffs relied on a summary accounting to determine those costs incurred for service of the summons and complaint. In light of Defendants' objection, Plaintiffs conducted further research, through which they discovered the disputed $620.47 in "Registered Process Server" costs were actually "rush fees" for the service of Plaintiffs' Motion for Preliminary Injunction, and that they had been inadvertently coded to the wrong account. (CDM Decl., ¶ 10; Ex. E.) Plaintiffs agree with Defendants that such fees are not recoverable under Section 1033.5 and, therefore, withdraw their request for reimbursement of those fees.

Plaintiffs should, however, recover the remaining $160.56 for the service of the complaint on each of the three Defendants – an amount which Defendant concedes is reasonable. (CDM Decl., ¶ 11Defs.' Mot., at 7:3-4.)

V. PLAINTIFFS WITHDRAW THEIR REQUEST FOR $121.50, THE COST OF COURT REPORTER FEES ASSOCIATED WITH THE SUMMARY JUDGMENT HEARING [ITEM NO. 12].

Upon review of Defendants' objection to Item No. 12 and relevant case law, Plaintiffs agree with Defendants' view that such costs are not recoverable unless court ordered. (Code Civ. Proc., §

1033.5, subd.(b); see also *Davis v. KGO-T.B., Inc.* (1998) 17 Cal.4th 436, 440-442; *Sanchez v. Pacificare Health Systems* (1999) 75 Cal.App.4th 846, 948-949.) In light of Defendants' objection, Plaintiffs reviewed their detailed accounting report to find that the fee was, in fact, for the preparation of the hearing transcript and not some other recoverable fee. Because the Court did not order preparation of the transcript, Plaintiffs withdraw their request for this expense.

VI. PLAINTIFFS' HEARING-RELATED TRAVEL COSTS [ITEM NO. 13] ARE NEITHER EXPLICITLY RECOVERABLE NOR EXPLICITLY DISALLOWED, AND THE COURT SHOULD EXERCISE ITS DISCRETION TO AWARD THESE COSTS

"An item not specifically allowable under subdivision (a) nor prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court if 'reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.' " (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774 (quoting Code Civ. Proc., § 1033.5, subd. (c)(2).) Even though Plaintiffs chose to file in Fresno, under the circumstances, the travel costs incurred were "reasonably necessary" to the conduct of the litigation, and the Court should exercise its discretion to award Plaintiffs these costs.[3]

The court in *Ladas*, applying the above principle, found "*routine* expenses for local travel by attorneys or other firm employees" to be unnecessary to the conduct of the litigation. (19 Cal.App.4th at pp. 775-776.) There, the prevailing defendant sought reimbursement for four years of "local travel expenses" unrelated to depositions, including "parking fees, cab fares and 'mileage/parking' fees for attorney and paralegals." (*Id.* at 775.) The court reasoned that the requesting party had failed to prove these charges were "necessary," as opposed to being merely "convenient." (*Id.* at 775-776.) As such,

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[3] In light of Defendants' objections, Plaintiffs' counsel conducted a detailed review of the invoices for summary judgment travel-related costs. (CBM Decl., ¶ 14.) It was then discovered that the lodging bill for Clinton B. Monfort included a $20.30 "Restaurant Room Charge," and the lodging bill for C.D. Michel included a $2.50 charge for "Bottled Water." (CDM Decl., ¶ 14; Ex. F.) It was also discovered that, due to a billing error, Plaintiffs' Memorandum of Costs includes a request for both "mileage" and "gas," essentially seeking double recovery for Plaintiffs' attorneys' transportation to and from the hearing. (CDM Decl., ¶ 14; Ex. F.) Because the costs of meals are not recoverable under section 1033.5, *Ladas*, 19 Cal.App.4th at pp. 774-775, and because double recovery of costs improper, Plaintiffs request only $988.21 in hearing-related travel costs ($1,226.13 in reasonable lodging and transportation costs, minus $22.80 in inadvertently requested meal costs, minus $215.12 in twice-entered gas costs).

the court denied those expenses. (*Id.* at 776.) The court's decision did not rest solely on the fact that only deposition-related travel expenses are *explicitly* recoverable under section 1033.5, subdivision (a).

