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SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Case No. 01CECG03182

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Date:	January 23, 2008
Time:	3:30 p.m.
Dept:	72
Judge:	Hon. Alan Simpson
Trial Date:	March 10, 2008
Action Filed:	September 18, 2001

1/15/08

I.

INTRODUCTION

How do the hundreds of pages of documents submitted by plaintiffs, none of which appear to have any bearing on this case, support the intrusive and time-consuming depositions that plaintiffs have embarked upon very late in this six-year lawsuit? The answer is that they do not. Nor does the declaration of plaintiffs' counsel. Indeed, plaintiffs' opposition and their concurrent motion to compel depositions underscore the need for this court to take control of discovery that is quickly spiraling beyond any rational connection to this case.

First, and this is critically important, plaintiffs have not established "extremely good cause" – or for that matter any cause – to take the deposition of Deputy Attorney General Alison Merrilees, the attorney assigned to provide legal counsel to the Department's Bureau of Firearms. Plaintiffs have not shown that Ms. Merrilees acts in a "dual role" as a "public advisor" outside the scope of her duties as a Deputy Attorney General. Despite plaintiffs' protests to the contrary, this deposition would almost certainly intrude on matters subject to the attorney-client privilege and the attorney work product privilege. Even if the court allows other depositions to proceed, this deposition should be quashed.

Further, plaintiffs have not shown that the other depositions would uncover admissible evidence or lead to the discovery of admissible evidence. As plaintiffs concede, this case involves a *facial* constitutional challenge to the regulation defining "flash suppressor" and the phrase "permanently altered" as used in the Assault Weapons Control Act (AWCA). Under applicable Supreme Court authority, this means that plaintiffs must show that these terms are "impermissibly vague in all of [their] applications." (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 495.) Contrary to plaintiffs' assertions, there is not some lesser standard that applies to the phrases at issue in this case.

The lack of any relevant basis to proceed with the depositions also underscores the lack of merit in plaintiffs' effort to depose senior executives with the Bureau of Firearms. The depositions of Dale Ferranto and Stephen Buford, the second and third ranking Bureau officials, should be quashed on this separate ground.

If, however, the Court does allow some or all of the depositions, reasonable restrictions should be placed on the scope and conduct of the proceedings. This subject is addressed in the section before the conclusion of this brief.

Finally, defendants note that plaintiffs' brief contains a disturbing number of misstatements. For example, plaintiffs assert that after the motion for summary judgment they "began a six month long protracted attempt to depose eleven key employees with the DOJ." (Opp., p. 2:19-21.) As the records submitted in opposition to the motion to compel show, this statement is untrue. (Opp. Appx., Beckington Declaration, ¶¶ 12-13, Exh. 11-12.) Plaintiffs first raised the deposition of Ms. Merrilees and most of the other deponents in counsel's letter of November 14, 2007, and in the notices served on November 28, 2007.[1] (*Ibid.*) Only the Chinn and Abad depositions, which have been taken, and the Small and Amador depositions, to which defendants have always objected, were raised before these dates. (*Ibid.*) The plaintiffs' exaggerated and tendentious statements serve only to emphasize the erratic nature of their discovery efforts and the need for court intervention.

II.

THE DEPOSITION OF ALISON MERRILEES WOULD INTRUDE ON THE ATTORNEY-CLIENT RELATIONSHIP AND IS NOT SUPPORTED BY GOOD CAUSE

In the motion for a protective order and the opposition to the motion to compel, defendants have addressed most of the arguments advanced by plaintiffs in connection with the deposition of Alison Merrilees. Defendants invite the Court's attention to these papers and will limit their response in this brief to the additional arguments made by plaintiffs in their opposition brief.

Plaintiffs submit nearly 200 pages of letters and emails written by Ms. Merrilees and suggest that these somehow justify going forward with her deposition. (Supp. Davis Declaration, ¶ 5, Exh. Q.) But they do not identify a single document that has any bearing on this litigation or about which they would specifically question Ms. Merrilees at her deposition. Nor do they

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1. The depositions of Ms. Merrilees and George were first requested in the November 14, 2007 letter. The depositions of Ferranto, Biscailuz, Buford, and Giusto were not demanded until the deposition notices served November 28, 2007. (*See* Opp. Appx., Exhs. 11-12.)

explain how these documents would be relevant or lead to the discovery of admissible evidence. For example, example, one of the first letters attached to plaintiffs' Exhibit Q concerns "Civil War Artillery." (*Id.*, Exh. Q [8.4.05 letter to Edwin C. Mann].) Not surprisingly, plaintiffs do not argue that deposition questions about this letter would be material to the meaning of "flash suppressor" or "permanently altered" ammunition feeding devices.

