SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Unlimited Department, Central Division 1100 Van Ness Avenue Fresno, California 93724-0002 (559) 488-2816	*FOR COURT USE ONLY*
TITLE OF CASE: **Edward Hunt vs State of California**	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: **01CECG03182**

I certify that I am not a party to this cause and that a true copy of the **ruling** was placed in a sealed envelope and:

☐ Deposited with the United States Postal Service, mailed first class, postage fully prepaid, addressed as shown below.

☒ Placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: **Fresno, California 93724-0002** on:

Date: **January 30, 2008** Clerk, by K. Artis, Deputy

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☐ Clerk's Certificate of Mailing Additional Address Page Attached

SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Department - Non-Limited	Entered by:
TITLE OF CASE: **Edward Hunt vs State of California**	
LAW AND MOTION MINUTE ORDER	Case Number: **01CECG03182 AMS**

Hearing Date: **JANUARY 23, 2008** Hearing Type: **Motion for Protective Ord & Mtn Compel**

Department: **72** Judge/Temporary Judge: **Alan Simpson**

Court Clerk: K. Artis Reporter/Tape: S. McKennon

Appearing Parties:

Plaintiff: Defendant:

Counsel: Jason A. Davis, Attorney, via Court Call Counsel: Mark R. Beckington, Attorney at Law

☐ Off Calendar

☐ Continued to ☒ Set for 5-27-08 at 9:00 Dept. 97C for Court Trial

☐ Submitted on points and authorities with/without argument. ☒ Matter is argued and submitted.

☐ Upon filing of points and authorities.

☐ Motion is granted ☐ in part and denied in part. ☐ Motion is denied ☐ with/without prejudice.

☐ Taken under advisement

☐ Demurrer ☐ overruled ☐ sustained with _____ days to ☐ answer ☐ amend

☐ Tentative ruling becomes the order of the court. No further order is necessary.

☐ Pursuant to CRC 391(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

☐ Service by the clerk will constitute notice of the order.

☐ Time for amendment of the complaint runs from the date the clerk serves the minute order.

☐ Judgment debtor _____ sworn and examined.

☐ Judgment debtor _____ failed to appear.
Bench warrant issued in the amount of $ _____

Judgment:

☐ Money damages ☐ Default ☐ Other _____ entered in the amount of:
Principal $ _____ Interest $ _____ Costs $ _____ Attorney fees $ _____ Total $ _____

☐ Claim of exemption ☐ granted ☐ denied. Court orders withholdings modified to $ _____ per _____

Further, court orders:

☐ Monies held by levying officer to be ☐ released to judgment creditor. ☐ returned to judgment debtor.

☐ $ _____ to be released to judgment creditor and balance returned to judgment debtor.

☐ Levying Officer, County of _____, notified. ☐ Writ to issue

☐ Notice to be filed within 15 days. ☐ Restitution of Premises

☒ Other: The tentative ruling is amended on page 4 and adopted. See attachment for details. The current trial dates of CT on 3/10/08, TRR on 3/7/08 and MSC on 2/26/08 are vacated. The trial is continued as indicated above with the TRR on 5/23/08 @ 9:30 in Dept. 97C and MSC on 5/13/08 @ 10:00 in Dept. 97C.

03

Tentative Ruling

Re: ***Hunt v. State of California***
Case No. 01 CE CG 03182

Hearing Date: January 23rd, 2008 **(Dept. 72)**

Motion: Plaintiffs' Motion to Compel Depositions of Mike Small, Jeff Amador and Alison Merrilees

Defendants' Motion for Protective Order

Tentative Ruling:

To grant plaintiffs' motion to compel the depositions of Mike Small and Jeff Amador. (CCP § 2025.450.) To deny the motion to compel the deposition of Alison Merrilees. To grant the motion for protective order barring the deposition of Merrilees, but deny the remainder of the motion for a protective order. (CCP § 2025.420.) To deny plaintiffs' request for sanctions against defendants.

