

1 C. D. Michel - S.B.N. 144258
Don B. Kates - S.B.N. 39193
2 Glenn S. McRoberts - SBN 144852
Hillary J. Green - S.B.N. 243221
3 MICHEL & ASSOCIATES, PC
180 E. Ocean Boulevard, Suite 200
4 Long Beach, CA 90802
Telephone: 562-216-4444
5 Facsimile: 562-216-4445
Email: cmichel@michellawyers.com
6 Attorneys for Plaintiffs

7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 ESPANOLA JACKSON, PAUL
COLVIN, THOMAS BOYER,
12 LARRY BARSETTI, DAVID
GOLDEN, NOEMI MARGARET
13 ROBINSON, NATIONAL RIFLE
ASSOCIATION OF AMERICA,
14 INC. SAN FRANCISCO VETERAN
POLICE OFFICERS
15 ASSOCIATION,

16 Plaintiffs

17 vs.

18 CITY AND COUNTY OF SAN
19 FRANCISCO, MAYOR GAVIN
NEWSOM, IN HIS OFFICIAL
20 CAPACITY; POLICE CHIEF
HEATHER FONG, in her official
21 capacity, and Does 1-10,

22 Defendants.

) **CASE NO.: CV-09-2143-RS**
) **NOTICE OF MOTION AND MOTION**
) **FOR RELIEF FROM STAY**

) Date: July 22, 2010
) Time: 1:30 p.m.
) Courtroom: 3

23
24 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

25 Please take notice that Plaintiffs will make this motion for relief from the stay before this
26 court on July 22, 2010 at 1:30 p.m., or as soon thereafter as the matter can be heard, in Courtroom
27 No. 3 of the United States Courthouse located at 450 Golden Gate Avenue, 17th Floor, San
28 Francisco, California.

1 The motion for relief from stay is based on this Notice, the Motion and Memorandum of
2 Points and Authorities in support thereof submitted herewith, the Declaration of C.D. Michel
3 filed herewith, the pleadings, records, and papers filed herein, and any other such evidence or
4 argument as may be presented or heard by the Court on or before the motion.

5

6

Date: June 17, 2010

MICHEL & ASSOCIATES, PC

7

/s/

8

C. D. Michel
Attorney for Plaintiffs

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Plaintiffs move this Court for relief of stay and an Order to lift the stay on the grounds that the stay is no longer justified. The stay was originally granted because this case begs the question of whether the Second Amendment of the United States Constitution is incorporated into the Fourteenth Amendment and thus restricts state and local governments from infringing on the constitutional right to keep and bear arms. Rather than litigate that issue in this case, the parties agreed that it was wiser to wait for that issue to be resolved by the Ninth Circuit *en banc* in *Nordyke v. King*, 575 F.3d 890 (9th Cir., 2009, *en banc* review granted).

But the *Nordyke* case was then itself stayed pending the resolution of the incorporation issue by the United States Supreme Court in *McDonald v. City of Chicago* (No. 08-1521). A decision in the *McDonald* case will be issued by June 28, 2010, the end of the Supreme Court's current session.

Since *McDonald* will resolve the incorporation issue, there is no longer any need to wait for *Nordyke* to be decided.

II. STATEMENT OF FACTS

On May 15, 2009, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief against Defendants on Second Amendment grounds, challenging the validity of three firearms-related ordinances enacted by the City and County of San Francisco. Specifically, the ordinances challenged are: (1) San Francisco Police Code ("SFPC") § 4512 which prohibits the keeping of a handgun in a residence unless stored in a locked container or disabled with a trigger lock; (2) SFPC § 613.10(g), prohibiting the sale of ammunition which serves no sporting purpose; and (3) SFPC § 1290, which prohibits the discharge of any firearms within the limits of the City and County of San Francisco. (Declaration of C.D. Michel at ¶ 2).

Defendants filed a 12(b)(1) Motion to Dismiss Plaintiff's Complaint for lack of subject matter jurisdiction on July 9, 2009. The hearing was set for September 23, 2009.

On August 24, 2009, Plaintiff's filed a First Amended Complaint which made the Motion to Dismiss moot. (Declaration of C.D. Michel at ¶ 3).

1 On August 27, 2009, the Court held an Initial Case Management Conference whereby the
 2 parties stipulated to stay the case pending the resolution of whether the Second Amendment was
 3 to be incorporated against the states, which was to be considered in the Appellate Court in
 4 *Nordyke v. King*, on September 24, 2009. (Declaration of C.D. Michel at ¶ 4 - 7; *See* Exhibit A;
 5 Exhibit B; Exhibit C; Exhibit D).

