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COUNTY OF SANTA CLARA, SARA H. CODY,
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8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF SANTA CLARA

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12 LOKEY FIREARMS, a sole proprietorship;
FFLGUARD, LLC, a Delaware limited liability
13 company, and CALIFORNIA RIFLE & PISTOL
ASSOCIATION, INCORPORATED, a
14 California corporation,

15 Plaintiffs,

16 v.

17 COUNTY OF SANTA CLARA; SARA H.
CODY, M.D., in her official capacity as Health
18 Officer of the County of Santa Clara; LAURIE
SMITH, in her official capacity as Sheriff of the
19 County of Santa Clara; JEFF ROSEN, in his
official capacity as District Attorney for the
20 County of Santa Clara; and DOES 1-25,

21 Defendants.

No. 20CV365840

**DEFENDANTS' OPPOSITION TO EX
PARTE APPLICATION TO STAY
ENFORCEMENT OF SANTA CLARA
ORDER REQUIRING LICENSED
FIREARMS DEALERS TO CLOSE OR
ALTERNATIVELY, FOR TEMPORARY
RESTRAINING ORDER AND ORDER TO
SHOW CAUSE**

Date: TBA
Time: TBA
Dept.: TBA

22
23 Plaintiffs in this case—a firearms dealer and two organizations—argue that the emergency
24 shelter-in-place orders of the Santa Clara County Health Officer violate an order of the California
25 Department of Public Health; are preempted by state law regarding the sale of firearms; and violate
26 both procedural and substantive due process. However, five weeks after the first order went into
27 effect and in the midst of the worst public health crisis in more than a century, they ask the Court to
28 upend, and alter, the status quo by immediately staying enforcement of the County Health Officer's

1 current order and requiring the County to allow firearm dealers to reopen for retail business. The
2 Court should deny this request.

3 First, as Plaintiffs acknowledge, the “general purpose of a[n] [] injunction is to preserve the
4 status quo until the merits of the action can be determined.” (Plaintiffs’ Memorandum of Points and
5 Authorities (“Mot.”) at p. 19 [quoting *Harbor Chevrolet Corp. v. Machinists Local Union 1484*
6 (1959) 173 Cal.App.2d 380, 384].) Here, however, the status quo is, as it has been for the past five
7 weeks, that firearms dealers are not deemed essential under the County Health Officer’s shelter-in-
8 place orders. Plaintiffs seek mandatory injunctive relief to alter—not preserve—“the status quo at
9 the time this lawsuit was filed.” (*O’Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1472.)
10 Such relief is disfavored. (*See id.* [vacating trial court’s order granting injunctive relief that failed
11 “to give due consideration to the obligation to preserve the status quo”].) They fail to explain either
12 their five-week delay or why it would be appropriate now to disregard the general purpose of
13 injunctive relief and upend the current state of affairs. Plaintiffs’ delay of more than a month in
14 seeking a temporary restraining order (“TRO”) is reason alone to deny it.

15 Second, Plaintiffs have not met their burden to obtain interim injunctive relief. To obtain a
16 TRO or preliminary injunction, Plaintiffs must demonstrate that they are likely to succeed on the
17 merits of their claims and that the relative balance of harms weighs in favor of interim injunctive
18 relief. (*O’Connell, supra*, 141 Cal.App.4th at p. 1467.) Even with the benefit of five weeks and a
19 21-page brief, they do neither. In light of the expedited nature of this filing, the County addresses
20 only the latter requirement. If, however, the Court is inclined to more fully consider the request for
21 interim injunctive relief, the County asks that the Court schedule a hearing on the request for a
22 preliminary injunction and allow the County to fully brief the merits of Plaintiffs’ request.

