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9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE EASTERN DISTRICT OF CALIFORNIA
 12 SACRAMENTO DIVISION

13 **STATE AMMUNITION INC., dba**
 14 **www.stateammo.com; JIM OTTEN, dba**
 15 **www.a1ammo.com, and JIM RUSSELL**
 16 **USMC (Ret.),**

17 Plaintiffs,

18 v.

19 **STEVEN LINDLEY, in his official**
 20 **capacity as Acting Chief of the**
 21 **California Department of Justice,**
 22 **Bureau of Firearms, and DOES 1**
 23 **through 10,**

24 Defendants.

Case No. 10-CV-01864 -MCE-KJN

- (1) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT STEVEN LINDLEY'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO STAY THE ACTION; and**
- (2) **DECLARATION OF PETER A. KRAUSE IN SUPPORT THEREOF**

Date: November 18, 2010
 Time: 2:00 p.m.
 Ctrm: No. 7 - 14th Floor
 Judge: Hon. Morrison C. England, Jr.
 Trial Date: None
 Action Filed: July 16, 2010

[Notice of Motion and Request for Judicial Notice Lodged Concurrently Herewith]

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1 **SUMMARY OF ARGUMENT**

2 In 2009, the Governor signed California Assembly Bill (AB) 962, the “Anti-Gang
3 Neighborhood Protection Act,” which places certain restrictions on the purchase, sale, and
4 display of handgun ammunition. In this action plaintiffs allege that AB 962 will, when it
5 goes into effect in February 2011, violate the Commerce Clause, deprive them of Due
6 Process and Equal Protection under the Fourteenth Amendment, and unreasonably
7 infringe on their right to keep and bear arms in violation of the Second Amendment.
8 Plaintiffs’ claims should be dismissed on numerous grounds.

9 Federal courts are courts of limited jurisdiction. Article III does not grant a federal
10 court jurisdiction to consider this action because the issues presented are not ripe for
11 review. Until the challenged statutes take effect next year and there is a legitimate threat
12 of enforcement, the law’s application, and any harm that plaintiffs might suffer, is purely
13 speculative. The Court should therefore withhold its jurisdiction to issue declaratory
14 relief. Furthermore, although state officers may be sued in federal court under limited
15 circumstances, this suit against Acting Chief Lindley is based solely upon his official
16 capacity at the California Department of Justice and his generalized duty to enforce state
17 law. The action therefore is the equivalent of a prohibited action against the State itself;
18 hence plaintiffs’ claims are barred by the Eleventh Amendment.

19 Should any portion of plaintiffs’ claims survive dismissal, the Court should exercise
20 its discretion to stay the action to allow a related state court case to proceed to judgment.
21 For the foregoing reasons, and as more fully explained below, the State respectfully
22 requests that the Court grant this Motion.

23 **ALLEGATIONS OF THE COMPLAINT**

24 Plaintiffs¹ allege that AB 962 violates the Commerce Clause because it discriminates
25 against ammunition sellers and purchasers outside of California by purportedly banning

26 _____
27 ¹ Plaintiffs are State Ammunition, Inc., an online retail ammunition store, Jim Otten, an
28 individual who resides in Minnesota and operates an online retail ammunition store, and Jim
Russell, a California resident who purchases ammunition through the internet from sources
located outside of California. They are referred to collectively as “Plaintiffs.”

1 sales other than those completed in face-to-face transactions. They argue that under AB
2 962, residents of California are prohibited from purchasing ammunition from out-of-state
3 sellers online or by mail-order, and sellers in California are prohibited from selling
4 ammunition online or by mail-order to purchasers outside of California. (¶¶ 27-36.²)

5 Plaintiffs also argue that AB 962 violates Due Process and Equal Protection under
6 the Fourteenth Amendment because: (1) AB 962 explicitly discriminates between
7 California and out-of-state residents; (2) the definition of “handgun ammunition” is
8 unconstitutionally vague; and (3) AB 962 is impossible to comply with. (¶¶ 37-44.)

