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10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION
13

14 EUGENE EVAN BAKER,)	NO. CV 10-3996 SVW (AJWx)
)	
15 Plaintiff,)	
)	
16 v.)	DATE: February 25, 2013
)	TIME: 1:30 p.m.
17 ERIC H. HOLDER, JR.,)	CTRM: 6
Attorney General of the)	
18 United States, et al,)	
)	
19 Defendants.)	Hon. Stephen V. Wilson
)	

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23 FEDERAL DEFENDANT'S REPLY BRIEF
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FEDERAL DEFENDANT'S REPLY BRIEF

I.

INTRODUCTION

Reiterating the arguments previously made, Plaintiff sets forth nothing in his Opposition which undermines the reasons set forth in Defendant's Opening Brief and Responding Brief that 18 U.S.C. § 922(g)(9) is a constitutionally valid enactment of Congress. Every Circuit Court and the only California District Court to have considered this issue have upheld the statute. In the absence of any contrary authority, Plaintiff must argue that each case was decided wrongly¹.

Because amendment would be futile, this Court is respectfully requested to dismiss the complaint with prejudice.

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¹ The cases upholding the constitutionality of Section 922(g)(9) include decisions from the First Circuit, Fourth Circuit, Seventh Circuit (*en banc*), Tenth Circuit, Eleventh Circuit and the Eastern District of California. See United States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010) ("We now explicitly hold that § 922(g)(9) is a presumptively lawful 'longstanding prohibition on the possession of firearms'"); In re United States, 578 F.3d 1195 (10th Cir. 2009) (order) ("Nothing suggests that the Heller dictum, which we must follow, is not inclusive of § 922(g)(9) involving those convicted of misdemeanor domestic violence"); United States v. Booker, 644 F.3d 12, 24 (1st Cir. 2011) ("Indeed, § 922(g)(9) fits comfortably among the categories of regulations that Heller suggested would be 'presumptively lawful.'" 554 U.S. at 627 n.26 Section 922(g)(9) is, historically and practically, a corollary outgrowth of the federal felon disqualification statute"); United States v. Staten, 666 F.3d 154, 168 (4th Cir. 2011) ("§ 922(g)(9) satisfies the intermediate scrutiny standard"); United States v. Skoien, 614 F.3d 638 (7th Cir. 2010) (*en banc*) (concluding that Section 922(g)(9) withstands intermediate scrutiny); Enos v. Holder, 855 F.Supp.2d 1088, 1099 (E.D.Cal. 2012) ("§ 922(g)(9) is a presumptively lawful categorical ban on firearm possession. Keeping guns out of the hands of those convicted of domestic violence fits squarely into the prohibitions noted by Heller").

II.

THIS COURT CAN DISMISS THE COMPLAINT

As a procedural matter, Plaintiff misconstrues this Court's Order dated October 15, 2012 and the Ninth Circuit's Order dated June 6, 2012, neither of which preclude this Court from dismissing Plaintiff's complaint; indeed, each order contemplated just such a result.

The order from the Ninth Circuit, for example, upheld this Court's determination that previous Ninth Circuit precedent barred Plaintiff's claim that he was entitled to possess a firearm under California law. See Order dated June 6, 2012, 3 (attached as Exhibit A). That same order allowed Plaintiff's claim under the Second Amendment to proceed but, in doing so, the Ninth Circuit did not foreclose this Court's ability to determine whether such a claim was legally valid. See Id. Indeed, the very purpose of the remand was for this Court to determine this very question.

Plaintiff acknowledged as much at the hearing before this Court on October 15, 2012. Addressing Plaintiff's counsel, this Court asked:

What do you understand the issue to be, assuming that the amended complaint is in place? Is it whether the Supreme Court's recent Heller decision supports the defendant's argument that notwithstanding the state conviction, he's entitled to bear a firearm?

Transcript of October 15, 2012 Hearing, 4:12-16 (attached as Exhibit B). In response, Plaintiff's counsel stated:

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1 Yes, that's correct. In District of Columbia versus
2 Heller in 2008, the U.S. Supreme Court did declare that
3 there is a fundamental Second Amendment right to keep
4 and bear arms for self-defense purposes and -
5 Id., 4:17-20. After some discussion, the Court asked undersigned
6 counsel the following:

7 So now the question is, as [Plaintiff's counsel]
8 presented it, even if his conviction isn't expunged in
9 accordance with federal law, does Heller versus
10 District of Columbia - is that the case - give him the
11 right to bear a firearm? And what is your argument
12 there?