Here, Plaintiffs seek only the costs of driving to the Fresno courthouse for hearings on Plaintiffs' motions for preliminary injunction and summary judgment and one night's lodging in Fresno for the summary judgment hearing. (CDM Decl., ¶¶ 13; Ex. F.) This is a far cry from the barrage of "routine costs" claimed by the defendants in *Ladas*. For the reasons described above, Plaintiffs' preliminary injunction motion was more than "reasonably necessary" to the conduct of this litigation, it was essential. And costs related to travel to the summary judgment hearing were necessarily incurred because that hearing was to serve dual roles – as a hearing on Plaintiffs' motion and as a trial on the merits. It can hardly be said that travel to the hearing that would ultimately dispose of Plaintiffs' claims was not "reasonably necessary."

Defendants further suggest that because Plaintiffs chose to file in Fresno rather than a jurisdiction closer to their attorneys, and because they did not choose counsel from the Fresno area, their motion-related travel costs should be taxed. (Defs.' Mot., at 8:1-3.) Plaintiffs being mostly from Fresno and the surrounding areas elected to bring suit in a jurisdiction close to their own homes. And they sought not just any attorney to bring their claims, but those attorneys best known for their experience with firearms and ammunition litigation, attorneys who have, for decades brought such cases on behalf of the California Rifle and Pistol Association, the National Rifle Association, and other prominent organizations dedicated to preserving the Second Amendment rights of Californians. And this is their right. Just because their attorneys happen to be located in Long Beach, rather than Fresno, does not require that they be denied reimbursement for travel necessary for the litigation of their claims. (See *Thon*, 29 Cal.App.4th at 1548 (reimbursement for deposition travel is not limited to travel by attorneys practicing locally).)

Because travel to Fresno for hearings on Plaintiffs' motions was "reasonably necessary" to the conduct of this litigation, and because Plaintiffs should not have their costs denied simply because they chose out-of-county counsel, the Court should deny Defendants' request to tax the cost of Plaintiffs' motion-related travel.

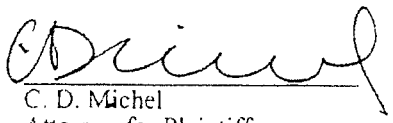
///

CONCLUSION

Based on the foregoing, Plaintiffs respectfully requests this Court deny Defendants' motion and award Plaintiffs $10,375.73, those costs actually incurred and reasonably necessary to the conduct of this litigation.

Dated: April 19, 2011

MICHEL & ASSOCIATES, PC



C. D. Michel
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 April 19, 2011, I served the foregoing document(s) described as

PLAINTIFFS' OPPOSITION TO DEFENDANTS' NOTICE OF MOTION AND MOTION TO TAX COSTS

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Kamala D. Harris
Attorney General of California
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General
1300 I Street, Suite 125
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 April 19, 2011, at Long Beach, California.

— (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on April 19, 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 April 19, 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

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

Attorneys for Plaintiffs/Petitioners

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. 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 **DECLARATION OF CLINTON B. MONFORT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO TAX COSTS** Date: May 3, 2011 Time: 3:30 p.m. Location: Dept. 402 Judge: Hon. Jeffrey Y. Hamilton Action Filed: June 17, 2010

DECLARATION OF CLINTON B. MONFORT

I, Clinton B. Monfort, declare as follows:

1. I am an attorney licensed to practice law before the courts of the State of California. I am an associate attorney of the law firm Michel & Associates, P.C., attorneys of record for Plaintiffs 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. On or about June 17, 2010, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief against Defendants the State of California, Jerry Brown, in his official capacity as Attorney General for the State of California, and the California Department of Justice (collectively "Defendants"), challenging the validity of Penal Code sections 12060, 12061, and 12318.

3. In or about July 2010, counsel for all parties conferred regarding the merits of this litigation. At this time, Defendants' counsel sought an extension of time to file Defendants' Answer to [Plaintiffs'] Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate. Out of professional courtesy, Plaintiffs granted this request.

4. On August 2, 2010, Defendants filed their Answer to [Plaintiffs'] Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate.