9 Finally, Plaintiffs allege that AB 962 generally violates the Second Amendment and
10 cannot survive the strict scrutiny analysis which they contend the courts must apply to
11 laws that infringe upon individual and fundamental rights. (¶¶ 45-48.)

12 Plaintiffs sue defendant Steven Lindley in his official capacity as the Acting Chief of
13 the California Department of Justice’s Bureau of Firearms. (¶ 8.) Chief Lindley disputes
14 the accuracy of Plaintiffs allegations, but accepts them as true for purposes of this Motion.

15 APPLICABLE LEGAL STANDARD

16 Rule 12(b)(1) allows a party to raise the defense that a court lacks jurisdiction over
17 the subject matter of a claim. “A motion to dismiss for lack of subject matter jurisdiction
18 may either attack the allegations of the complaint or may be made as a 'speaking motion'
19 attacking the existence of subject matter jurisdiction in fact.” *Thornhill Publ'g Co. v. Gen.*
20 *Tel. & Elecs.*, 594 F.2d 730, 733 (9th Cir. 1979). The instant Rule 12(b)(1) motion
21 attacks the allegations of the complaint, so the district court must accept the allegations of
22 the complaint as true. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.
23 1994). But the burden of proof on a Rule 12(b)(1) motion is on the party seeking to
24 invoke the court’s subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*,
25 511 U.S. 375, 377 (1944); *Thornhill*, 594 F.2d at 733.

26
27
28 ² All citations using only the paragraph symbol are to the Complaint filed July 16, 2010.

1 **ARGUMENT**

2 **I. PLAINTIFFS HAVE NOT ALLEGED A RIPE CONTROVERSY.**

3 A district court’s role is neither to issue advisory opinions nor to declare rights in
4 hypothetical cases, but to adjudicate live cases or controversies consistent with the powers
5 granted the judiciary in Article III of the Constitution. In their complaint, Plaintiffs allege
6 that AB 962 will have a host of unconstitutional effects, but the act does not even go into
7 effect until February 1, 2011. Hence, the Court cannot know precisely how the law might
8 apply to, or be enforced against, these Plaintiffs. Because the allegations plead in the
9 complaint are based on conjecture, speculation, and a misreading of AB 962, the issues
10 presented are not ripe for adjudication by this Court.

11 The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides in pertinent part that
12 in “a case of actual controversy within its jurisdiction, . . . any court of the United States,
13 upon the filing of any appropriate pleading, may declare the rights and other legal
14 relations of any interested party seeking such declaration.” The “actual controversy”
15 requirement of section 2201 refers to the type of cases and controversies that are
16 justiciable under Article III; i.e., cases involving a substantial controversy between parties
17 having adverse interests of sufficient immediacy and reality. *Aetna Life Ins. Co. of*
18 *Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937); *MedImmune, Inc. v. Genentech,*
19 *Inc.*, 549 U.S. 118, 125-126 (2007).

20 The basic rationale of the ripeness doctrine “is to prevent the courts, through
21 premature adjudication, from entangling themselves in abstract disagreements.” *Thomas v.*
22 *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985). The central concern is to
23 avoid making decisions that depend on uncertain or contingent future events that may not
24 occur as anticipated, or may not occur at all. *Cardenas v. Anzai*, 311 F.3d 929, 934 (9th
25 Cir. 2002). Ripeness is, thus, a question of timing. See *Regional Rail Reorganization Act*
26 *Cases*, 419 U.S. 102, 140 (1974).

27 Plaintiffs seek to invalidate AB 962 in its entirety based on what they *predict* its
28 effects will be, yet can offer no facts to show that events will unfold as they anticipate. To

1 compound matters, Plaintiffs misrepresent how AB 962 will operate.³ The hypothetical
2 nature of this case is accentuated by the fact that the Penal Code provisions they challenge
3 have not been enforced and will not take effect for several months. Until AB 962 is
4 operational, there is no way to know how the law will actually be enforced, or what its
5 effects might be on plaintiffs and others. See *Toilet Goods Ass'n v. Gardner*, 387 U.S.
6 158, 164 (1967) (pre-enforcement dispute not ripe where regulation's impact could not
7 "be said to be felt immediately by those subject to it in conducting their day-to-day
8 affairs").