13 Id., 9:5-9. Undersigned counsel responded:

14 Well, at first, it's a procedural question. When
15 Jennings was decided, Heller had not been decided, and
16 so no court had ever considered the Second Amendment as
17 applying a fundamental right to an individual. And so
18 the Ninth Circuit said, We're going to punt - excuse
19 the expression - and allow the district court to
20 determine, first, the level of scrutiny to be
21 determined and then secondly, whether or not using that
22 level of scrutiny the statute passes constitutional
23 muster. Our argument is one, that this court should do
24 just that, determine the level of scrutiny, which has
25 to be either rational basis or intermediate level, and
26 then applying that level of scrutiny should find that
27 the statute, as interpreted under federal law, does not
28 violate Mr. Baker's constitutional rights.

1 Id., 9:10-23. A little later, undersigned counsel continued:

2 It's very clear that his conviction was not expunged,
3 and in the absence of Heller, [Plaintiff] would not be
4 allowed to have a firearm. The *only question* is does
5 Heller change the constitutional makeup to such a
6 degree that the federal law that prohibits his use of
7 the handgun is found to be unconstitutional.

8 Id., 10:7-12 (emphasis added).

9 This Court then observed:

10 Well, then, it seems that the way to get this before
11 [the] court is by briefing it, correct?

12 Id., 11:2-3. To which Plaintiff's counsel responded:

13 *That's correct.*

14 Id., 11:4 (emphasis added). The Court then ordered Plaintiff's
15 counsel to serve all defendants, and the Court set forth a
16 briefing schedule where the parties were ordered to submit
17 opening and responding briefs on the issue. See Id., 11:5-16:17.

18 The Department of Justice has followed this Court's
19 instructions; it has set forth in its briefs exactly what
20 undersigned counsel stated in open court; and, at the end of the
21 briefs, the Federal Defendant has made the non-controversial
22 observation that Plaintiff's complaint should be dismissed with
23 prejudice because a complaint cannot survive without a valid
24 legal claim, citing Balistreri v. Pacifica Police Department, 901
25 F.2d 696, 699 (9th Cir. 1990) ("Dismissal can be based on the

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1 lack of a cognizable legal theory or the absence of sufficient
2 facts alleged under a cognizable legal theory").²

3 Accordingly, if this Court accepts the arguments advanced by
4 the Department of Justice, then Plaintiff does not have a
5 cognizable legal theory, and dismissal should result as a matter
6 of course.

8 III.

9 THIS COURT SHOULD DISMISS THE COMPLAINT

10 BECAUSE THE STATUTE DOES NOT VIOLATE THE CONSTITUTION

11 This Court gave each party the opportunity to file two
12 briefs on whether Section 922(g)(9) was constitutional, with the
13 further opportunity to address the Court at a hearing on the
14 matter. As this Court instructed, and as anticipated at the
15 October 15th hearing, the Department of Justice has set forth the
16 reasons why this Court should uphold that statute in its Opening
17 and Responding Briefs.

18 As a substantive matter, those briefs address, and refute,
19 each contrary assertion made in Plaintiff's opposition. The
20 Federal Defendant respectfully refers the Court to the reasons
21 advanced in those briefs, which are hereby incorporated, rather
22 than reiterate those reasons here. In broad strokes, Plaintiff
23 has failed to explain why this Court should disregard the
24 reasoning set forth by its sister California District Court and
25

26
27 ² Plaintiff cannot maintain surprise or confusion, as
28 undersigned counsel explained all of this in a letter dated
January 14, 2013, before the responding briefs were due, in
response to a letter from Plaintiff's counsel dated January 9,
2013 (attached respectively as Exhibits D and C).

1 the other Circuit Courts which have considered this issue, each
2 one of which has upheld the statute as a valid enactment of
3 Congress.

4 IV.

5 CONCLUSION

6 For the foregoing reasons, as set forth above and in the
7 previously filed briefs, the Federal Defendant respectfully
8 requests that this Court uphold the constitutionality of 18
9 U.S.C. § 922(g)(9) and, having done so, dismiss Plaintiff's
10 complaint with prejudice.

11 Respectfully submitted,

12 DATED: February 11, 2013

ANDRÉ BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

15 /s/ David A. DeJute
16 DAVID A. DeJUTE
17 Assistant United States Attorney
18 Attorneys for Federal Defendant
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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EUGENE EVAN BAKER,

Plaintiff - Appellant,

v.

ERIC H. HOLDER, Jr., in his official
capacity as Attorney General of the United
States,

Defendant - Appellee.,

No. 11-55067

D.C. No. 2:10-cv-03996-SVW-
AJW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted June 6, 2012
Pasadena, California

Before: B. FLETCHER, WARDLAW, and BYBEE, Circuit Judges.