5. On or about August 5, 2010, anticipating that this case hinged largely on a question of law, our office contacted counsel for Defendants via e-mail, inquiring as to whether they would stipulate to a briefing schedule whereby this case would be resolved via cross-motions for summary judgment well before February 1, 2011, the date Penal Code sections 12061, subdivision (a)(3)-(7) and 12318 were set to take effect. Plaintiffs sought speedy resolution of their claims to increase the likelihood that a final decision would be rendered before the Challenged Provisions took effect and because Plaintiffs' immediate business decisions relied heavily on whether those sections could be enforced. The parties were unable to agree to a shortened briefing schedule, as Defendants asserted the need to conduct discovery and depose Plaintiffs' expert witnesses. Accordingly, Plaintiffs informed Defendants of their intention to proceed with a Motion for Preliminary Injunction.

6. In or about August 2010, Plaintiffs sought to file a Motion for Preliminary Injunction, but, out of professional courtesy, postponed filing to accommodate opposing counsel's scheduled vacation from August 27, 2010, to September 7, 2010.

7. On or about August 19, 2010, Plaintiffs' counsel learned that Assembly Bill 2358, a bill introduced in 2010 to amend Penal Code sections 12061, 12077, 12318, and 12323, had been amended to include a list of ammunition calibers that would be considered "handgun ammunition." This knowledge led Plaintiffs to postpone filing the Motion for Preliminary Injunction until it could be determined whether and how AB 2358 would impact the shape of Plaintiffs' arguments in this case.

8. On September 7, 2010, Plaintiffs moved for a preliminary injunction to enjoin the enforcement of the Challenged Provisions pending a decision of this case on the merits.

9. On or about October 7, 2010, Plaintiffs propounded written discovery on Defendants, seeking responses to several form interrogatories, specially prepared interrogatories, requests for admission, and requests for production of documents. Defendants were expected to respond to those requests on or before November 11, 2010, but Defendants requested an extension of time to respond. Out of professional courtesy, Plaintiffs granted Defendants' request.

10. On November 17, 2010, Plaintiffs withdrew their Motion for Preliminary Injunction and the parties, with the participation of the Court, negotiated an expedited briefing schedule by which summary judgment could be heard and, if necessary, a trial could be held and judgment rendered before the remainder of the Challenged Provisions were to take effect.

11. On or about November 23, 2010, Defendants responded to Plaintiffs' written discovery. Their responses included a list of ammunition calibers commonly understood to be "handgun ammunition" under California Penal Code sections 12060, 12061, and 12318. Defendants' responses were verified by Special Agent Supervisor Blake Graham. Having reviewed Defendants' responses, Plaintiffs recognized the need to depose Defendants' expert to examine the basis for the list.

12. On December 1 and 2, 2010, Plaintiffs took the deposition of Defendants' expert, Blake Graham. Deputy Attorney General Peter Krause and Deputy Attorney General IV Kimberly Graham entered appearances on behalf of Defendants. Only Mr. Krause took an active role, while Ms. Graham observed the proceedings.

13. Though Defendants first claimed the need to conduct discovery and depose Plaintiffs' expert witnesses in August 2010, they did not depose Plaintiffs' expert, Stephen Helsley, until December 16, 2010. They took the depositions of Plaintiffs Steven Stonecipher and Barry Bauer (of Herb Bauer Sporting Goods) on December 13 and 14, 2010, respectively.

14. Three attorneys from Michel & Associates, P.C., (Joshua R. Dale, Sean A. Brady, and Clinton B. Monfort) appeared on behalf of Plaintiffs at the depositions of Stephen Helsley, Steven Stonecipher, and Barry Bauer. Mr. Dale, a senior associate and the most experienced litigator, took the most active role in the proceedings. Mr. Brady, one of the firm's attorneys most experienced with firearms and ammunition, attended to provide firearms expertise due to the highly technical nature of this lawsuit's subject matter. I am the attorney principally responsible for this litigation and would have been unable to prepare my case efficiently and fully had I not been present for the questioning of Plaintiffs and their witnesses.