9 Ripeness also requires a threat of imminent harm. Neither the mere existence of a
10 proscriptive statute nor a generalized threat of prosecution satisfies the "case or
11 controversy" requirement. *San Diego County Gun Rights Comm'n v. Reno*, 98 F.3d 1121,
12 1126-27 (9th Cir. 1996). Here, Plaintiffs cannot even allege a generalized threat of
13 prosecution or enforcement because the act remains dormant. And while Plaintiffs allege
14 that "residents of California will now be unable to purchase ammunition from out-of-state
15 sellers, and will be forced to personally travel to some location just to buy ammunition
16 subject to lack of stock, lack of product availability, and inflated prices" (§ 32), and that
17 "out of state vendors will simply refuse to sell or ship [ammunition] to California
18 residents" (§ 33), these are predictive factual and legal conclusions, not allegations that
19 the Court must accept as true. As the court in *San Diego Gun Rights Comm'n* said:

20 A concrete factual situation is necessary to delineate the boundaries of what
21 conduct the government may or may not regulate. . . . As we have previously
22 observed, "the District Court should not be forced to decide ... constitutional
23 constitutional claims would be devoid of any factual context whatsoever.
24 Neither the district court nor this court can "be umpire to debates concerning
25 harmless, empty shadows."

25 ³ For instance, Plaintiffs allege that under AB 962, "residents of California will now be
26 unable to purchase ammunition from out-of-state sellers." (§ 32.) This is false – individuals in
27 California will still be able to purchase handgun ammunition from out-of-state sellers. AB 962
28 simply will require that the transaction be completed face-to-face. Cal. Penal Code § 12318
("Commencing February 1, 2011, the delivery or transfer of ownership of handgun ammunition
may only occur in a face-to-face transaction.").

1 *Id.* at 1132-33 (citations omitted). For the same reasons, the Court should decline to
2 adjudicate Plaintiffs' indefinite claims of injury and unconstitutionality in the absence of a
3 ripe dispute.⁴

4 **II. STEVEN LINDLEY, IN HIS OFFICIAL CAPACITY AS AN ACTING BUREAU**
5 **CHIEF FOR THE CALIFORNIA DEPARTMENT OF JUSTICE, IS IMMUNE FROM**
6 **SUIT IN FEDERAL COURT UNDER THE ELEVENTH AMENDMENT.**

7 The Eleventh Amendment bars suits against a state or its instrumentalities in federal
8 court, irrespective of the nature of the relief requested, in the absence of consent by the
9 state or an abrogation of that immunity by Congress. *Papasan v. Allain*, 478 U.S. 265,
10 276-77 (1986); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984).
11 Section 1983 does not abrogate a state's Eleventh Amendment immunity. *Quern v.*
12 *Jordan*, 440 U.S. 332, 341 (1979). Nor has the State of California waived its immunity
13 with respect to claims brought under section 1983 in federal court. *Atascadero State*
14 *Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

15 "The Eleventh Amendment [also] bars a suit against state officials when 'the state is
16 the real, substantial party in interest.'" *Pennhurst*, 465 U.S. at 101; *see Almond Hill Sch.*
17 *v. U.S. Dep't of Agric.*, 768 F.2d 1030, 1033 (9th Cir. 1985). The "general rule is that
18 relief sought nominally against an officer is in fact against the sovereign if the decree
19 would operate against the latter." *Pennhurst*, 465 U.S. at 101. "[A]s when the State itself
20 is named as the defendant, a suit against state officials that is in fact a suit against a State
21 is barred regardless of whether it seeks damages or injunctive relief." *Id.* at 101-02.

