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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**

11 ESPANOLA JACKSON, PAUL COLVIN, ) **CASE NO. C09-2143-RS**  
THOMAS BOYER, LARRY BARSETTI, )  
12 DAVID GOLDEN, NOEMI MARGARET ) **PLAINTIFFS' NOTICE OF UNOPPOSED**  
ROBINSON, NATIONAL RIFLE ) **MOTION AND MOTION TO DISMISS**  
13 ASSOCIATION OF AMERICA, INC., SAN ) **PLAINTIFF PAUL COLVIN; NOTICE OF**  
FRANCISCO VETERAN POLICE ) **MOTION AND MOTION TO DISMISS**  
14 OFFICERS ASSOCIATION, ) **PLAINTIFF THOMAS BOYER; POINTS**  
 ) **AND AUTHORITIES IN SUPPORT;**  
15 Plaintiffs ) **DECLARATION OF CLINTON B.**  
 ) **MONFORT**  
16 vs. )  
 ) Fed. R. Civ. P. 41(a)  
17 CITY AND COUNTY OF SAN )  
FRANCISCO, THE MAYOR OF )  
18 SAN FRANCISCO, AND THE CHIEF ) Date: November 8, 2012  
OF THE SAN FRANCISCO POLICE ) Time: 1:30 p.m.  
19 DEPARTMENT, in their official capacities, ) Place: Courtroom 3 - 17th Floor  
and DOES 1-10, ) 450 Golden Gate Ave.  
20 ) San Francisco, CA 94102  
Defendants. )  
21 )

1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:** Notice is hereby given  
3 that on November 8, 2012, at 1:30 p.m., or as soon thereafter as counsel may be heard by the  
4 above-entitled Court, located at 450 Golden Gate Ave., San Francisco, California, in the  
5 courtroom of the Honorable Judge Richard Seeborg, Plaintiffs will and hereby do move for  
6 voluntary dismissal of certain individual plaintiffs' claims pursuant to Rule 41(a) of the Federal  
7 Rules of Civil Procedure.

8 Plaintiffs will seek an order dismissing all claims of the individual plaintiffs Thomas Boyer  
9 and Paul Colvin against all defendants. Mr. Colvin seeks dismissal of his claims against  
10 defendants due to his age, serious medical condition, and unreliable memory. The City does not  
11 oppose Mr. Colvin's dismissal. Dismissal of Mr. Boyer's claims is proper because he has  
12 legitimate concerns regarding his continued participation in this lawsuit, and because the City  
13 cannot establish any legally cognizable prejudice resulting from his removal.

14 This motion shall be based on this notice of motion and motion, the memorandum of points  
15 and authorities in support, the declarations filed concurrently herewith, and upon any further  
16 matters the Court deems appropriate.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. INTRODUCTION**

19 Plaintiffs Colvin and Boyer initially joined this lawsuit to secure the ability to exercise their  
20 right to keep and bear arms within the City and County of San Francisco free from threat of  
21 criminal prosecution in the same manner that all other Americans do. But, in light of Mr. Colvin's  
22 age, memory loss, and current medical condition and in light of Mr. Boyer's legitimate fears of  
23 harassment and retaliation by the City, they have each realized that the pressures and risks of  
24 actively participating in this lawsuit have become too great. No matter how deeply and sincerely  
25 they believe the challenged ordinances unconstitutionally infringe upon their Second Amendment  
26 liberties, the risks are simply not worth the fight. And they each seek dismissal from this lawsuit.

27 The City has indicated it will not oppose Mr. Colvin's dismissal, but seems insistent on  
28 forcing Mr. Boyer to continue his active participation in this lawsuit over his legitimate concerns.

1 Through past discovery efforts, the City delved into irrelevant and private details about Mr.  
2 Boyer's gun ownership and possession, and now seeks to keep him in the case and compel him to  
3 disclose such details when all he seeks now is to be released from the case and to be left alone.