15. On January 18, 2011, at the hearing on Plaintiffs' summary judgment motion, the Court granted summary adjudication as to Plaintiffs' first cause of action. Plaintiffs voluntarily dismissed the second and third causes of action. On January 31, 2011, the Court issued its Order Denying Plaintiffs' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiffs' Motion for Summary Adjudication. Judgment as to the first cause of action was entered in Plaintiffs' favor on February 23, 2011. Plaintiffs served Notice of Entry of Judgment on March 2, 2011. Plaintiffs filed their Memorandum of Costs on March 11, 2011, seeking $11,355.63 for filing fees, deposition costs, service of process, court reporter fees, and travel expenses related to the hearings on Plaintiffs' motions. Defendants brought this Motion to Tax Costs on April 1, 2011.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 19th day of April, 2011, at Long Beach, California.

Clinton B. Monfort
Declarant

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 April 19, 2011, I served the foregoing document(s) described as

DECLARATION OF CLINTON B. MONFORT IN SUPPORT OF OPPOSITION TO DEFENDANTS' MOTION TO TAX COSTS

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Kamala D. Harris
Attorney General of California
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General
1300 I Street, Suite 125
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 April 19, 2011, at Long Beach, California.

__ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
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Executed on April 19, 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

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

Attorneys for Plaintiffs/Petitioners

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. 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 **DECLARATION OF C. D. MICHEL IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO TAX COSTS** Date: May 3, 2011 Time: 3:30 p.m. Location: Dept. 402 Judge: Hon. Jeffrey Y. Hamilton Action Filed: June 17, 2010

DECLARATION OF C. D. MICHEL

I, C. D. Michel, declare as follows:

1. I am an attorney duly licenced to practice law before all courts in the State of California. I am the managing partner of the law firm Michel & Associates, P.C., and am counsel of record for Plaintiffs Sheriff Clay Parker, et al.

2. I have personal knowledge of the facts contained in this declaration and could, if called upon to do so, testify competently there to. This declaration is offered in support of Plaintiffs' Opposition to Defendants' Motion to Tax Plaintiffs' Costs.

FILING FEE EXPENSES

3. Attached as Exhibit A[1] is a true and correct copy of Plaintiffs' Filing Fee Expenses which total **$895.00**. The expenses itemized in Exhibit A are reasonable and necessary filing fee expenses as verified in Plaintiffs' Memorandum of Costs and not objected to in Defendants' Motion to Tax Costs.

DEPOSITION-RELATED TRAVEL COSTS

4. Three attorneys from my office traveled to Sacramento, California, to attend the deposition of Plaintiffs' expert, Stephen Helsley, taken on December 16, 2010: Their attendance at this deposition was reasonably necessary as detailed in Plaintiffs' Opposition to Defendants' Motion to Tax Costs.

5. The travel expenses for this trip are as follows: (1) $96.17 for one night's lodging in Sacramento, on December 15, 2010; (2) $486.80 for two attorneys' airfare from Long Beach to Sacramento; (3) $395.40 for one attorney's airfare from San Diego to Sacramento; and (4) $186.50 for parking and cab fares.

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[1] All exhibits hereafter cited refer to exhibits lodged with this court in the "Plaintiffs' Notice of Lodging Exhibits A through F to C. D. Michel's Declaration in Support of Plaintiffs' Opposition to Defendants' Motion to Tax Costs."

6. Three attorneys from my office traveled to Fresno, California, to attend the deposition of Plaintiffs Steven Stonecipher and Barry Bauer, taken on December 13 and 14, 2010, respectively. Their attendance as these deposition was reasonably necessary as detailed in Plaintiffs' Opposition to Defendants' Motion to Tax Costs.

7. The travel expenses claimed for this trip are as follows: (1) $301.05 for one night's lodging in Fresno, on December 13, 2010; and (2) $343.32 for mileage between San Diego and Fresno.

8. Attached as Exhibit B is a true and correct copy of Plaintiffs' Attorneys' Deposition-Related Travel Expenses which total **$1809.24**. The expenses itemized in Exhibit A are reasonable and necessary travel expenses for the reasons detailed in Plaintiffs' Opposition to Defendants' Motion to Tax Costs.

DEPOSITION TRANSCRIPTS

9. Attached as Exhibit C is a true and correct copy of Plaintiffs' Deposition Transcription Expenses which total **$6522.72**. The expenses itemized in Exhibit C are reasonable and necessary transcription expenses for the reasons detailed in Plaintiffs' Opposition to Defendants' Motion to Tax Costs.