22 The Supreme Court recognized a limited exception to Eleventh Amendment
23 immunity in *Ex Parte Young*, 209 U.S. 123 (1908). The *Ex Parte Young* exception allows
24 "suits for prospective declaratory and injunctive relief against state officers, sued in their
25 official capacities, to enjoin an alleged ongoing violation of federal law." *Wilbur v.*

26 ⁴ Plaintiffs also cannot satisfy the prudential component of ripeness, under which courts
27 examine the fitness of the issues for judicial decision and the hardship to the parties of
28 withholding court consideration. *Thomas*, 220 F.3d at 1141. Because of the statute's inchoate
posture, Plaintiffs will experience no hardship if they are required to wait until after February
2011 to bring a challenge to the statute once its application is known.

1 *Locke*, 423 F.3d 1101, 1111 (9th Cir. 2005). But, for the *Ex Parte Young* exception to
2 apply “such officer must have some connection with the enforcement of the act, or else it
3 is merely making him a party as a representative of the State, and thereby attempting to
4 make the State a party.” *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998). “This
5 connection must be fairly direct; a generalized duty to enforce state law or general
6 supervisory power over the persons responsible for enforcing the challenged provision
7 will not subject an official to suit.” *L.A. County Bar Ass’n v. Eu*, 979 F.2d 697, 704 (9th
8 Cir. 1992).

9 Here, defendant Lindley is being sued for declaratory and injunctive relief in his
10 official capacity as the Acting Chief of the Department of Justice, Bureau of Firearms.
11 Plaintiffs allege that in this capacity he is “the individual currently charged with oversight
12 of the California State agency that will enforce the statute at issue.” (¶ 8.) This
13 conclusory allegation is insufficient to defeat sovereign immunity. Indeed, the Court may
14 disregard such unsupported factual conclusions. *W. Mining Council v. Watt*, 643 F.2d
15 618,624 (9th Cir. 1981). A close reading of the complaint reveals no specific allegations
16 whatsoever regarding the Department of Justice’s enforcement role. That is because the
17 Legislature did not give the agency any special role in administering or enforcing AB 962
18 – any law enforcement officer in California may enforce its provisions once it goes into
19 effect. This action against Chief Lindley, then, is based solely upon his “generalized duty
20 to enforce state law” and is the equivalent of a prohibited action against the State itself.

21 Dismissing Chief Lindley on Eleventh Amendment grounds is firmly supported by
22 Ninth Circuit authority, including the case of *Long v. Van de Kamp*, 961 F.2d 151 (9th
23 Cir. 1992). *Long* arose from warrantless surprise searches of a motorcycle repair shop by
24 deputy sheriffs and members of the California Highway Patrol pursuant to a provision in
25 the California Vehicle Code that authorized such searches. *Long v. Van de Kamp*, 772 F.
26 Supp. 1141, 1142 (C.D. Cal. 1991).⁵ One of the operators of the repair shop was arrested

27 _____
28 ⁵ While the court of appeals vacated the trial court’s order in *Long*, the Ninth Circuit’s
published decision incorporates by reference the facts of the case. *See Long*, 961 F.2d at 152.

1 during a search. *Long*, 772 F. Supp. at 1142-43. The operators filed suit challenging the
2 constitutionality of the Vehicle Code provision. *Id.* at 1143. The operators named the
3 Attorney General and sought to enjoin him from enforcing the statute. *Id.*

4 In directing the district court to dismiss the Attorney General on Eleventh
5 Amendment grounds, the Ninth Circuit stated that “there must be a connection between
6 the official sued and enforcement of the allegedly unconstitutional statute, and there must
7 be a threat of enforcement.” *Long*, 961 F.2d at 152. The Ninth Circuit found that the
8 “general supervisory powers of the California Attorney General” did not establish the
9 connection with enforcement required by *Ex Parte Young*. *Id.* (citing *S. Pac. Transp. Co.*
10 *v. Brown*, 651 F.2d 613, 614 (9th Cir. 1981) (as amended)).⁶ There also was no threat that
11 the Vehicle Code provision would be enforced by the Attorney General, who “ha[d] not in
12 any way indicated that he intend[ed] to enforce [the provision].” *Id.* “In addition, the
13 searches of plaintiffs’ premises were not the result of any action attributable or traceable
14 to the Attorney General.” *Id.* The Ninth Circuit held that “[a]bsent a *real likelihood* that
15 the state official will employ his supervisory powers against plaintiffs’ interests, the
16 Eleventh Amendment bars federal court jurisdiction.” *Id.* (emphasis added).