4 Defendants will suffer no legally cognizable prejudice if the court dismisses Mr. Boyer at  
5 this time. The City has expended no significant time or effort in specifically defending itself  
6 against Mr. Boyer's claims. Plaintiffs have neither engaged in excessive delay nor demonstrated a  
7 lack of diligence in prosecuting their claims. Mr. Boyer has explained his legitimate reasons for  
8 seeking dismissal. And the City has not yet filed a motion for summary judgment, such that might  
9 suggest Mr. Boyer seeks dismissal of his claims to prevent an unfavorable final ruling on the  
10 merits. Indeed, four individual plaintiffs and two organizational plaintiffs remain willing and able  
11 to continue pursuit of their identical claims and they each remain available for deposition.

12 Absent any legal harm to the City by Mr. Boyer's dismissal, the Court should reject the  
13 City's attempt to coerce his continued participation and grant Plaintiffs' request to dismiss the  
14 claims of both Mr. Boyer and Mr. Colvin against all defendants.

15  
16 **II. THE COURT SHOULD GRANT PLAINTIFFS' UNOPPOSED MOTION TO  
DISMISS PLAINTIFF PAUL COLVIN**

17 The City has indicated that it will not oppose Plaintiffs' motion to dismiss Mr. Colvin's  
18 claims against all defendants, based on his age, medical condition, and unreliable memory.  
19 Declaration of Clinton B. Monfort ("Monfort Decl.") ¶ 2. As such, Plaintiffs request this Court  
20 issue an order granting Plaintiffs' Unopposed Motion to Dismiss Plaintiff Paul Colvin and  
21 dismissing all claims brought by Mr. Colvin against all defendants.

22  
23 **III. PLAINTIFFS' MOTION TO DISMISS PLAINTIFF THOMAS BOYER IS PROPER  
BECAUSE MR. BOYER HAS LEGITIMATE CONCERNS REGARDING HIS  
24 CONTINUED PARTICIPATION AND BECAUSE THE CITY WILL SUFFER NO  
LEGAL PREJUDICE**

25 Rule 41(a)(2) of the Federal Rules of Civil Procedure allows a plaintiff, pursuant to court  
26 order, to voluntarily dismiss an action by court order at any time. *Westlands Water Dist. v. United*  
27 *States*, 100 F.3d 94, 96 (9th Cir. 1996) (citing *Stevedoring Servs. of Am. v. Armilla Int'l B.V.*, 889  
28 F.2d 919, 921 (9th Cir. 1989)). Even when the defendant has filed an answer and refuses to

1 stipulate to a voluntary dismissal, the Court has discretion to grant a motion for voluntary  
2 dismissal “upon such terms and conditions as [it] deems proper.” *Burnette v. Godshall*, 828 F.  
3 Supp. 1439, 1443 (N.D. Cal. 1993) (quoting Fed. R. Civ. P. 41(a)(2)). The Court should freely  
4 grant a motion for voluntary dismissal unless the defendant can demonstrate that it will suffer  
5 some “plain legal prejudice” as a result. *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001).  
6 Because Mr. Boyer has legitimate concerns regarding his continued participation in this lawsuit,  
7 and because the City cannot establish any legally cognizable prejudice resulting from Mr. Boyer’s  
8 dismissal, the Court should grant Plaintiffs’ request.

9  
10 **A. Mr. Boyer Has Legitimate Concerns Regarding His Continued Participation in  
this Lawsuit and Seeks Dismissal of His Claims**

11 Mr. Boyer previously faced harassment from the City and its agents which followed his  
12 participation in other litigation against the City. Boyer Decl. ¶ 3. He legitimately fears further  
13 retaliation from the City and, for that reason, he wishes to be released from the case at this time.  
14 Boyer Decl. ¶ 3.

15 Additionally, Mr. Boyer is HIV positive, and he believes that his ongoing participation in  
16 this lawsuit and the stress it causes is deleterious to his health. Boyer Decl. ¶ 5. For this additional  
17 reason, Mr. Boyer wishes to be dismissed from this lawsuit. Boyer Decl. ¶ 5.