23 As to the latter requirement, Plaintiffs have failed to demonstrate that the balance of harms
24 weighs in favor of granting a TRO. On one side of the ledger, they have not demonstrated, as they
25 must, an “irreparable injury” absent interim injunctive relief. (*City of Torrance v. Transl. Living*
26 *Ctrs. for L.A.* (1982) 30 Cal.3d 516, 526.) Although the Health Officer issued her first shelter-in-
27 place order on March 17, 2020, and the current order on March 31, 2020, Plaintiffs waited until
28 April 20, 2020 to file suit and seek injunctive relief. This five-week delay undermines their assertion

1 of irreparable harm. (*See O’Connell, supra*, 141 Cal.App.4th at p. 1472 [instructing courts to
2 consider plaintiff’s delay in seeking injunctive relief when determining weight to give “claim of
3 imminent irreparable injury”].)

4 A federal court within the Ninth Circuit recently so found. Two weeks ago, the district court
5 for the Northern District of California considered—and denied—a group of firearm owners, retailers,
6 and advocacy organizations’ motion for temporary restraining order of the same shelter-in-place
7 order based on an even shorter delay in seeking a TRO. Specifically, on April 10, 2020, Judge Tigar
8 cited those plaintiffs’ “ten-day delay between filing their original complaint and seeking equitable
9 relief” when concluding that the plaintiffs had not shown “an ‘immediate and irreparable’ injury.”
10 (Req. for Jud. Notice, Ex. A, at 1–2.) Although the Plaintiffs here have simultaneously filed their
11 complaint and sought equitable relief, they only did so after five weeks—that is, more than three
12 times the period of delay which undermined the claim of irreparable harm in the federal case.

13 Even had they not been dilatory, Plaintiffs still do not meet their burden of demonstrating
14 their “injury is impending and so immediately likely as only to be avoided by issuance of the
15 injunction.” (*E. Bay Mun. Utility Dist. v. Dep’t of Forestry & Fire Protection* (1996) 43
16 Cal.App.4th 1113, 1126.) To make this showing, “it is incumbent upon the plaintiff[s] to present
17 evidence.” (*Loder v. City of Glendale* (1989) 216 Cal.App.3d 777, 783.) They have not. Plaintiffs
18 assert that “Lokey Firearms will suffer immediate threat of irreparable harm if forcibly continued to
19 cease all operations, including furloughing or terminating staff and having no choice but to cease
20 operations permanently.” (*See Lokey Decl.*, ¶ 11.) This conclusory sentence is not evidence of a
21 threat of immediate harm before a preliminary injunction could be briefed. In fact, in their briefing,
22 Plaintiffs suggest only that “being shut down indefinitely *could* lead to their business permanently
23 ending” (Mot. at p. 19 [emphasis supplied]), not that it is likely to. Speculative assertions are not
24 enough. What is more, Plaintiffs seek an injunction not just for themselves but for all firearm
25 dealers within the County. They do not attempt to explain how other firearm dealers may be harmed
26 by the Health Officer’s order or even how many firearm dealers have been impacted.

27 On the other side of the ledger, the interim harm that would likely result from a temporary
28 restraining order is significant. When evaluating the balance of the harms, courts consider “the

1 degree of adverse effect on the public interest” (*Cohen v. Bd. of Supervisors* (1985) 40 Cal.3d 277,
2 286 n.5), which includes harms specific to public health (*see Shoemaker v. Cty. of L.A.* (1995) 37
3 Cal.App.4th 618, 638 [concluding that “the factor of interim harm strongly counsels against an
4 injunction” in part because “the health of the community” would be “put at risk” by injunction].)

5 As Plaintiffs acknowledge, “[p]reventing the spread of COVID-19 is undeniably a critical
6 and urgent matter.” (Mot. at p. 19.) The Health Officer’s shelter-in-place order reflects the
7 considered judgment of public health experts responding to the worst pandemic in more than a
8 century and is due considerable deference. Exercising that judgment, the Health Officer made
9 continued business operations the exception rather than the norm by narrowly defining the list of
10 essential businesses that are exempted from the broad shelter-in-place orders. This is because each
11 such exception increases the risk of community transmission of COVID-19. Plaintiffs may believe
12 there is nothing “particularly risky” about purchasing firearms as opposed to other commerce and
13 that firearm dealers could simply follow the “behavioral guidelines” applicable to “other businesses
14 operating during this health crisis.” (*Id.* at p. 21). But this layperson’s estimation ignores the sound
15 epidemiological reasons to exempt the smallest possible number of businesses because social
16 distancing protocols can only lower, not eliminate entirely, the increased risks of transmission
17 associated with in-person operations. Thus, far from being “slight” (*id.* at p. 20), the harm from
18 enjoining the shelter-in-place orders could include increased community transmissions and even
19 death.