17 The circumstances here are analogous to those in *Long*. Plaintiffs’ complaint alleges
18 no “direct connection” between Chief Lindley and the enforcement of AB 962. His
19 general duty to enforce California law is insufficient to establish the requisite connection.
20 Perhaps more importantly, there is no threat of enforcement. The vague allegation that
21 Chief Lindley “will enforce the statute at issue” is insufficient to establish a “real
22 likelihood” that Chief Lindley will employ his general powers to enforce AB 962 against
23 Plaintiffs. *Long*, 961 F.2d at 152. Accordingly, the *Ex Parte Young* exception does not
24 apply in this case. *See Long*, 961 F.2d at 152; *see also Snoeck*, 153 F.3d at 987 (“As *Ex*

25 _____
26 ⁶ In *Southern Pacific Transp. Co.*, several railroads sued the Oregon Attorney General to
27 enjoin enforcement of a statute limiting employers’ abilities to negotiate settlements with
28 employees injured on the job. *S. Pac. Transp. Co.*, 651 F.2d at 614. The Ninth Circuit held that
“[t]he attorney general’s power to direct and advise [district attorneys] does not make the alleged
injury fairly traceable to his action, nor does it establish sufficient connection with enforcement to
satisfy *Ex parte Young*.” *Id.* at 615.

1 *Parte Young* explains, the officers of the state must be cloaked with a duty to enforce the
2 laws of the state and must threaten or be about to commence civil or criminal proceedings
3 to enforce an unconstitutional act”). For these reasons, Chief Lindley respectfully
4 requests that the Court grant this motion.

5 **III. IF THE COURT DOES NOT DISMISS THE COMPLAINT IN ITS ENTIRETY, IT**
6 **SHOULD STAY THE ACTION PENDING RESOLUTION OF *PARKER V. STATE OF***
7 ***CALIFORNIA, ET AL.***

8 If the Court does not dismiss this action on one of the grounds discussed above, it
9 should stay the matter pending a decision in the related case of *Parker v. State of*
10 *California, et al.*, Superior Court of California, County of Fresno, Case No.
11 10CECG02116 (filed 6/17/2010).⁷ Like this case, *Parker* involves a constitutional
12 challenge to AB 962. Specifically, the plaintiffs in *Parker*, like Plaintiffs here, allege that
13 several sections of AB 962 are unconstitutionally vague. A stay is appropriate to allow
14 the Superior Court to adjudicate these claims of vagueness.

15 A district court has the discretionary power to control the disposition of the cases on
16 its docket “in a manner which will promote economy of time and effort for itself, for
17 counsel, and for the litigants.” *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962); see
18 *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). How these objectives can be achieved
19 “calls for the exercise of judgment, which must weigh competing interests and maintain
20 an even balance.” *Landis*, 299 U.S. at 254-55; see *Lockyer v. Miran Corp.*, 398 F.3d
21 1098, 1110 (9th Cir. 2005) (“Where it is proposed that a pending proceeding be stayed,
22 the competing interests which will be affected by the granting or refusal to grant a stay
23 must be weighed.”). Such competing interests include “the possible damage which may
24 result from the granting of a stay, the hardship or inequity which a party may suffer in
25 being required to go forward, and the orderly course of justice measured in terms of the
26 simplifying or complicating of issues, proof, and questions of law which could be
27 expected to result from a stay.” *CMAX*, 300 F.2d at 268.

28 ⁷ The complaint in *Parker* is attached as Exhibit “A” to Defendant’s Request for Judicial
Notice, which is lodged concurrently with this motion.