18 Further, in December 2011, during the preparation of responses to the City’s written  
19 discovery, Mr. Boyer first became concerned that the types of questions posed by the City would  
20 expose to the government personal information regarding, among other things, the types and  
21 number of firearms he owns. Boyer Decl. ¶ 2. He was particularly concerned about requests for an  
22 itemized list of all firearms and ammunition he had possessed at any point and for any duration  
23 since 2007,<sup>1</sup> Boyer Decl. ¶ 2, the answers to which would entail the creation of a de facto

24  
25 <sup>1</sup> The City specifically asked Mr. Boyer to identify “each firearm that has been in [his] private  
26 residence while in your possession, custody or control at any time since August 2007, including  
27 but not limited to its make, model and serial number and the period of time during which [he]  
28 kept that firearm in [his] home.” Pl. Boyer’s Resp. to Defs.’ Interrogs. Set One 4 (attached as Ex.  
B to Monfort Decl.). The City also asked him to “[i]dentify every type of ammunition [he] has  
purchased for or used in each of the firearms [he] identified in response to Interrogatory No. 2,  
including but not limited to its manufacturer or brand name, caliber, jacket construction, place of

1 registration of his gun collection with the City. Mr. Boyer agreed to provide substantive and  
2 relevant responses to the City’s written discovery, but Plaintiffs’ counsel raised numerous  
3 objections consistent with Mr. Boyer’s concerns. *See, e.g.*, Pl. Boyer’s Resp. to Defs.’ Interrogs.  
4 Set One 4-8 (attached as Ex. B to Monfort Decl.). Mr. Boyer, then satisfied that his sensitive,  
5 personal information would not be divulged to the City, elected to remain a party to this action for  
6 the time. Boyer Decl. ¶ 2.

7 In recent weeks, however, Mr. Boyer again raised concerns that his continued participation  
8 in this lawsuit would ultimately result in the City learning of his sensitive, personal information  
9 and further intimidation and harassment, similar to that faced following his past participation in  
10 litigation against the City. Boyer Decl. ¶ 4. Because the City is the party seeking to force Mr.  
11 Boyer’s deposition (and continued participation in this suit), the common avenues for protecting a  
12 party’s privacy, including the filing of deposition testimony under seal, are insufficient to alleviate  
13 these concerns. Mr. Boyer further fears retaliation his continued participation in this lawsuit in  
14 any other capacity, and he wishes to be removed from the lawsuit to prevent this.

15 For each of these reasons, Mr. Boyer seeks dismissal of his claims against all defendants.  
16 The identical claims of Plaintiffs Jackson, Barsetti, Golden, Robinson, the National Rifle  
17 Association, and the San Francisco Veteran Police Officers Association would remain.

18  
19 **B. The City Cannot Establish Any Legally Cognizable Prejudice Resulting From Dismissal**

20 Dismissal of Mr. Boyer’s claims is proper because the City cannot establish any legally  
21 cognizable prejudice that dismissal of Mr. Boyer’s claims would invite upon it. When ruling on a  
22 Rule 41 motion to dismiss, the district court must first determine whether the defendant will  
23 suffer legal prejudice. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1169 (9th Cir. 1994). Legal  
24 prejudice “is just that – prejudice to some legal interest, some legal claim, some legal argument.”  
25 *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996). To decide the question of  
26 “legal prejudice” to a defendant, courts generally consider: (1) The defendant’s effort and expense  
27 \_\_\_\_\_  
28 purchase and date of purchase.” Pl. Boyer’s Resp. to Defs.’ Interrogs. Set One 6(attached as Ex. B  
to Monfort Decl.).

1 involved in preparing for trial; (2) excessive delay and lack of diligence on the part of plaintiff in  
2 prosecuting the action; (3) insufficient explanation of need to take a dismissal; and (4) whether  
3 summary judgment has been filed by the defendant. *United States v. Berg*, 190 F.R.D. 539, 543  
4 (E.D. Cal. 1999).<sup>2</sup> None of these factors counsel in favor of denying Mr. Boyer's request to be  
5 released from this lawsuit.

6 First, there remain in this litigation four individual plaintiffs, who are each willing and  
7 physically able to continue pursuit of their identical claims against all defendants. Any effort or  
8 expense the City has already expended in preparing this case for summary judgment or trial will  
9 undoubtedly be essential to the City's continued defense against the remaining plaintiffs' claims.  
10 Further, any efforts directed toward Mr. Boyer alone have been insufficient to justify denial of  
11 Mr. Boyer's request for dismissal. Indeed, his claims are identical to those remaining, the City's  
12 previously raised standing and ripeness defenses applied equally to each individual plaintiff, Mr.  
13 Boyer's deposition has not yet taken place, and the only written discovery propounded on Mr.  
14 Boyer was simply copied from the discovery propounded on every other individual plaintiff.<sup>3</sup> All  
15 of these points make it highly unlikely that the City has spent any significant time or effort  
16 defending itself specifically against Mr. Boyer's claims.

