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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

DAVID GENTRY, JAMES PARKER, MARK MIDLAM, JAMES BASS, and CALGUNS SHOOTING SPORTS ASSOCIATION Plaintiffs and Petitioners, vs. KAMALA HARRIS, in Her Official Capacity as Attorney General for the State of California; STEPHEN LINDLEY, in His Official Capacity as Acting Chief for the California Department of Justice, JOHN CHIANG, in his official capacity as State Controller for the State of California, and DOES 1-10. Defendants and Respondents.	CASE NO. 34-2013-80001667 **REPLY IN SUPPORT OF MOTIONS TO COMPEL FURTHER RESPONSES TO: (1) REQUEST FOR ADMISSIONS, SET ONE; AND (2) FORM INTERROGATORIES, SET ONE, BOTH PROPOUNDED ON DEFENDANTS KAMALA HARRIS AND STEPHEN LINDLEY** Date: 06/05/15 (resched. from 04/24/15) Time: 9:00 a.m. Dept.: 31 Action filed: 10/16/13

I. INTRODUCTION

The Plaintiffs believe judicial economy will be best served if the Court issues a tentative ruling on the current Motions[1] on or before April 24, 2015, the date the Motions were first set for

[1] I.e., Plaintiffs' Motion to Compel Further Responses to Form Interrogatories, Set One, Propounded on Defendants Kamala Harris and Stephen Lindley ("Motion re: FI") and Plaintiffs' Motion to Compel Further Responses to Requests for Admissions Propounded on Defendants Kamala Harris and Stephen Lindley ("Motion re: RFA").

hearing.[2] Defendants and Respondents Kamala Harris and Stephen Lindley's (collectively "Defendants") Opposition to Plaintiffs' Motions to Compel ("Opposition") is premised on a claim that they can argue their primary defense to the Motions *currently* before the Court in a later, as-of-now unfiled motion for judgment on the pleadings ("MJOP"). Briefing on the Motions is now closed under both generally applicable law (Code of Civil Procedure section 1005) and this Court's Order of March 13, 2015. Defendants should not be allowed to manipulate the Court's schedule to use an MJOP as a de facto sur-reply to raise arguments and objections that Plaintiffs have already shown to be untimely and without merit.

Specifically, Defendants have requested that the Court withhold consideration of the current Motions until the hearing on Defendants' inchoate MJOP. Defendants claim that the proposed delay will conserve the Court's resources.[3] The evidence indicates the opposite is true.

Plaintiffs have shown, and Defendants have utterly failed to rebut, that there is no pleading deficiency that will prevent success on the Motions. Therefore, a well-timed tentative ruling reflecting that reality will give Defendants the ability to avoid wasting the parties and the Court's time on an MJOP founded on an argument that has already been considered by the Court in the context of the current Motions.

Defendants intentionally chose to file the Opposition sans argument regarding their supposed justification for discovery non-compliance, and they should not be rewarded with a second bite at the apple through the MJOP process, especially where Plaintiffs have already shown the proposed MJOP is not likely to succeed. And in any event, even if the Court issues the tentative ruling sought, that works no prejudice on Defendants, as that tentative ruling would not bar the filing of an MJOP.

Accordingly, Plaintiffs request that the Court issue a tentative order on or about April 24, 2015, indicating an inclination to grant the relief sought in the Motions.

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[2] The hearing date for the Motions was rescheduled by stipulation to resolve a scheduling conflict, though the parties did agree to complete briefing for the Motions by April 17, 2015, with the hearing on those Motions, if necessary, being held on June 5, 2015. (*See* Order of March 13, 2015).

[3] (Opp. 8:17-21).

II. ARGUMENT

Before delving into discussion concerning specific discovery requests and responses, Plaintiffs need to address a "theme" that is reiterated throughout the Opposition. The Opposition repeatedly refers to the amount of discovery propounded by Plaintiffs, characterizing Plaintiffs' discovery as "enormous[,]" "numerous[,]" "vast[,]" and otherwise intimating that complying with the discovery at issue would unduly burden Defendants. (Opp. 1:12-13; 1:21-22; 2:24-28; 8:22-23). Defendants' comments on this point are specious, inasmuch as Defendants: (1) did not timely[4] raise an undue burden or oppression objection concerning the discovery requests at issue,[5] and (2) Defendants did not promptly, or ever, seek a protective order in response to the discovery requests Plaintiffs served on Defendants. Civ. Proc. Code §§ 2030.090, 2033.080; *see St. Mary v. Super. Ct.*, 223 Cal. App. 4th 762, 774 (indicating that section 2033.080's use of the word "promptly" refers to taking action in less than thirty days from the service of a set of requests for admissions); *accord* Rylaarsdam, et al., *California Practice Guide: Civil Procedure Before Trial* §§ 8:1013, 8:1304.1 (The Rutter Group 2014).