1 “A trial court may, with propriety, find it is efficient for its own docket and the
2 fairest course for the parties to enter a stay of an action before it, pending resolution of
3 independent proceedings which bear upon the case.” *Lockyer*, 398 F.3d at 1111 (quoting
4 *Levy v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979); see *Landis*,
5 299 U.S. at 255 (rejecting as “too mechanical and narrow” the view that there is no power
6 to stay a proceeding upon the outcome of a controversy to which the litigant is a stranger).
7 These separate proceedings may be judicial, administrative, or arbitral in nature, and
8 proper imposition of a stay does not require that the issues in such separate proceedings
9 are necessarily controlling of the action before the court. *Id.* However, “[a] stay should
10 not be granted unless it appears likely the other proceedings will be concluded within a
11 reasonable time in relation to the urgency of the claims presented to the court.” *Id.*

12 There is considerable overlap between the issues raised in this case and those raised
13 in *Parker*. Plaintiffs here devote a substantial portion of their complaint to allegations
14 concerning AB 962’s purported vagueness, particularly the definition of “handgun
15 ammunition.” (See ¶¶ 11, 13, 18, 23, & 33.) That issue is pivotal in *Parker*. (See
16 Request for Judicial Notice, Exh. “A” [*Parker* complaint], ¶¶ 88-103.) If plaintiffs’
17 vagueness challenge in *Parker* is successful, AB 962 likely will be invalidated and this
18 action could become moot. At a minimum, the Superior Court’s judgment in *Parker* will
19 provide crucial direction to this Court in its analysis of the issues presented in this case.

20 A stay is especially appropriate here in light of the jurisdictional concerns identified
21 above, as well as principles of federalism and comity implicated when a federal court is
22 asked to invalidate new state legislation. See *Stefanelli v. Minard*, 342 U.S. 117, 120
23 (1951) (in exercising their equitable powers federal courts must recognize “[t]he special
24 delicacy of the adjustment to be preserved between federal equitable power and State
25 administration of its own law”).

26 Finally, Plaintiffs will not be prejudiced by a stay pending a decision in *Parker*
27 because that case already is at issue, a preliminary injunction motion is set for hearing on
28 October 28, 2010, and a motion for summary judgment is calendared for December 16,

1 2010. (Krause Decl., ¶ 3.) Hence, those proceedings should be concluded almost *two*
2 *months* before the laws challenged here will even go into effect. To promote judicial
3 economy, and to avoid the needless construction of state statutes, the State respectfully
4 requests a stay of these proceedings pending a decision in *Parker v. State of California*.

5 **CONCLUSION**

6 For all the foregoing reasons, the State respectfully requests that the Court issue an
7 order dismissing the complaint and, if necessary, staying the action pending a decision in
8 the matter of *Parker v. State of California, et al.*

9 Dated: September 20, 2010

Respectfully Submitted,

10 EDMUND G. BROWN JR.
11 Attorney General of California
12 JONATHAN K. RENNER
13 Senior Assistant Attorney General

/s/ Peter A. Krause

14 PETER A. KRAUSE
15 Deputy Attorney General
16 *Attorneys for Defendant Steven Lindley,*
17 *in his official capacity as Acting Chief of*
18 *the California Department Of Justice*

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DECLARATION OF PETER A. KRAUSE

I, Peter A. Krause, declare as follows:

1. I am an attorney at law duly licensed to practice in the State of California. I am a Deputy Attorney General in the Office of the Attorney General, counsel for defendant Steven Lindley, in his official capacity as Acting Chief of the California Department Of Justice. This declaration is submitted in support of the State’s Motion to Dismiss or, in the Alternative, to Stay the Action. I have personal knowledge of the facts set forth herein and, if called and sworn as a witness, could and would testify competently thereto.

2. I also am counsel to defendants the State of California, Edmund G. Brown Jr. (in his capacity as Attorney General of the State of California), and the California Department of Justice in *Parker v. State of California, et al.*, Superior Court of California, County of Fresno, Case No. 10CECG02116 (June 17, 2010), the complaint in which is the subject of a Request for Judicial Notice lodged concurrently herewith.

3. The *Parker* matter is at issue and the plaintiffs in that case filed a preliminary injunction motion on September 7, 2010 that is set for hearing on October 28, 2010. The plaintiffs also have calendared a motion for summary judgment for hearing on December 16, 2010.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 20, 2010 at Sacramento, California.

/s/ Peter A. Krause

Peter A. Krause