Eugene Baker appeals from the district court's order dismissing his
complaint under Federal Rules of Civil Procedure 12(b)(1) and (b)(6). We affirm
in part, reverse in part, and remand for further proceedings.

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

The district court dismissed the complaint without prejudice under Rule 12(b)(1), concluding that Baker's complaint fails to state facts sufficient to present a "case or controversy" under Article III, § 2 of the Constitution. At the outset, we note a disparity between the complaint as filed on the district court's electronic docket and the complaint as it appears in Baker's excerpts of record. The complaint found in the electronic docket consists of only the first and last pages of the complaint in Baker's excerpts. It is not clear from the record whether the district court had the opportunity to review the complaint in its entirety. The two pages of the complaint available on the electronic docket clearly fail to assert facts sufficient to satisfy the justiciability requirements of Article III, as they do not allege that Baker has taken any steps to acquire a firearm. It is unclear whether the full complaint is adequate.

It is apparent, however, that Baker is capable of amending his complaint to include additional facts that would confer standing. In his opposition to the motion to dismiss, Baker attached a letter from the California Department of Justice ("CA DOJ") informing him that his application to purchase a firearm had been denied because his prior conviction for a misdemeanor crime of domestic violence barred him from purchasing or possessing firearms under federal law. Baker also attached a letter sent by the CA DOJ to a firearms dealer, ordering the dealer not to release

firearms to Baker. These facts, if alleged in the complaint, are sufficient to confer standing, as the government conceded at oral argument. Therefore, the district court properly granted the 12(b)(1) motion without prejudice, and, upon remand, Baker should be allowed to amend his complaint to allege the additional jurisdictional facts. *See Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991) (“Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment.”).

The district court erred by dismissing the complaint with prejudice under Rule 12(b)(6) for failure to state a claim. Baker’s complaint sets forth both a statutory and a constitutional argument as to the invalidity of applying the prohibition in 18 U.S.C. § 922(g)(9) to him. Although *Jennings v. Mukasey*, 511 F.3d 894, 898-99 (9th Cir. 2007), forecloses Baker’s statutory argument that his state court order purporting to “set aside” his misdemeanor domestic violence conviction renders § 922(g)(9) inapplicable, *Jennings* does not foreclose Baker’s Second Amendment argument. *Jennings* was decided before the Supreme Court announced that the Second Amendment “conferred an individual right to keep and bear arms.” *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008). The *Jennings* decision did not address the question of whether § 922(g)(9) violates the

Second Amendment, and therefore does not control Baker's Second Amendment claim.

We therefore affirm the Rule 12(b)(1) dismissal without prejudice, reverse the Rule 12(b)(6) dismissal, and remand with leave to amend the complaint.

Each party shall bear its own costs on appeal.

AFFIRMED in part; **REVERSED** in part; **REMANDED**.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE STEPHEN V. WILSON, U.S. DISTRICT JUDGE PRESIDING

EUGENE EVAN BAKER,)	
)	
Plaintiff,)	
)	
vs.)	No. CV 2010-3996-SVW
)	
)	
ERIC H. HOLDER, JR.,)	
)	
Defendant.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, OCTOBER 15, 2012

DEBORAH K. GACKLE, CSR, RPR
United States Courthouse
312 North Spring Street, Room 402A
Los Angeles, California 90012
(213) 620-1149

1 **APPEARANCES OF COUNSEL:**

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4 **For the Plaintiff:**

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13 **For the Defendant:**

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15 U.S. DEPARTMENT OF JUSTICE
16 BY: DAVID A. DeJUTE
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20 Los Angeles, California 90012

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1 LOS ANGELES, CALIFORNIA; MONDAY, OCTOBER 15, 2012; 1:30 P.M.

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4 THE CLERK: Item 7, CV 2010-3996-SVW, Eugene Evan
5 Baker v. Eric H. Holder, Jr.

6 Counsel, please state your appearance.

7 MS. RIDER: Tamara Rider, counsel for the plaintiff,
8 Eugene Evan Baker.

9 MR. DeJUTE: Good afternoon, Your Honor. David
10 DeJute, assistant United States attorney, for defendant Holder.

11 THE COURT: This is a status conference, and can you,
12 Ms. Rider, bring the court up to date with where we are. I
13 have a sense that there are problems with some electronic
14 filings, at least at some point. But where are we now?

15 MS. RIDER: That's correct. Essentially, what
16 happened is the Ninth Circuit did take up the appeal, and the
17 Ninth Circuit ruled that the motion should be reversed to allow
18 the plaintiff to allow -- excuse me -- to amend his complaint
19 for standing purposes, because the Ninth Circuit indicated in
20 their memorandum that they didn't receive all the pages in the
21 complaint, but they did receive his attachment. So to make
22 sure that --

23 THE COURT: Do you have a copy of the Ninth Circuit
24 order?

25 MS. RIDER: Yes, I do.

1 THE COURT: Can I see it.

2 MS. RIDER: Yes.

3 THE COURT: What is your understanding at the end of
4 the memorandum when the court says, "The Jennings decision did
5 not address the question of whether Section 922(g)(9)" -- is
6 that felon in possession? What is 922(g)(9))?