Plaintiffs do not authenticate the many letters and emails included with Exhibit Q. (Supp. Davis Declaration, ¶ 5.) Presumably, plaintiffs obtained these materials in this litigation and in response to Public Records Act requests made by the law firm representing plaintiffs. (*See, id.*, ¶ 2.) It appears that plaintiffs combed these records and copied any letter or email, no matter the subject, written by Ms. Merrilees. This level of overkill does not demonstrate the need for her deposition; it demonstrates the danger with permitting it to proceed.

Although plaintiffs argue at length that Ms. Merrilees does not qualify as "opposing counsel," they do not challenge her declaration explaining that she has worked with the Deputy Attorneys General assigned to this case and taken an active role in the litigation since being appointed to her assignment in July 2005. (*See* Opp. Appx., Merrilees Declaration, ¶ 2.) Instead, plaintiffs rely solely on the conclusory assertion by *their* counsel that Ms. Merrilees is not counsel in this action. (Davis Declaration, ¶ 22.) In addition, without citation to authority, plaintiffs assert that Ms. Merrilees is not covered by the *Carehouse* decision merely because she is not listed among defense counsel on the face page of the pleadings. Nothing in *Carehouse* suggests that the scope of its holding turns solely on this arbitrary factor. (*See Carehouse Convalescent Hospital v. Superior Court* (2006) 143 Cal.App.4th 1558.)

Moreover, plaintiffs do not offer any evidence that supports their bald assertion that Ms. Merrilees has a "dual role" as a "public advisor" justifying her deposition. As shown in her declarations, Ms. Merrilees is a Deputy Attorney General whose assignment involves providing legal advice to the Bureau of Firearms and does not involve a separate assignment as a "public advisor." (*See, e.g.*, Opp. Appx., Merrilees Declaration, ¶¶ 2-5.) The conclusory Jason Davis Declaration does not begin to show otherwise. (*See* Supp. Davis Declaration, ¶ 5.) Nor do the letters and emails. (*Id.*, Exh. Q.) All were written in Ms. Merrilees' capacity as a Deputy

Attorney General. (*Ibid.*) Of course, it is consistent with her role as an attorney that she would respond to third parties who have submitted legal questions or demands to the Department.

Indeed, the letters and emails prove too much for the plaintiffs. They demonstrate that any substantive inquiry would inevitably intrude on the attorney-client and attorney work product privilege. If plaintiffs ask Ms. Merrilees about how she reached her conclusions, or what facts or documents she relied upon, or the type of analysis used, they would be probing her thoughts and legal reasoning. Plainly, this would violate the attorney-work product privilege. (Code Civ. Proc., § 2018.030, subd. (b) [attorney work product "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice."]) Alternatively, if plaintiffs ask about client input into the letters and emails, they would be pursuing privileged communications. (Evid. Code, § 954 [lawyer-client privilege].)

Plaintiffs imply that they would ask Ms. Merrilees about oral communications. But any inquiry beyond repetition of the literal communications themselves would infringe on the attorney work product and attorney-client privileges for the same reasons as with the written communications. And, plaintiffs do not identify a single oral communication that they claim Ms. Merrilees has had regarding flash suppressors or permanently altered magazines outside the scope of a privileged communication. This hardly presents "extremely good cause" for the deposition. (*Carehouse Convalescent Hosp. v. Superior Court*, *supra*, 143 Cal.App.4th at p. 1562.) Nor would it make any sense to depose Ms. Merrilees about prosecutions. There is no evidence that Ms. Merrilees has had any direct involvement with prosecutions, which would ordinarily be carried out by local district attorneys. The reasonable method to obtain discovery regarding prosecutions involving flash suppressors and permanently altered magazines would be an interrogatory, not a deposition.

Under these circumstances, plaintiffs have not established the requisite good cause to allow them to take the deposition of the Bureau's assigned attorney. Because this deposition would potentially interfere with the attorney-client relationship, the motion for protective order as to this deposition should be granted.