17 Further, Plaintiffs have not engaged in "excessive delay" or shown a "lack of diligence" in  
18 prosecuting their claims. While it is true this case was filed some three years ago, the long  
19 procedural history is not the fault of Plaintiffs. In fact, all proceedings were stayed for more than a  
20 year – on the parties' stipulation – pending the determination of whether the Second Amendment  
21 applies against the states. Min. Order, Aug. 27, 2009 [Doc. No. 21]. And even then, the City itself  
22 opposed Plaintiffs' motion to lift that stay when the U.S. Supreme Court ruled in *McDonald v.*

23 \_\_\_\_\_  
24 <sup>2</sup> Conversely, courts have concluded that the following harms do not constitute the required legal  
25 prejudice: (1) any harm flowing from defendant facing prospect of second lawsuit or plaintiff  
26 merely gaining a tactical advantage; (2) uncertainty because a dispute remains unresolved; (3)  
27 expenses incurred in defending against a lawsuit; and (4) the threat of future litigation. *Petaluma*  
*City Sch. Dist. v. Victor D.*, No. 00-01979, 2001 WL 492466, at \*2 (N.D. Cal. May 3, 2001).

28 <sup>3</sup> Compare Defs.' Interrogs. to Pl. Espanola Jackson Set One (attached as Ex. B to Monfort  
Decl.), with Pl. Boyer's Resp. to Defs.' Interrogs. Set One (attached as Ex. B to Monfort Decl.).

1 *City of Chicago*, 561 U.S. 2025, 130 S. Ct. 3020 (2010), that it does. Defs.’ Partial Oppn. Mot.  
2 Relief from Stay [Doc. No. 32.]. The City thereafter filed its second Rule 12(b)(1) motion to  
3 dismiss, arguing that Plaintiffs lacked standing to challenge the ordinances and the case was not  
4 yet ripe for review. Defs.’ Mem. Supp. Mot. Dismiss [Doc. No. 61] 12:17-20. That motion was  
5 not heard until May 5, 2011, and it was not decided until September 27, 2011. Min. Entry, May 5,  
6 2011 [Doc. No. 81]; Order Den. Mot. Dismiss for Lack of Standing [Doc. No. 89].) As a result,  
7 the City was not even required to file its answer until October 17, 2011. Order Setting Deadline to  
8 Resp. to Compl. [Doc. No. 91]. And since that time, Plaintiffs have continued to seek the prompt  
9 conclusion on its merits, filing a motion for judgment on the pleadings and a motion for  
10 preliminary injunction. Pls.’ Mot. Partial J. Pldgs. [Doc. No. 109]; Pls.’ Mot. Prelim. Inj. [Doc.  
11 No. [Doc. No. 136]. As such, denial of Mr. Boyer’s request on grounds of delay or lack of  
12 diligence is improper.

13 Third, Mr. Boyer has explained his need to dismiss his claims against all defendants in Part  
14 II.A. above and in his supporting declaration. In light of Mr. Boyer’s legitimate concerns, forcing  
15 his continued participation is not warranted as the City can show no other legally cognizable  
16 prejudice.

17 The final factor also weighs in favor of granting dismissal as no motion for summary  
18 judgment has yet been filed by the City, and so Mr. Boyer does not seek dismissal of his claims  
19 simply to prevent an unfavorable final ruling on the merits.

20 As an aside, the City will suffer no legal harm from being unable to pursue the deposition of  
21 Mr. Boyer as a party if the Court dismisses his claims. It is Plaintiffs’ position that the individual  
22 circumstances of *any* person are irrelevant to the merits of this facial challenge. To the extent the  
23 City disagrees, any testimony it could elicit regarding Mr. Boyer’s individual circumstances or his  
24 personal desire or ability to engage in Second Amendment conduct would certainly be irrelevant  
25 to the determination of whether the remaining plaintiffs’ claims have merit.

26 In sum, the City suffers no legally cognizable harm from Mr. Boyer’s dismissal at this  
27 juncture, all four factors weigh in Plaintiffs’ favor, and Plaintiffs’ motion for voluntary dismissal  
28 of Mr. Boyer’s claims against all defendants should be granted.