7 MS. RIDER: 922(g)(9) relates to a misdemeanor crime
8 of domestic violence.

9 THE COURT: Oh, that's the state violation.

10 -- "violates the Second Amendment and therefore does
11 not control Baker's Second Amendment claim."

12 What do you understand the issue to be, assuming that
13 the amended complaint is in place? Is it whether the Supreme
14 Court's recent *Heller* decision supports the defendant's
15 argument that notwithstanding the state conviction, he's
16 entitled to bear a firearm?

17 MS. RIDER: Yes, that's correct. In *District of*
18 *Columbia versus Heller* in 2008, the U.S. Supreme Court did
19 declare that there is a fundamental Second Amendment right to
20 keep and bear arms for self-defense purposes and --

21 THE COURT: In other words, what the Ninth Circuit
22 seems to be setting up -- so to speak -- is the tension between
23 that decision and a restriction under supervised release
24 regarding the right to bear a firearm, correct?

25 MS. RIDER: That's correct.

1 THE COURT: So how, then, would that be resolved from
2 your standpoint?

3 MS. RIDER: Well, essentially, Your Honor, my client
4 sought permission from a court and did have his conviction
5 expunged and so under state law, he is able to keep and bear a
6 firearm for self-defenses purposes. Unfortunately, under
7 federal law, it's a lifetime ban instead of a mere ten-year
8 ban. And so he believes pursuant to *District of Columbia*
9 *versus Heller* --

10 THE COURT: Slow down just a drop.

11 You're saying that he's had his state court 922(g)(9)
12 conviction erased?

13 MS. RIDER: My understanding is he was convicted of a
14 misdemeanor crime of domestic violence -- or he had a domestic
15 violence order.

16 THE COURT: Right.

17 MS. RIDER: He served his probation term, and under
18 California law, you're prohibited from owning and possessing a
19 firearm for ten years. He had that ten-year period, and in
20 addition to that, he also went to a Ventura courthouse, and a
21 judge provided an order indicating he has the right to have a
22 firearm.

23 So we have -- under state law, he is able to -- yeah,
24 have a firearm, and now --

25 THE COURT: What was the conviction for in this

1 court?

2 MS. RIDER: I believe it was in 1997 -- let's see --
3 it was a guilty plea. My apologies. We just got substituted
4 in recently.

5 THE COURT: Do you know --

6 MR. DeJUTE: Misdemeanor domestic violence, Your
7 Honor.

8 THE COURT: But a different episode than the
9 conviction in the state court, correct?

10 MR. DeJUTE: There's only one conviction in state
11 court. That's for domestic violence.

12 THE COURT: But -- what was his conviction for in
13 this court?

14 MR. DeJUTE: There was no conviction in this court,
15 Your Honor. Plaintiff brought a cause of action in *Baker v.*
16 *Holder I*, which said, I should be entitled under federal law to
17 have a firearm, and the *Jennings* case -- which you just
18 mentioned -- said that you're not entitled unless your
19 conviction is expunged under state law. There is an
20 expungement statute under Washington law --

21 THE COURT: So what is the court's jurisdiction?

22 MR. DeJUTE: Under federal law, which prohibits --

23 THE COURT: What federal law?

24 MR. DeJUTE: The federal law that says -- I don't
25 have the statutory cite, but they do in the complaint -- the

1 one that says if you are convicted or plead guilty as
2 misdemeanor to domestic violence, you may not own or possess a
3 firearm unless that conviction is expunged under state law.

4 THE COURT: But what gives the court independent
5 jurisdiction? What is the --

6 MR. DeJUTE: Federal question jurisdiction on the
7 issue of whether or not that federal law which interprets state
8 law is constitutional under *Heller* and --

9 THE COURT: I see. So if counsel, Ms. Rider, is
10 correct that the domestic violence offense has been expunged,
11 you're saying that that doesn't affect the federal law?

12 MR. DeJUTE: I'm saying something similar to that,
13 Your Honor. If I could go back one step to --

14 THE COURT: Take the lectern, if you would.

15 MR. DeJUTE: Yes, Your Honor. If I could go back one
16 step to Baker's original complaint. He essentially made two
17 arguments: One was that he had a statutory right to possess a
18 firearm, and as opposing counsel says, he went to the Ventura
19 County Courthouse. Under state law, the court ruled that his
20 record was expunged and --

21 THE COURT: When you say "statutory right," statutory
22 right under California statute?

23 MR. DeJUTE: Yes, sir.

24 THE COURT: Okay.

25 MR. DeJUTE: And his conviction was expunged, and

1 there was nothing under state law preventing him from owning a
2 handgun.