SERVICE OF PROCESS FEES

10. In preparing the Memorandum of Costs, my office relied on a summary accounting of those fees associated with serving a copy of the summons and complaint on each of the three Defendants. On or about April 18, 2011, our office reviewed the detailed accounting reports and invoices related to the disputed $620.47 in "Registered Process Server" costs and learned, for the first time, that those fees were actually "rush fees" incurred in the filing and service of Plaintiffs' Motion for Preliminary Injunction and that they had been inadvertently coded to the wrong account. Attached as Exhibit D is a true and correct copy of Plaintiffs' Preliminary Injunction Service Fees.

11. Attached as Exhibit E is a true and correct copy of Plaintiffs' Service of Process Fees which total **$160.56**. The expenses itemized in Exhibit E are reasonable and necessary service fees as verified Plaintiffs' Memorandum of Costs and conceded to in Defendants' Motion to Tax Costs.

HEARING-RELATED TRAVEL COSTS

12. I traveled from Long Beach, California, to Fresno, California, to attend two separate court hearings: the Motion for Preliminary Injunction hearing on November 17, 2010, and the Motion for Summary Judgment hearing on January 18, 2011. My attendance at these hearings was reasonably necessary as detailed in Plaintiffs' Opposition to Defendants' Motion to Tax Costs.

13. The travel expenses for these trips are as follows: (1) $505.35 for one night's lodging in Fresno on January 17, 2011, for the Motion for Summary Judgment hearing; (2) $224.00 for mileage to Fresno on November 17, 2010, for the Motion for Preliminary Injunction hearing; and (3) $258.86 for mileage to Fresno on January 18, 2011, for the Motion for Summary Judgment hearing.

14. In preparing the Memorandum of Costs, my office relied on a summary accounting of hearing-related travel fees. On or about April 18, 2011, our office reviewed the detailed accounting reports and invoices related to the disputed $1,226.13 in hearing-related travel fees. At this time, it was learned that the lodging invoices for Clinton B. Monfort and C.D. Michel included a $20.30 "Restaurant Room Charge" and a $2.50 charge for "Bottled Water," respectively, and that those costs had not been separately entered by our billing department. It was also discovered that, due to a billing error, Plaintiffs' Memorandum of Costs includes a request for both "mileage" (in the amount of $256.86) and "gas" (in the amount of $215.12), essentially seeking double recovery for Plaintiffs' attorneys' transportation to and from the hearing.

15. Attached as Exhibit F is a true and correct copy of Plaintiffs' attorneys' Hearing-Related Travel Expenses which total **$988.21** The expenses itemized in Exhibit F are reasonable and necessary travel expenses for the reasons detailed in Plaintiffs' Opposition to Defendants' Motion to Tax Costs.

RECAPITULATION OF PLAINTIFFS' COSTS

16. The total expenses requested by Plaintiffs' are $10,375.73. These calculations are summarized as follows:

Filing and Motion Fees	$ 895.00
Deposition Costs	$ 8,331.96
Service of Process	$ 160.56

Hearing Attendance Travel Expenses $ 988.21

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 19th day of April, 2011, at Long Beach, California.

C. D. Michel
Declarant

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 April 19, 2011, I served the foregoing document(s) described as

DECLARATION OF C. D. MICHEL IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO TAX COSTS

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Kamala D. Harris
Attorney General of California
Zackery P. Morazzini
Supervising Deputy Attorney General
Peter A. Krause
Deputy Attorney General
1300 I Street, Suite 125
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.
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Executed on April 19, 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

DECLARATION OF SERVICE BY OVERNIGHT COURIER

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

No.: **F062490**

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: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On February 22, 2012, I served the attached **JOINT APPENDIX, VOLUME XIV, Pages JA004005-JA004200** by placing a true copy thereof enclosed in a sealed envelope with the Golden State Overnight, addressed as follows:

Carl Dawson Michel, Esq.
Clinton Barnwell Monfort. Esq.
Michel and Associates, PC
180 East Ocean Blvd., Ste. 200
Long Beach, CA 90802
(Attorneys for Respondents)

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 February 22, 2012, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature

SA2011101434