Because Defendants have waived any argument of undue burden as to the discovery requests actually at issue, Defendants' protestations on this issue should be ignored by the Court.

A. Further Responses to RFA Nos. 83-96 and 88-89 Should Be Ordered

1. Defendants' Claimed Inability to Respond Lacks Veracity

Defendants are still claiming an "inability to admit or deny Request for Admissions Nos. 83-86 and 88-89" notwithstanding what the Opposition confirms: Defendants believe they *can* respond, they just do not want to, regardless of the plain requirements of Code of Civil

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[4] Objections to requests for admissions that are not timely made are waived. *See* Civ. Proc. Code §§ 2030.240(b), 2030.260(a); *see also Scottsdale Ins. Co. v. Super. Ct.*, 59. Cal. App. 4th 263, 272-273 (1997) (holding that, in the context of an attorney-client privilege objection made *after* a timely interrogatory response, "an objection based on privilege must be made in the *original* response or waiver results") (emphasis in original).

[5] *See* Plaintiffs' Separate Statement in Support of Motion to Compel Further Responses to Request for Admissions, Set One, Propounded on Defendants Kamala Harris and Stephen Lindley ("Sep. Statement re: RFA"); Plaintiffs' Separate Statement in Support of Motion to Compel Further Responses to Form Interrogatories, Set One, Propounded on Defendants Kamala Harris and Stephen Lindley ("Sep. Statement re: FI").

Procedure section 2033.220. (Opp. 7:26-27) ("In the event the ancillary legal issues implicated by Request Nos. 83-86 and 88-89 become relevant, defendants plan to contest them."). Defendants are not entitled to set the bounds of relevance based on their viewpoint, and their claim that they are unable to comply with the relevant Requests for Admissions ("RFA") offends the spirt and the letter of California's Discovery Act.

The statutory bounds of relevance are clear"any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action[.]" Civ. Proc. Code § 2017.010. The benefits, burdens, and interests related to the feepayers at issue are the substance of the request for admissions at issue, and because this case is about: (1) the proper use of the money provided by feepayers as limited by Article XIII A of the California Constitution; and (2) the justification for the amount being paid by the feepayers, the Court should order the production of the information sought. *Id.* § 2017.010 (*See, e.g.,* Compl. ¶¶ 75, 105).

2. The "No Higher Tax" Argument Fails Procedurally and Substantively

Defendants incorrectly allege that responding to the relevant RFAs would "force defendants to unnecessarily and prematurely take a position on" legal issues. (Opp. 7:19-21). The law is clear that "[p]leading deficiencies generally do not affect either party's right to conduct discovery[.]" *Mattco Forge, Inc. v. Arthur Young & Co.*, 223 Cal. App. 3d 1429, 1437 n.3 (1990) (citation omitted). Therefore, even assuming arguendo that the proposed MJOP might be successful, Defendants' initial RFA responses, served more than nine months ago (and several months before the "no higher tax" argument was explained) needed to be complete at the time they were served, *regardless* of a supposed pleading defect raised months later. Defendants could have promptly sought a protective order to stay discovery pending the resolution of an MJOP, but they did not, so that "objection" was waived, as described above. Civ. Proc. Code § 2033.080(a).

> [Defendants now claim that, a]t this stage of the proceedings, defendants have clearly articulated its [sic] position that Proposition 26 does not apply because SB 819 simply did not "result[] in any taxpayer paying a higher tax." (Cal. Const., art. XIIIA, § 3, subd. (a).) Thus, defendants have not formulated a position on ancillary legal questions like **[(1)]** whether those who participate in the DROS process "place an unusual burden" on the general public [citation]; **[(2)]** whether they pose a "greater burden" on the public as to illegal firearm possession than those who have not participated in the DROS process [citation]; or **[(3)]** whether law-abiding firearm owners have "a greater interest" than law-abiding citizens who

> do not own firearms in making sure that prohibited persons do not possess firearms [citation].

(Opp. 7:7-16).

First, contrary to their claim, Defendants have never "clearly articulated" their "no higher tax" position. The Opposition's omission of a citation to support Defendants' claim is telling. (*Id.*). And perhaps more to the point, neither the "no higher tax" argument, nor the threatened MJOP, was referred to in Defendants' RFA responses. (*See* Sep. Statement re: RFA).

In reality, the only place Defendants have ever provided a written explanation of this argument was in a somewhat cryptic email sent well after the meet-and-confer process started, wherein Defendants' attorney provided a few sentences comprising a "rough outline" of the inchoate MJOP. (Declaration of Scott M. Franklin in Support of Motion to Compel Further Responses to Requests for Admissions, Set One, Propounded on Defendants Kamala Harris and Stephen Lindley Ex. 3). As that email predated the Motions, Defendants have never responded to the Motions' arguments as to how Proposition 26 should be interpreted.