3 THE COURT: All right.

4 MR. DeJUTE: However, under federal law, the federal
5 law looks at whether or not the conviction has been expunged,
6 and so you have to have, sort of, an existential problem. It's
7 expunged under state law, but it's not expunged under federal
8 law because the manner in which states and the Ninth Circuit
9 have interpreted California law is that it's not a true
10 expungement statute, like *Washington*, for example.

11 THE COURT: I've come across that in a somewhat
12 different context, in the guideline context, for example,
13 because the expungement under California statute doesn't mean
14 that, at least in many cases, that the conviction is totally
15 wiped off the slate, it means that the conviction can't be used
16 for certain purposes. In other words, can't be used for
17 calculating a sentence or being a repeat violator or even for
18 impeaching someone with a prior conviction.

19 And so am I correct that under federal law,
20 expungement means -- at least as you argue it -- total erasure
21 of the conviction? Which you say hasn't occurred under the
22 state expungement process.

23 MR. DeJUTE: Well, 100 percent correct. I would only
24 add that it's not my saying it, Your Honor, it is this court,
25 this court that said it -- because you cited *Jennings v.*

1 Mukasey, and it is now the Ninth Circuit in affirming this
2 court's order that has said it -- Mr. Baker is precluded from
3 making the argument in his amended complaint that his statute
4 was not expunged for purposes of the federal law.

5 THE COURT: So now the question is, as Ms. Rider
6 presented it, even if his conviction isn't expunged in
7 accordance with federal law, does *Heller versus District of*
8 *Columbia* -- is that the case -- give him the right to bear a
9 firearm? And what is your argument there?

10 MR. DeJUTE: Well, at first, it's a procedural
11 question. When *Jennings* was decided, *Heller* had not been
12 decided, and so no court had ever considered the Second
13 Amendment as applying a fundamental right to an individual.
14 And so the Ninth Circuit said, We're going to punt -- excuse
15 the expression -- and allow the district court to determine,
16 first, the level of scrutiny to be determined and then
17 secondly, whether or not using that level of scrutiny the
18 statute passes constitutional muster. Our argument is one,
19 that this court should do just that, determine the level of
20 scrutiny, which has to be either rational basis or intermediate
21 level, and then applying that level of scrutiny should find
22 that the statute, as interpreted under federal law, does not
23 violate Mr. Baker's constitutional rights. That is to say that
24 *Heller* -- the reason for that is because --

25 THE COURT: But the -- when you say the statute

1 doesn't offend federal law, it seems like Ms. Rider is
2 presenting it as a constitutional question.

3 MR. DeJUTE: It is, Your Honor.

4 THE COURT: When you mean "federal law," you mean the
5 Constitution.

6 MR. DeJUTE: No, I meant the federal law which
7 interprets expungement. It's very clear that his conviction
8 was not expunged, and in the absence *Heller*, he would not be
9 allowed to have a firearm. The only question is does *Heller*
10 change the constitutional makeup to such a degree that the
11 federal law that prohibits his use of the handgun is found to
12 be unconstitutional.

13 THE COURT: Is there something -- I'm a little out of
14 sync with *Heller*. What specifically was before the court in
15 *Heller*, other than the issue of right to bear arms?

16 MR. DeJUTE: In both *Heller* and -- I think it's
17 *McDermott* -- one for Chicago and one for D.C. -- the court
18 found that the state's absolute ban without distinction for
19 everyone to possess a handgun was unconstitutional because
20 there as a fundamental Second Amendment right for personal use
21 of a handgun. But in doing so, they limited it to law-abiding
22 citizens; they limited it by the very terms of the order to
23 cases where there were no -- not a convicted felon. That's
24 been held to be upheld -- and they have language in there that
25 longstanding prohibitions on gun use and gun control are not

1 affected by the statute.

2 THE COURT: Well, then, it seems that the way to get
3 this before court is by briefing it, correct?

4 MS. RIDER: That's correct.

5 THE COURT: So maybe the best way to brief it would
6 to be have opening simultaneous briefs and then opposing
7 simultaneous briefs. In other words -- that way you're
8 opposing each other's arguments. It isn't someone going first,
9 second and third, and then at the hearing we can take up
10 whatever thoughts you have, you know, that relate to the mutual
11 or simultaneous oppositions.