6 Thereafter, *Nordyke* was itself stayed pending the United States Supreme Court ruling on
 7 the incorporation issue raised in *McDonald v. City of Chicago*. (Declaration of C.D. Michel at ¶
 8 8; *See* Exhibit E).

9 The United States Supreme Court will issue a decision resolving the Second Amendment
 10 incorporation issue *McDonald v. City of Chicago* (No. 08-1521) by the end of this Term.
 11 (Declaration of C.D. Michel at ¶ 10; *See* Exhibit F).

12 Upon the resolution of the Second Amendment incorporation issue, this Court is to be
 13 contacted immediately, the stay is to be lifted, and the Defendants shall have 20 days to respond
 14 to the Plaintiff's First Amended Complaint. (*See* Exhibit A).

15 **III. ARGUMENT**

16 **A. Judicial Economy Warrants Relief from Stay Because The Issue Of** 17 **Incorporation, Upon Which The Stay Was Originally Based, Will Be Resolved**

18 “[T]he power to stay proceedings is incidental to the power inherent in every court to
 19 control the disposition of the causes on its docket with economy of time and effort for itself,
 20 counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In the interests of
 21 judicial economy, “[a] trial court may, with propriety, find it is efficient for its own docket and
 22 the fairest course for the parties to enter a stay of an action before it, *pending the resolution of*
 23 *independent proceedings which bear upon the case.*” *Dependable Highway Express, Inc. v.*
 24 *Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir., 2007) (citing *Leyva v. Certified Grocers of*
 25 *California, Ltd.*, 593 F.2d 857, 863 (9th Cir., 1979)) (emphasis added).

26 The above captioned case has been stayed pending a decision from the Ninth Circuit *en*
 27 *banc* panel in *Nordyke v. King* 575 F.3d 890 (9th Cir., 2009). In turn, *Nordyke* is effectively
 28 stayed pending the United States Supreme Court's ruling in *McDonald v. City of Chicago* (No.

1 08-1521). The issue that warranted *en banc* review in *Nordyke* was the Ninth Circuit three judge
2 panel decision that the Second Amendment to the United States Constitution is incorporated by
3 the Fourteenth Amendment and thus applicable to the states. (Declaration of C.D. Michel at ¶ 9).

4 The question presented in *McDonald v. City of Chicago* is “[w]hether the Second
5 Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth
6 Amendment’s Privileges or Immunities or Due Process Clauses.” (See Exhibit F). This issue
7 will be decided before the end of the current United States Supreme Court Term.

8 Because the United States Supreme Court will have already addressed the incorporation
9 issue and determined whether the Second Amendment applies to the state and local governments,
10 there is no need for the stay to remain in effect until a *Nordyke* decision is issued.

11 Rather, the resolution of the Second Amendment incorporation issue as decided by the
12 United States Supreme Court alleviates the need to wait for the *Nordyke* decision, permits the
13 above captioned case to proceed without prejudicing the Defendant, and promotes judicial
14 economy.

15 **IV. CONCLUSION**

16 Plaintiff respectfully requests relief from the stay and an order to lift the stay to expedite the
17 disposition of the action.

18
19 Date: June 17, 2010

MICHEL & ASSOCIATES, PC

20
21 /S/

22 C. D. Michel
23 Attorney for Plaintiffs
24
25
26
27
28

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

4	ESPANOLA JACKSON, PAUL COLVIN,)	CASE NO.: CV-09-2143-RS
	THOMAS BOYER,)	
5	LARRY BARSETTI, DAVID GOLDEN,)	
	NOEMI MARGARET ROBINSON,)	CERTIFICATE OF SERVICE
6	NATIONAL RIFLE ASSOCIATION OF)	
	AMERICA, INC. SAN FRANCISCO)	
7	VETERAN POLICE OFFICERS)	
	ASSOCIATION,)	
8)	
)	
9	Plaintiffs)	
)	
10	vs.)	
)	
11	CITY AND COUNTY OF SAN)	
	FRANCISCO, MAYOR GAVIN)	
12	NEWSOM, IN HIS OFFICIAL)	
	CAPACITY; POLICE CHIEF HEATHER)	
13	FONG, in her official capacity, and Does 1-)	
	10,)	
14)	
	Defendants.)	
15)	

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:

NOTICE OF MOTION AND MOTION FOR RELIEF FROM STAY

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
Sherri Kaiser, Deputy City Attorney
sherri.kaiser@sfgov.org
City and County of San Francisco
Office of the City Attorney
City Hall 1 Drive Carlton B.
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.
Executed on June 17, 2010.

_____/S/
C. D. Michel
Attorney for Plaintiffs'