20 Plaintiffs try to minimize the importance of the shelter-in-place orders in another way,
21 characterizing what they seek as “merely” an order to “delay enforcement.” (*Id.* at p. 21.) Putting
22 aside that the County has had a shelter-in-place order in effect since March 17, 2020, Plaintiffs miss
23 that, given the nature of a viral pandemic, consistent compliance could not be more important.
24 Suggesting that the public will suffer little harm by pausing what is essentially a quarantine
25 completely misses the point of quarantine. At the very least, the County requests that it be given the
26 opportunity to develop the record on this and related points regarding the epidemiological support
27 for its shelter-in-place orders.
28

1 Finally, Plaintiffs are simply wrong that the Health Officer's orders are "indefinite." (*Id.* at
2 pp. 14, 19.) Rather, the March 31, 2020 order is set to expire May 3, 2020, and even if subsequently
3 extended is expressly not intended to be permanent. This, too, supports the County's request for the
4 Court to deny Plaintiffs' request for a TRO and instead set a hearing on the application for a
5 preliminary injunction once it is clear what, if anything, replaces the current order.

6 For these reasons, the County requests that this Court deny Plaintiffs' requests for interim
7 injunctive relief or, in the alternative, deny Plaintiffs' application for a TRO and set a hearing, and
8 briefing schedule, on their request for a preliminary injunction.

9
10 Dated: April 22, 2020

Respectfully submitted,

11 JAMES R. WILLIAMS
12 County Counsel

13 By: /s/ Melissa R. Kinyalocets
14 MELISSA R. KINIYALOCETS
15 Lead Deputy County Counsel

16 Attorneys for Defendants
17 COUNTY OF SANTA CLARA, SARA H,
18 CODY, LAURIE SMITH and JEFF ROSEN
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1 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

2 PROOF OF SERVICE BY ELECTRONIC MAIL

3
4 *LOKEY FIREARMS, et al. v. COUNTY OF SANTA CLARA, et al.* Case No.: 20CV365840
5

6 I, Kimberly Ide, declare:

7 I am now and at all times herein mentioned have been over the age of eighteen years,
8 employed in Santa Clara County, California, and not a party to the within action or cause; that my
9 business address is 70 West Hedding Street, 9th Floor, San Jose, California 95110-1770. My
10 electronic service address is: kimberly.ide@cco.sccgov.org. On **April 22, 2020**, I caused to be
11 electronically served via the Odyssey E-File system, copies of the following:

12 **DEFENDANTS' OPPOSITION TO EX PARTE APPLICATION TO STAY**
13 **ENFORCEMENT OF SANTA CLARA ORDER REQUIRING LICENSED**
14 **FIREARMS DEALERS TO CLOSE OR ALTERNATIVELY, FOR TEMPORARY**
15 **RESTRAINING ORDER AND ORDER TO SHOW CAUSE**

16 to the people listed below at the following electronic service address:

17 Michel & Associates
18 C.D. Michel, Esq.
19 Email: cmichel@michellawyers.com

20 Michel & Associates
21 Sean A. Brady, Esq.
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23 Michel & Associates
24 Matthew D. Cubeiro, Esq.
25 Email: mcubeiro@michellawyers.com

26 Email: lpalmerin@michellawyers.com

27 I declare under penalty of perjury under the laws of the State of California that the foregoing
28 is true and correct, and that this declaration was executed on April 22, 2020.

29 */s/ Kimberly Ide*

30 Kimberly Ide

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