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17 **UNITED STATES DISTRICT COURT**
18 **SOUTHERN DISTRICT OF CALIFORNIA**

19 SOUTH BAY ROD & GUN CLUB,
20 INC.; GARY BRENNAN, an
21 individual; CORY HENRY, an
22 individual; PATRICK LOVETTE, an
23 individual; VIRGINIA DUNCAN, an
24 individual; RANDY RICKS, an
25 individual; CITIZENS COMMITTEE
26 FOR THE RIGHT TO KEEP AND
27 BEAR ARMS; GUN OWNERS OF
28 CALIFORNIA; SECOND
AMENDMENT LAW CENTER; and
CALIFORNIA RIFLE & PISTOL
ASSOCIATION, INCORPORATED,

Plaintiffs,

v.

ROBERT BONTA, in his official
capacity as Attorney General of the
State of California; and DOES 1-10,

Defendants.

CASE NO: 3:22-cv-01461-RBM-WVG

**DECLARATION OF JOSHUA
ROBERT DALE IN SUPPORT OF
PLAINTIFFS’ REPLY TO
DEFENDANT BONTA’S
SUPPLEMENTAL BRIEF**

**Hearing Date: December 16, 2022
Courtroom: 5B
Judge: Hon. Roger T. Benitez**

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GAVIN NEWSOM, in his official
capacity as Governor of the State of
California,

Intervenor-Defendant.

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1 I, Joshua Robert Dale, declare:

2 1. I am a member of the bars of the State of California and State of
3 Nevada. I am an attorney at law duly licensed to practice in the State of California
4 and before the District Court for the Southern District of California. I am counsel of
5 record for South Bay Rod & Gun Club, Inc. Gary Brennan, Cory Henry, Patrick
6 Lovette, Virginia Duncan, Randy Ricks, Gun Owners of California, Second
7 Amendment Law Center, and California Rifle and Pistol Association, Incorporated
8 in this action. I submit this declaration in support of Plaintiffs’ Reply Brief to
9 Defendant Bonta’s Supplemental Brief Re Motion for Preliminary Injunction in this
10 matter. I have personal knowledge of the facts stated below, and if I were to be
11 called as a witness, I could and would competently testify under oath as to the
12 matters herein.

13 2. I am also counsel for Plaintiffs in the *Lance Boland, et al. v. Robert*
14 *Bonta, et al.*, Case No. 8:22-cv-01421 (C.D. Cal.) In that matter, I filed an initial
15 complaint on behalf of several plaintiffs suing Attorney General Bonta challenging
16 California’s Unsafe Handgun Act (“UHA”) under two theories: (1) that the UHA
17 violated the Second Amendment under the recently-recognized historical analogues
18 analysis; and (2) that the disparate treatment to out-of-state vendors who wanted to
19 sell firearms to California residents and the inability of California residents to
20 purchase firearms from out-of-state retailers violated the Dormant Commerce
21 Clause.

22 3. I attempted to locate out-of-state manufacturers, distributors, or
23 retailers of firearms who wanted to participate in the lawsuit as plaintiffs, but was
24 unable to do so.

25 4. Following the filing of the *Boland* complaint, Deputy Attorney
26 General Rob Meyerhoff contacted me to conduct a meet-and-confer teleconference
27 regarding Defendant’s intention to file a motion to dismiss under FRCP 12(b)(6)
28 against the second claim in the complaint, the Dormant Commerce Clause

1 challenge. During that teleconference, Mr. Meyerhoff explained Defendant's
2 theories as to why the second claim for violation of the Dormant Commerce Clause
3 should be dismissed. Following review of authorities he supplied me via email to
4 support his client's position, I decided that while my clients did have valid and
5 persuasive arguments for standing as to a Dormant Commerce Clause claim, an out-
6 of-state manufacturer, distributor, or retailer might have a better argument for
7 standing and their participation would afford a greater opportunity for success in
8 challenging the UHA on Dormant Commerce Clause grounds. Therefore, a
9 strategic decision was made to dismiss the Dormant Commerce Clause claim,
10 proceed with the Second Amendment claim to the UHA, and reraise the Dormant
11 Commerce Clause claim at a later date once an out-of-state manufacturer,
12 distributor, or retailer had agreed to participate in the litigation.