Explanation:

With regard to the deposition of Alison Merrilees, plaintiffs have not shown that they have "extremely good cause" for taking her deposition. Under *Carehouse Convalescent Hospital v. Superior Court* (2006) 143 Cal.App.4th 1558, "[d]epositions of opposing counsel are presumptively improper, severely restricted, and require extremely good cause – a high standard." (*Id.* at 1562.) There is a strong public policy against taking the deposition of opposing counsel, since "[t]he practice runs counter to the adversarial process and to the state's public policy to '[p]revent attorneys from taking undue advantage of their adversary's industry and efforts.'" (*Ibid.*) "...California applies a three-prong test in considering the propriety of attorney depositions. First, does the proponent have other practicable means to obtain the information? Second, is the information crucial to the preparation of the case? Third, is the information subject to a privilege? [Citations omitted.] (*Id.* at 1563.)

Here, plaintiffs argue that Merrilees is not "opposing counsel" for defendants since she is not listed as one of the named attorneys for defendants in the pleadings. However, Merrilees states in her declaration that she is a Deputy Attorney General assigned to the Bureau of Firearms, which is a division of the Department of Justice. (Merrilees decl., ¶¶ 1, 2.) She has also served as legal counsel for the Division of Firearms and Bureau of Firearms since 2005. (*Id.* at ¶ 2.) In her capacity as legal counsel for the Bureau, she has consulted and communicated with the Deputy Attorney General who has been assigned to represent the defendants in this case. (*Id.* at ¶ 3.) Her role as counsel for

Firearms also includes being informed about this action and providing legal advice and information to the Bureau and Department about this action. (*Ibid.*) She considers these communications to be confidential. (*Id.* at ¶ 4.) She does not have an assignment as a "public advisor" separate from her assignment as a Deputy Attorney General. (*Id.* at ¶ 5.) All of her duties have been solely in the capacity of her job as Deputy Attorney General. (*Ibid.*)

Thus, Merrilees has declared that she has given confidential legal advice and information to the Bureau related to the present action, which indicates that she has acted as "opposing counsel" for the purposes of *Carehouse*. While plaintiffs contend that Merrilees is not opposing counsel because she is not listed on the pleadings, the court believes that plaintiffs' definition of "opposing counsel" is overly narrow. Plaintiffs do not deny the Merrilees works for the DOJ, which is a named party to the action. Nor do they deny that she may have assisted the DOJ with advice regarding the present case. The fact that her name is not listed on the pleadings, by itself, does not mean that she does not have a confidential attorney-client relationship with the DOJ, or that she has never worked on the case.

In addition, while plaintiffs contend that they only want to question Merrilees about her communications with the public and law enforcement agencies regarding the application and interpretation of the regulations at issue here, there does not appear to be a clear distinction between Merrilees' communications with the public and her duties as counsel for the DOJ. Merrilees herself states that she has no separate duties as "public advisor", and the letters and emails attached to plaintiffs' motion are all signed "Alison Merrilees, Deputy Attorney General, Firearms Division." (See Exhibit Q to supplemental decl. of Davis.) Thus, it does not appear that there is any distinction between her duties as a Deputy Attorney General and an "advisor" to the public.

Because Merrilees is "opposing counsel" under Carehouse, the plaintiffs must meet the three-prong test and show "extremely good cause" for deposing Merrilees. (*Carehouse, supra*, at 1562-1563.) However, plaintiffs cannot meet this test, since they have not demonstrated that the information they seek is crucial to the preparation of their case, and the information is not privileged. (*Id.* at 1563.) Plaintiffs claim that they want to ask Merrilees about her communications with the public, gun dealers, and law enforcement agencies. However, it is unclear what plaintiffs could ask her without violating attorney-client or work product privileges. Plaintiffs would not be able to ask about the research, analysis, or opinions that went into Merrilees' responses to the public. Nor would they be able to ask her about any communications she had with other DOJ employees in regard to the letters and emails. All such discussions and analysis would be privileged. Thus, it appears that plaintiffs would only be able to ask whether Merrilees wrote the letters and emails, which hardly shows extremely good cause for deposing her. Plaintiffs could obtain the same information through interrogatories.

For the same reasons, plaintiffs have not shown that the information sought is crucial to their case. Again, simply asking Merrilees whether she wrote the letters and emails hardly constitutes crucial information that could not be obtained except by deposition. Any other questions are likely to implicate privileged information. Plaintiffs have not adequately explained why it is necessary to depose Merrilees. Therefore, the court intends to deny the motion to compel Merrilees' deposition and grant the protective order barring plaintiffs from taking her deposition.