12 When can you file the briefs? It sounds like an
13 interesting question.

14 MR. DeJUTE: It sounds like a very interesting
15 question. I just have two procedural points: One, we have not
16 been served, so the first time I've seen the complaint was in
17 the hallway and glancing over to. Secondly, this time, unlike
18 the first time, Baker is adding two new defendants: The
19 California Department of Justice, and Kamala Harris as Attorney
20 General of California. So my suggestion is that the complaint
21 should be properly served, and everyone should appear and
22 perhaps then a different --

23 THE COURT: But what would the court's jurisdiction
24 be over them? I mean, in other words, you're saying that they
25 are the -- what relief do you want from the Attorney General?

1 MS. RIDER: Our understanding is that California is a
2 point-of-contact state where the California Department of
3 Justice is able to interpret and implement the laws -- the
4 federal laws. As Kamala Harris is the Attorney General of
5 California, she also is able to enforce those laws. Because
6 California is prohibiting Mr. Baker from obtaining a firearm --
7 or from purchasing a firearm, we also amended the complaint to
8 ensure that all of the adequate parties for defendants were
9 included.

10 THE COURT: So the arguments -- the essential
11 argument is the same or different with respect to the U.S.
12 defendant and the California defendant.

13 MS. RIDER: The complaint is against all of the
14 defendants with the same arguments against all the defendants.

15 THE COURT: So the complaint is against the Attorney
16 General because the Attorney General has interpreted the *Heller*
17 case in a way that prohibits your client from bearing a
18 firearm.

19 MS. RIDER: That's correct.

20 THE COURT: But -- I see.

21 If Holder's actions were unconstitutional, would they
22 automatically mean that the State Attorney General's actions
23 are unconstitutional, too?

24 MS. RIDER: We believe so, solely to the effect that
25 to the extent Mr. Holder is acting unconstitutionally, so is

1 the California Department of Justice in interpreting what he's
2 directing them to do as a point-of-contact state for firearms
3 dealers. And in addition to that, Ms. Kamala Harris is the
4 Attorney General of California.

5 THE COURT: How do you -- you have no position
6 regarding -- would your thinking be that, at least
7 preliminarily, that the decision regarding the United States
8 Attorney General would necessarily dictate the result as to the
9 California Attorney General?

10 MR. DeJUTE: I appreciate the ability to wiggle out
11 if we change our position --

12 THE COURT: Yes.

13 MR. DeJUTE: -- but I just saw the complaint, and I
14 just learned about these two new defendants.

15 (Pause in the proceedings)

16 THE COURT: In any event, the amended complaint does
17 name the State Attorney General, right?

18 MS. RIDER: Yes.

19 THE COURT: And so in terms of service, have you gone
20 about serving the government as you have to?

21 MS. RIDER: Not at this point, no. The complaint we
22 filed last week on the 11th, and we just received the conformed
23 summons today. So we're planning on effectuating service.

24 THE COURT: Then you have to do that by what?
25 Sending a certified copy to the Attorney General in Washington?

1 Are you with the Justice Department?

2 MR. DeJUTE: Yes, sir -- I'm with the U.S. Attorney's
3 Office across the street.

4 THE COURT: So you -- in order to serve the
5 government, you have to serve the U.S. attorney in the
6 district, and you have to send -- what -- a certified copy of
7 the complaint to the Attorney General in Washington?

8 MR. DeJUTE: That's correct. And in this instance,
9 only those two because you always have to serve the Attorney
10 General and the agency. In this case, the agency and the
11 Attorney General are the same.

12 THE COURT: So all that the plaintiff has to do is
13 send -- is send a certified copy to the Attorney General.

14 MR. DeJUTE: And serve the U.S. Attorney's Office,
15 which has not yet been done. I'm right here.

16 THE COURT: But you can accept service?

17 MR. DeJUTE: I what?

18 THE COURT: You can accept service?

19 MR. DeJUTE: I can't under federal statute.

20 THE COURT: I see. How does she do it, then? Send a
21 certified copy to you?

22 MR. DeJUTE: Not to me personally -- it's in the
23 rules -- to the mail processing clerk, I believe, or by
24 personal service by walking across the street --

25 THE COURT: What about the -- California? How do you

1 plan to serve them?

2 MS. RIDER: I need to look at the rules and make sure
3 I do it right. I haven't --

4 THE COURT: Well, I would like you to effectuate
5 service within 20 days, and I'm going to set up a briefing
6 schedule on the assumption that that is accomplished, and the
7 opening briefs should be exchanged, and within 30 days of the
8 end of the 20-day period. So that means 50 days from today.

9 THE CLERK: Simultaneous opening briefs will be due
10 December 3rd.

11 THE COURT: And then I'll give you ten days to file
12 simultaneous oppositions. It would be helpful, Ms. Rider, if you
13 could get going with service as soon as you can. Thank you.