13 5. Unlike prior Second Amendment cases and other civil rights cases I
14 have litigated on behalf of plaintiffs in the past, because of the passage of California
15 Senate Bill 1327 and its new Code of Civil Procedure section 1021.11 fee-shifting
16 provision, I could not voluntarily dismiss the Dormant Commerce Clause claim at
17 the pleading stage and proceed with the Second Amendment claim without
18 automatically imposing on both myself and my clients monetary liability for the
19 Defendant's fees in the *Boland* matter as a "not fully prevailing" party. Given this,
20 on September 19, 2022 I sent an email to Meyerhoff relaying that my clients were
21 willing to dismiss the Dormant Commerce Clause claim in response to his meet-
22 and-confer, but pointing out our wariness in doing so in light of the application of
23 Section 1021.11 to that dismissal as cresting "prevailing party" status for
24 Defendant.

25 6. Attached hereto as Exhibit "A" is a true and correct copy of my email
26 exchange with Meyerhoff from September 19th through September 22nd regarding
27 my clients' willingness to dismiss the Dormant Commerce Clause claim at the
28 pleading stage, and Defendant's condition for waiving a claim for fees under

1 Section 1021.11 if we did so.

2 7. I have handled approximately three dozen cases on behalf of civil
3 rights plaintiffs asserting claims under 42 U.S.C. §§ 1983 & 1988 in my 20-plus-
4 year career. The dismissal of the second claim in the *Boland* matter is the first time
5 I have ever dismissed a § 1988 claim at the pleading stage with prejudice.

6 8. Because of Section 1021.11 and my experience in the *Boland* matter,
7 going forward on firearms law challenges under §§ 1983 & 1988, I am wary of
8 pleading on behalf of clients an array of novel and potentially meritorious
9 constitutional theories that might be the basis for enjoining unjust firearms laws and
10 regulations. This is unfortunate for my clients, because in my experience, novel
11 areas of constitutional law, such as the Second Amendment, often require
12 exploration of many constitutional doctrines to determine if a law or restriction
13 comports with all such doctrines. The lack of much settled law in Second
14 Amendment jurisprudence, with the significant silence of Supreme Court rulings on
15 the Second Amendment between the 1939 *United States v. Miller* case and the 2008
16 *Heller v. District of Columbia* case, means that there is very little guidance on
17 which constitutional doctrines—e.g., Equal Protection, Privileges and Immunities,
18 the Dormant Commerce Clause—provide protection to individuals seeking to
19 exercise their Second Amendment self defense rights. Further, to the extent that
20 these other constitutional doctrines intersect with the Second Amendment, and the
21 Supreme Court has recently provided more guidance of the scope of the individual
22 Second Amendment right, it is also unclear to me as a practitioner the degree to
23 which each of those doctrines afford protections to those exercising their Second
24 Amendment rights.

25 9. Absent Section 1021.11, which essentially punishes litigants and their
26 counsel for probing in litigation these unexplored areas of jurisprudence regarding
27 the Second Amendment in a way no other right or constitutional doctrine is
28 punished or dissuaded for a similar exploration in litigation, I would feel

1 unencumbered to counsel my clients on all novel and potentially meritorious
2 arguments that those clients might advance to vindicate their Second Amendment
3 rights in litigation against the government. But given that any one novel theory, no
4 matter how potentially meritorious, can result in both me and my clients paying the
5 government’s attorney’s fees and costs if a court does not agree that it has merit—
6 or if I am acting in good faith but am just plain wrong—I feel constrained to
7 counsel my clients to only plead narrowly, or to not plead at all. Thus, I do not
8 believe I am fulfilling my ethical obligation to act in my client’s best interests when
9 counseling them on Second Amendment challenges, in that I have a wife, school-
10 aged children, a mortgage, and other bills, and the specter of personally owing
11 hundreds of thousands of dollars to a government entity for representing a client on
12 a Second Amendment case advancing a novel theory no doubt colors the advice I
13 give to those clients about what to plead, no matter how ethical, brave, or
14 iconoclastic I believe I might be.