1 **III. CONCLUSION**

2 Based on the foregoing, Plaintiffs respectfully request that this Court grant Plaintiffs’  
3 Unopposed Motion to Dismiss Plaintiff Paul Colvin. Plaintiffs further request that this Court  
4 grant Plaintiffs’ Motion to Dismiss Plaintiff Thomas Boyer.

5 Date: October 3, 2012

**MICHEL & ASSOCIATES, P.C.**

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s/ C. D. Michel  
C. D. Michel  
Attorney for Plaintiffs

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**DECLARATION OF CLINTON B. MONFORT**

I, Clinton B. Monfort, declare as follows:

1. I am over the age of eighteen and not a party to this action. I am an attorney licensed to practice law before all district courts in the State of California. I am an associate attorney at the law firm Michel & Associates, P.C., attorneys of record for plaintiffs in this action.

2. On or about September 19, 2012, I contacted Ms. Christine Van Aken, counsel of record for defendants, via e-mail regarding her client's position regarding the dismissal of plaintiffs Colvin and Boyer's claims. Ms. Van Aken responded via email on September 20, 2012, indicating that the City would oppose dismissal as to both plaintiffs. In a responsive email to Ms. Van Aken, I clarified that Mr. Colvin's age, medical condition, and unreliable memory made it impossible for him to continue as a plaintiff, and that Mr. Boyer had faced harassment from agents of the City and County of San Francisco ("the City") during his participation in previous litigation against the City and reasonably feared similar retaliation in connection with this lawsuit. In light of that further information, Ms. Van Aken stated that she would not object to Mr. Colvin's dismissal, but would continue to object to Mr. Boyer's dismissal.

3. On or about November 17, 2011, the City served Plaintiffs David Golden, Espanola Jackson, Thomas Boyer, Larry Barsetti, Noemi Margaret Robinson, and Paul Colvin with a first set of interrogatories. Each plaintiff was asked identical questions. As an example of the written discovery propounded on plaintiffs, attached hereto as "Exhibit A" is a true and correct copy of Plaintiff [sic] City and County of San Francisco's Interrogatories to Espanola Jackson (Set One).

4. On or about December 16, 2012, Plaintiff Thomas Boyer responded to the City's first set of written interrogatories. Plaintiff Boyer's original response was served on defendants by my office via mail. Attached hereto as "Exhibit B" is a true and correct copy of Plaintiff Thomas Boyer's Response to Defendants City and County of San Francisco Interrogatories Set One.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 3, 2012.

  
\_\_\_\_\_  
Clinton B. Monfort

**UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

ESPANOLA JACKSON, PAUL COLVIN, ) **CASE NO.: CV-09-2143-RS**  
 THOMAS BOYER, LARRY BARSETTI, )  
 DAVID GOLDEN, NOEMI MARGARET )  
 ROBINSON, NATIONAL RIFLE ) **CERTIFICATE OF SERVICE**  
 ASSOCIATION OF AMERICA, INC., SAN )  
 FRANCISCO VETERAN POLICE )  
 OFFICERS ASSOCIATION, )

Plaintiffs

vs.

CITY AND COUNTY OF SAN )  
 FRANCISCO, THE MAYOR OF )  
 SAN FRANCISCO, AND THE CHIEF )  
 OF THE SAN FRANCISCO POLICE )  
 DEPARTMENT, in their official capacities, )  
 and DOES 1-10, )

Defendants.

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of

**PLAINTIFFS' NOTICE OF UNOPPOSED MOTION AND MOTION TO DISMISS  
 PLAINTIFF PAUL COLVIN; NOTICE OF MOTION AND MOTION TO DISMISS  
 PLAINTIFF THOMAS BOYER; POINTS AND AUTHORITIES IN SUPPORT;  
 DECLARATION OF CLINTON B. MONFORT**

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

Wayne Snodgrass, Deputy City Attorney  
 Christine Van Aken, Deputy City Attorney  
 Office of the City Attorney  
 1 Drive Carlton B. Goodlett Place  
 City Hall, Room 234  
 San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 3, 2012.

/s/ C. D. Michel  
 C. D. Michel  
 Attorney for Plaintiffs