On the other hand, the court intends to deny the protective order as to the other deponents. Defendants argue that plaintiffs have not shown that they will be able to obtain any relevant evidence from the depositions of the other DOJ employees. However, under the Discovery Act, plaintiffs do not have to show that they will obtain directly relevant or admissible evidence in order to conduct depositions. They only need to show that the matter they seek is relevant to the subject matter of the case, is not privileged, and the matter is either admissible as evidence, or is calculated to lead to discovery of admissible evidence. (CCP § 2017.010.) This is a very broad standard. (*Gonzales v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546.)

Here, it appears that plaintiffs may be able to obtain information that is either admissible or at least calculated to lead to admissible evidence. Plaintiffs seek to establish that the regulatory definition of "flash suppressor" is vague and unenforceable because an ordinary person cannot determine whether a device is actually a flash suppressor by examining it. Allowing plaintiffs to depose DOJ employees who have had contact with the public and law enforcement regarding these issues may lead to discovery of admissible evidence regarding whether the DOJ itself is confused about the meaning of the term "flash suppressor", and also whether there is actually substantial public confusion on the issue.

Plaintiffs also seek to show that the regulatory exception of the term "permanently altered" its vague and confusing. Again, questioning DOJ officials who have dealt with public and law enforcement questions on this subject may lead to admissible evidence as to whether the term is actually causing confusion, and whether the DOJ itself knows what the term means. If the officials charged with interpreting and enforcing the law do not themselves know what the law means, or if they have given different and inconsistent explanations of its meaning, such testimony could be relevant to the question of whether the law is so vague as to be unenforceable. Therefore, plaintiffs are entitled to conduct depositions of DOJ officials.

Defendants argue that plaintiffs are not entitled to conduct depositions of Ferranto and Bufford because they are "top government executives." (*Westly v. Superior Court* (2004) 125 Cal.App.4th 907, 910.) However, plaintiffs have not shown that either Ferranto or Bufford are "top executives" within the meaning of

Westly. "The general rule in California and federal court is that agency heads and other top governmental executives are not subject to deposition absent compelling reasons... The general rule is based upon the recognition that '... an official's time and the exigencies of his everyday business would be severely impeded if every plaintiff filing a complaint against an agency head, in his official capacity, were allowed to take his oral deposition. Such procedure would be contrary to the public interest, plus the fact that ordinarily the head of an agency has little or no knowledge of the facts of the case.' " [Citation.] An exception to the rule exists *only* when the official has direct personal factual information pertaining to material issues in the action and the deposing party shows the information to be gained from the deposition is not available through any other source. [Citation.]" (*Id.* at 910-911.)

Here, defendants contend, and plaintiffs do not dispute, that Ferranto and Bufford are the second and third ranking executives in the Bureau of Firearms. However, it does not appear that the deponents are so highly placed in the hierarchy of the Department of Justice as to warrant protection under *Westly*. The deponents are not the heads of the agency, nor are they even the heads of the Bureau of Firearms. According to the chart supplied by plaintiffs, Ferranto is Assistant Bureau Chief under Wilfredo Cid. Bufford is the Firearms Program Operations Manager. (See Exhibit Y to Supplemental Davis decl.) The Bureau of Firearms is in turn a department of the Department of Justice. Thus, Ferranto and Bufford are "top governmental executives" or agency heads within the meaning of *Westly*. Consequently, the court intends to deny the motion for a protective order with regard to Ferranto and Bufford.

Finally, the court intends to deny the plaintiffs' request for sanctions. Plaintiffs are entitled to monetary sanctions when they prevail on their motion to compel under CCP § 2025.450, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of sanctions unjust. (CCP § 2025.450(c)(1).) Here, plaintiffs were only partially successful on their motion to compel. Plaintiffs have also threatened to take depositions of over two dozen DOJ employees, even though plaintiffs had previously represented that they would not have to call any witnesses in the case. (See Michel decl., ¶ 2, attached as Exhibit 1 to Mark Beckington decl.) While plaintiffs claim that there have been "dramatic changes" in the case warranting the need to call DOJ witnesses, it does not appear that any of the events since the filing of the suit have actually made a dramatic or fundamental change in the nature of the case. Therefore, defendants were justified in opposing the deposition notices under the circumstances, and the court does not intend to impose sanctions against them.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: _____ **on** 11/5/08 .
(Judge's Initials) (Date)