14 THE CLERK: I was wrong. Opening briefs will be due
15 December 6th, and opposing briefs would then be due ten days
16 later, which would be December 17th.

17 Will there be a hearing?

18 THE COURT: Yes, a hearing. Let's say the hearing
19 will be -- first week in January.

20 THE CLERK: Hearing will be January 7th at 1:30.

21 THE COURT: Look forward to it.

22 MR. DeJUTE: Thank you very much, Your Honor.

23 MS. RIDER: One last point, just so I'm clear. On
24 the briefs, you want us to specifically address the affect of
25 the California Department of Justice and the State Attorney

1 General of California being involved in this?

2 THE COURT: Excuse me?

3 MS. RIDER: I'm confused.

4 THE COURT: I'm assuming that you're seeking relief
5 against the Attorney General. My concern is assume you didn't
6 name Holder, what jurisdiction would I have over a lawsuit
7 against the Attorney General of the State of California?

8 MS. RIDER: I believe federal question as to whether
9 or not the state's --

10 THE COURT: You mean the same issue? You're saying
11 the same issue?

12 MS. RIDER: Yes.

13 THE COURT: Okay. So include the Attorney General in
14 any argument you make as to them, or if it's an argument that
15 just maintains that whatever relief is imposed on Holder
16 follows to the Attorney General of California. Okay. Thank
17 you.

18 MR. DeJUTE: Thank you, Your Honor.

19 MS. RIDER: Thank you.

20 (Proceedings concluded at 2:10 p.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is a true and correct transcript from the stenographic record of the proceedings in the foregoing matter.

November 13, 2012

/S/ _____

Deborah K. Gackle
Official Court Reporter

Date

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January 9, 2013

VIA FACSIMILE (213) 894-7819 & U.S. MAIL

David A. DeJute, Esq.
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Re: **EUGENE EVAN BAKER v. ERIC J. HOLDER, JR., et al.**
USDC Cent. Dist. of Cal. Case No. CV 10-3996-SVW(AJWx);
Meet-and-confer re Defendant's filing of a request for FRCP Rule 12
dismissal in violation of Rule 11

Dear Mr. DeJute,

As you are aware, the parties recently filed their briefing on legal issues the Court wanted further information on following the case's remand from the Ninth Circuit Court of Appeals.

Defendant Holder, in complying with the Court's order, included in his briefing a request that the complaint be dismissed and submitted a proposed order to that effect. This transmuted Defendant's briefing into some form of a Rule 12 motion. This was not proper under the Federal Rules of Civil Procedure and was not expressly or impliedly within the ambit of the Court's requested briefing. If you recall, the Court's comments at the most recent hearing concerned the effect of the State of California being joined in the litigation and the effect of the Ninth Circuit's remand on the proceedings. The Court did not expressly or impliedly solicit the parties to seek dismissal as part of their briefing, and Plaintiffs were neither aware of nor prepared to address a Rule 12 motion as part of complying with the Court's order.

While it is certainly Defendant's right under Rule 12 to bring a separate motion to dismiss (12(b)) or motion for judgment on the pleadings (12(c)) at this stage, such motion must be made in conformance with the rule, with Rule 6, and with Local Rule 6-1. By Defendant raising the issue without proper notice to Plaintiff, and as part of an unrelated brief, Defendant has flagrantly ignored the notice and other procedural requirements of these rules.

Mr. David A. DeJute, Esq.
January 9, 2013
Page 2 of 2

Such a basic failure to file motions with the Court in conformance with the FRCP and Local Rules violates Rule 11 and Local Rule 11-9. To rectify this violation, Defendant needs to immediately file a notice withdrawing his proposed order and needs to clarify to the Court in a supplemental brief (the court-ordered opposition brief or another filing) that Defendant is not making a Rule 12 motion as part of his court-ordered briefing.

If Defendant does not agree to do this, Plaintiff will be significantly prejudiced, in that not only will Plaintiff be forced to address in its coming opposition brief the issues the Court ordered the parties to address as part of its prior order, but will also have to attempt to address the issues raised by a Rule 12 motion. Given the Court's briefing schedule, there is not sufficient time for Plaintiff to address both the issues the Court desired the parties to address as well as the nascent Rule 12 motion.

Plaintiff will be further prejudiced in that Defendant's failure to follow the applicable notice requirements in bringing its motion also leaves Plaintiff unaware of the exact statutory basis for Defendant's Rule 12 motion. Thus, with less than the full notice period provided for under Rule 6, Plaintiff will have to attempt to address all potentially-applicable permutations of a Rule 12 motion in opposition, i.e., a Rule 12(b)(6) motion to dismiss, a 12(c) motion, etc. Given that the Court ordered opposition briefing on its issues by no later than January 16, 2013, the amount of time for Plaintiff to address all of these potential bases for Plaintiff's Rule 12 motion is both practically as well as statutorily insufficient.