III.

PLAINTIFFS HAVE NOT SHOWN THAT THE DEPOSITIONS ARE RELEVANT UNDER THE STANDARD OF REVIEW APPLICABLE IN THIS ACTION

In their opposition, plaintiffs claim that this Court recognized a lesser standard for determining whether a statute is impermissibly vague on its face for purposes of the due process clause. But, in its ruling on the motion for summary judgment, the Court stated:

> "A law failing to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited violates due process under both the federal and California Constitutions." (*Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1151.) "A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nonetheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all its applications." (*Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 498.)

(Pro. Order Appx., Exh. 1; Opp. Appx., Exh. 3.)

The Court's ruling follows directly from the full holding by the Supreme Court in *Village of Hoffman Estates*:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. *The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.* A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

(*Village of Hoffman Estates*, 455 U.S. at pp. 494-495 [emphasis added, footnotes omitted.])

The Supreme Court elaborated in language that is worth quoting at length:

> A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. *To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications.*
> . . . .
> These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates-as well as the relative importance of fair notice and fair enforcement-depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of

> enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed. Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.

(*Id.*, pp. 497-499 [emphasis added, footnotes omitted].)

Therefore, although it recognizes a heightened level of scrutiny in criminal cases, *Village of Hoffman Estates* holds that in order to challenge a law that *does not implicate constitutionally protected conduct* as unconstitutionally vague *on its face*, a plaintiff must show that such law is impermissibly vague *in all applications*.

In an effort to circumvent this rule, plaintiffs argue that *Village of Hoffman Estates* does not apply on grounds that this case concerns constitutionally protected conduct. (Opp., p. 5.) Apparently unaware that this argument implicitly recognizes the "in all applications" test when applied to cases not involving constitutionally protected conduct, plaintiffs further assert that the test does not apply because the AWCA involves "strict liability forfeitures" of assault weapons and "strict liability fines" for possession of assault weapons. (*Ibid.*) But neither argument counters the standard applicable in this case.

To begin with, unlike the *loitering* provisions at issue in *Kolender v. Lawson* (1983) 461 U.S. 352 and *City of Chicago v. Morales* (1999) 527 U.S. 41, the provisions challenged here do not "reach a substantial amount of constitutionally protected conduct." (*See Kolender*, 461 U.S. at 358 ["Our concern here is based upon the 'potential for arbitrarily suppressing First Amendment liberties' . . . . In addition [the provision] implicates consideration of the constitutional right to freedom of movement."]; *City of Chicago*, 527 U.S. at 53 ["freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment"]).

Nor did the loitering provisions at issue in those cases include a *mens rea* requirement to protect against prosecution of the innocent, unlike the provision at issue in *Village of Hoffman Estates*, and unlike the provisions at issue here as the Court has confirmed at pages 3-4 of its

summary judgment ruling. (Compare *City of Chicago*, 527 U.S. at 55 [provision "contains no *mens rea* requirement"], with *Village of Hoffman Estates*, 455 U.S. at 499 [provision "contains a scienter requirement"].)

In advocating a lesser standard, plaintiffs take the Supreme Court's language from *City of Chicago* out of context in arguing that "a prohibition is facially invalid where it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." (Opp., p. 3:12-14.) The Supreme Court was simply confirming that the "constitutionally protected conduct" in question need not be, strictly speaking, First Amendment conduct. (See *City of Chicago*, 527 U.S. at 52-53.) But by no reach of the imagination was the Supreme Court abrogating the ordinary rule that the challenged law must reach "a substantial amount of constitutionally protected conduct" in order for a plaintiff to avoid the high burden on a *facial* challenge identified in *Village of Hoffman Estates*. The decisions in *Kolender* and *City of Chicago*, addressing challenged provisions implicating constitutionally protected conduct, simply do not apply to the present matter.