15 I declare under penalty of perjury of the laws of the State of California and
16 the United States that the foregoing is true and correct. Executed within the United
17 States on December 13, 2022.

18 *s/ Joshua Robert Dale*
19 _____
20 Joshua Robert Dale, declarant

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**EXHIBITS
TABLE OF CONTENTS**

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EXH NO.	DESCRIPTION	PAGE NO.
A	True and correct copy of email exchange with Meyerhoff from September 19th through September 22nd	8

EXHIBIT A

Joshua Robert Dale

From: Joshua Robert Dale
Sent: Thursday, September 22, 2022 11:29 AM
To: Robert Meyerhoff
Subject: RE: Further meet-and-confer on defendant's proposed Rule 12 motion [MA-Interwoven.FID88338]

We will file the dismissal today and the amended complaint tomorrow.

<p>Joshua Robert Dale Partner</p>  <p>MICHEL & ASSOCIATES, P.C. Attorneys at Law Environmental - Land Use - Firearms - Employment Law Civil Litigation - Criminal Defense</p>	<p>Direct: (562) 216-4448 Main: (562) 216-4444 Fax: (562) 216-4445 Email: jdale@michellawyers.com Web: www.michellawyers.com</p> <p>180 E. Ocean Blvd. Suite 200 Long Beach, CA 90802</p>
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From: Robert Meyerhoff <Robert.Meyerhoff@doj.ca.gov>
Sent: Tuesday, September 20, 2022 3:32 PM
To: Joshua Robert Dale <jdale@michellawyers.com>
Subject: Re: Further meet-and-confer on defendant's proposed Rule 12 motion

Joshua,

We will agree to not seek fees and costs as the prevailing party pursuant to Code of Civil Procedure section 1021.11 on (a) the claim for monetary damages, and (b) the dormant Commerce Clause claim, if you dismiss those claims with prejudice prior to our responding to the initial complaint.

Will you be able to file a First Amended Complaint by Friday (our current deadline to respond to the initial complaint)?

Thank you,
Rob

From: Joshua Robert Dale <jdale@michellawyers.com>
Sent: Monday, September 19, 2022 3:05 PM

To: Robert Meyerhoff


Subject: Further meet-and-confer on defendant's proposed Rule 12 motion

EXTERNAL EMAIL: This message was sent from outside DOJ. Please do not click links or open attachments that appear suspicious.


Rob-

Thank you for the productive call last week. I've reviewed the authority you provided. We are willing to amend the complaint to remove the monetary damages prayer and remove the second cause of action for violation of the dormant commerce clause. However, because the upcoming application of SB 1327 negatively impacts our clients if we voluntarily dismiss claims in this matter, as a condition of dismissing/amending at this point, we would need the state to stipulate to waive any claim for fees as a prevailing party under CCP section 1021.11 based solely on our voluntary dismissal of these claims and prayer during the pleading stage.

If you want to talk about this, I'm around for the next couple of hours as well as most of tomorrow.

<p>Joshua Robert Dale Partner</p> 	<p>Direct: (562) 216-4448 Main: (562) 216-4444 Fax: (562) 216-4445 Email: JDale@michellawyers.com Web: www.michellawyers.com</p> <p>180 E. Ocean Blvd. Suite 200 Long Beach, CA 90802</p>
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**CERTIFICATE OF SERVICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Case Name: *South Bay Rod & Gun Club, Inc. v. Bonta*
Case No.: 3:22-cv-01461-RBM-WVG

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States over 18 years of age. My business address is 180 East Ocean Boulevard, Suite 200 Long Beach, CA 90802. I am not a party to the above-entitled action.

I have caused service of the following documents, described as:

**DECLARATION OF JOSHUA ROBERT DALE IN SUPPORT OF
PLAINTIFFS’ REPLY TO DEFENDANT BONTA’S SUPPLEMENTAL
BRIEF**

on the following parties by electronically filing the foregoing on December 13, 2022 with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on December 13, 2022, at Long Beach, CA.

/s/Christina Castron
CHRISTINA CASTRON