We will be contacting you via telephone this afternoon to discuss how to resolve Defendant's improper filing as well as whether Defendant will be voluntarily correcting the matter. If Defendant does not agree to voluntarily withdraw the request for dismissal and proposed order, Plaintiff will be forced to seek sanctions under Rule 11 and Local Rule 83-7. We are hopeful such a sanctions motion will not be necessary and the parties can involuntarily resolve this issue to everyone's satisfaction.

We look forward to speaking with you.

Sincerely,

Michel & Associates, P.C.


Joshua R. Dale



U. S. Department of Justice

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January 15, 2013

Via U.S. Mail and Email

Joshua R. Dale
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Re: Baker v. Holder, CV 10-3996 SVW (AJWx)

Dear Mr. Dale:

Despite the seeming urgency conveyed by your letter dated January 9, 2013, stating that you would call that day to discuss your view that Defendant's Opening Brief subjects the undersigned to sanctions under Rule 11, you have failed to do so. Perhaps the need to speak no longer exists because someone in your office, who was present in court and who actually attended the initial status conference, has changed your view by pointing out the errors contained in your letter. If not, and because I was present in court and remember well what was discussed, allow me to explain why nothing contained in the brief I filed violates Rule 11.

After discussion with Tamara Rider of your office and myself at the status conference, the Court concluded that the dispositive issue presented by your client's complaint concerned whether 18 U.S.C. § 922(g)(9) violates the Constitution. Each counsel agreed. Indeed, your client has underscored this point by stating in his opening brief that he "solely seeks to vindicate his Second Amendment rights against Defendants' application of 18 U.S.C. § 922(g)(9) to him." Each counsel present further agreed with the Court that to determine this issue nothing more was likely needed than a ruling from the Court based on briefing from all parties. When Ms. Rider asked what the briefs should include, the Court explained that the content of the briefs was entirely up to the parties.

When the Court asked me what I envisioned the briefs to include, I stated that the Department of Justice would argue that the statute did not violate the constitution and that I supposed your office would argue that it did. I also stated that there may be a question of whether the Court can make such a ruling without first determining the proper level of scrutiny. I then stated that, if a level of scrutiny were to be required, it was probably not rational basis or strict scrutiny but would most likely be a compelling interest scrutiny. These discussions in open court satisfied whatever notice requirements are required by the Federal Rules, the Local Rules or any other rules.

Federal Defendant's Opening Brief does exactly what I said it would do. It accurately sets forth the facts and the law. It argues that no level of scrutiny is required to uphold the constitutionality of the statute, as some Circuit Courts and the only California District Court to have considered the issue have held. Alternatively, the brief argues that, if any level of scrutiny is required, the Court should adopt an intermediate level of scrutiny and uphold the statute consistent with the holdings of every other Circuit Court to have considered this issue.

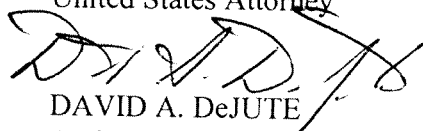
Your view that I have violated Rule 11 by noting at the end of the brief that the Court should dismiss the complaint is therefore groundless. The parties have been on notice since October 15, 2012, that a dispositive ruling was envisioned from the Court-ordered briefing. Moreover, the request to dismiss the complaint follows as a matter of logic from the argument made in Defendant's Opening Brief that the statute at issue does not violate the Constitution. If the Court accepts our arguments, then your client does not have a valid legal claim and dismissal of the complaint will result as a matter of course, whether requested in the brief or not.

In short, I did not bring a noticed motion because none was required. Indeed, I did not bring a motion under the Federal Rules. I simply followed the instructions given to me by the Court, included in the brief that which I stated in open court and concluded, non-controversially, that a complaint cannot survive without a valid legal claim.

I trust that this letter has enlightened you on why nothing violative of Rule 11 is contained in the brief. I share the sentiment contained in your letter, if not the semantics, that "the parties can involuntarily [sic] resolve this issue to everyone's satisfaction" without recourse to filing a Rule 11 motion with the Court. Indeed, for you to pursue a motion for sanctions against me would itself constitute a Rule 11 frivolous filing.

Very truly yours,

ANDRÉ BIROTTE JR.
United States Attorney



DAVID A. DeJUTE
Assistant United States Attorney

cc: Anthony R. Hakl
Deputy Attorney General
(with enclosure of January 9th letter)