Under this standard, plaintiffs have difficulty articulating how the depositions will lead to the discovery of admissible evidence. For example, they assert that they need to depose a wide range of Department employees to avoid having to take a "state-wide survey" of gun owners. (Opp., p. 4:5-9.) But neither the depositions nor a state-wide survey would bear on whether the challenged provisions are unconstitutionally vague in all applications. Nor do plaintiffs cite any authority supporting the view that a public opinion survey (or a set of substituted depositions of government employees) is germane to the facial constitutionality of a statute. Absent some showing of relevance to the issues that will actually be litigated at trial, a protective order is appropriate to avoid needless expense and inconvenience. (Code Civ. Proc., § 2025.420.)[2/]

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2. In a footnote, plaintiffs reference the Joint Stipulation for Clarification that parties have discussed but have not filed. Plaintiffs misleadingly imply that defendants have not responded to plaintffs' edits for four months. In fact, defendants prepared the original draft, which plaintiffs held for more than two months, and then returned in mid-October with extensive revisions at the same time they noticed the Chinn, Abad, Small and Amador depositions. (*See* Opp. Appx.)

IV.

PLAINTIFFS HAVE FAILED TO SHOW GOOD CAUSE FOR THE DEPOSITIONS OF SENIOR BUREAU EXECUTIVES FERRANTO AND BUFORD

Plaintiffs do not dispute that Dale Ferranto and Stephen Buford are the second and third ranking executives in the Bureau of Firearms. Instead, merely because neither is the head of the Department or the Bureau, plaintiffs argue that authority restricting depositions of high-ranking officials is inapplicable. Plaintiffs misread the cases.

As a general rule, "agency heads *and other top governmental executives* are not subject to deposition absent compelling reasons." (*Westly v. Superior Court* (2004) 125 Cal.App.4th 907, 910.) As *Westly* indicates, the rule is not restricted to agency heads but applies to other top executives. Behind this rule lies the recognition that such depositions pose a unique burdens on the executives and the agency. (*See Nagle v. Superior Court* (1994) 28 Cal.App.4th 1465, 1468.) This rationale applies to senior executives below the level of an agency head or director.

Plaintiffs offer no probative evidence that the depositions of these executives are justified by compelling reasons. In his declaration, plaintiffs' counsel asserts that "[t]hese individuals conduct educations (*sic*) seminars concerning firearms laws and regulations, and may have knowledge and information relating to prosecutions under the AWCA statutes and regulations at issue in this case." (Supp. Davis Declaration, ¶ 6.) But plaintiffs do not identify the seminars or assert that they concerned flash suppressors or permanently altered magazines. And the remainder of the assertion is purely speculative. Under these circumstances, plaintiffs have failed to offer sufficient justification for these depositions.

V.

REASONABLE RESTRICTIONS SHOULD BE PLACED ON THE SCOPE AND CONDUCT OF ANY DEPOSITIONS ALLOWED BY THE COURT

If the court allows any of the depositions to proceed, defendants request that reasonable restrictions be placed on the depositions' scope and conduct. For good cause shown, the court has the discretion to impose such restrictions. (Code Civ. Proc., § 2025.420, subd. (b)(2).)

First, the subject matter of the depositions should be limited to the topics identified by

plaintiffs in their moving papers. And, equally important, the subject matter should be limited to the issues remaining in this litigation: the meaning of "flash suppressor" and "permanently altered." This latter restriction is particularly important because plaintiffs have included a lengthy document demand that includes overbroad and irrelevant requests for documents relating to "assault weapons" (a broad topic encompassing components other than flash suppressors and permanently altered magazines), detachable magazines and a weapon's "capacity to accept a detachable magazine." (*See* Pro. Order Appx., Exh. 3.)

Second, if the court allows any of the depositions, a protective order should direct that the depositions not be videotaped. Each of the deposition notices included a provision for videotaping. (*See* Pro. Order Appx., Exh. 3.) There is no reason to videotape these deponents, and, because the deponents are Bureau employees, there may be significant security and safety issues. Plaintiffs agreed not to videotape Chinn and Abad after defendants objected. Similarly, plaintiffs should be directed not to videotape any remaining Bureau deponents.

VI.

CONCLUSION

For the foregoing reasons, plaintiffs' arguments in favor of the depositions are without merit and defendants' motion for a protective order should be granted.

Dated: January 15, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Hunt, et al. v. State of California, et al.**

No.: **01CECG03182**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On January 15, 2008, I served the attached **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER** by placing a true copy thereof enclosed in a sealed envelope with the **CALIFORNIA OVERNIGHT and FEDERAL EXPRESS**, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 15, 2008, at Los Angeles, California.

Betty Rodriguez
Declarant

Signature

50213727.wpd