For example, the Opposition does not provide any response regarding the fact that the California Department of Finance has clearly stated that the funds at issue, "when transferred, may become proceeds of taxes." (Motion re: RFA 9:9-27). Nor have Defendants ever addressed the fact that the relevant legislative history clearly states Proposition 26 requires "a two–thirds vote of each house of the Legislature to approve laws that increase taxes on any taxpayer, ***even if the law's overall fiscal effect does not increase state revenues***." Legislative Analyst's Office, *Proposition 26* [Title and Summary/Analysis] 57 (2010) (emphasis added) (Declaration of Scott M. Frankin in Support of Plaintiffs' Reply Ex. 1). Thus, though Defendants had the opportunity to use the Opposition to rebut Plaintiffs' claim that the "no higher tax" argument is meritless, they instead chose to gamble that the Court will let them brief the issue during the MJOP process.

Second, it is unreasonable for Defendants to argue that, because they have taken a position that Plaintiffs' Proposition 26 claim is flawed, that "fact" caused them to not formulate a position on certain questions that are directly relevant to their constitutional burden to show the challenged fee is in no way a tax. Cal. Const. art. XIII A, § 3(b, d) (Opp. 7:7-17). Just the opposite is true.

Defendants' have sworn that their position is "that the use of DROS funds does not operate as a tax." (Sep. Statement re: RFA at 2:18-19). To reach that position, Defendant *must* have considered the constitutional exceptions that allow certain governmental levies to be excluded from the presumption that such fees are taxes, e.g., "'tax' means any levy, charge, or exaction of any kind imposed by the State, *except* the following . . . ." Cal. Const. art. XIII A, § 3(a, b, d) (italics added) ("The State bears the burden of proving[, among other things, that the costs of a governmental activity allocated to a charge payor bear a] fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.").

Third, it is hard to swallow Defendants' attempt to paint key constitutional questions, e.g., the three numbered inquires in the block quote above, as "ancillary legal questions[.]" (Opp. 6:9-16). Indeed, whether a person paying the fee at issue has a specific interest in the use of the funds the payer paid, or if all who pay the fee create a specific burden on the public, those issues seem likely to be determinative as to Plaintiffs' Proposition 26 claim. Cal. Const. art. XIII A, § 3(b, d); (*e.g.*, Compl. ¶¶ 73-84.) Accordingly, because any relevancy-based claim Defendants are attempting to make are patently meritless, and because the "no higher tax" argument cannot withstand scrutiny, the Court should order further responses to RFA Nos. 83-86 and 88-89.

B. <u>Further FI Responses Should Be Ordered</u>

1. FI No. 17.1(b) Re: RFA Nos. 18, 19, 21, and 22

The Opposition states that "[l]ike the RFA discussed above, these requests go to the Proposition 26 issue. Thus, defendants expect that the requests will become moot following the Court's resolution of the [MJOP]." (Opp. 9:8-10). Even setting aside Plaintiffs' general position that Defendants' cannot rely on an inchoate MJOP argument, the Opposition fails to mention a critical distinction between "the RFA discussed above" (i.e., RFA Nos. 83-86, 88-89) and the specific portion of Form Interrogatory ("FI") 17.1(b) at issue here.

RFA Nos. 18, 19, 21, and 22, unlike RFA Nos. 83-86, 88-89, *have already been denied* by Defendants. (Sep. Statement re: RFA, *passim*; Sep. Statement re: FI at 1:22-2:2). In fact, Defendants have already responded, though insufficiently, to the relevant portion of FI at issue. (*See* Sep. Statement re: FI at 2:3-4:23). Clearly, it would be no great burden for Defendants to

provide the information sought, as the denials of RFA Nos. 18, 19, 21, and 22 must have been based on something. And regardless, because Defendants did not make a timely oppression objection, Defendants' allegations of undue burden are without legal import. (*Id.* at, *e.g.*, 11:1-5); *see Scottsdale Ins. Co. v. Super. Ct.*, 59. Cal. App. 4th 263, 272-273 (1997).

It is unreasonable for Defendants to try to backtrack and avoid providing the further responses upon Plaintiffs having now proven that the "cut and paste" responses at issue were non-responsive. The existence of Defendants' sworn response denying RFA Nos. 18, 19, 21, and 22 necessarily means Defendants already have the information required to answer the relevant portion of FI 17.1(b). In light of that key fact, there is no legitimate reason Defendants should be allowed to keep secret this relevant information that is already in Defendants' possession.

2. FI No. 17.1(b) Re: RFA No. 38 (Non-MJOP Response)

Initially, Plaintiffs want to point out that the disputed response is *not* related to the "no tax increase" issue, and thus a ruling on the threatened MJOP will not, even if successful, provide a basis for Defendants to avoid their insufficient response to FI No. 17.1(b) re: RFA No. 38. As to this and all of the other disputed responses that are unaffected by the potential MJOP, they are referred to as "non-MJOP" responses herein.

Once again, Defendants were able to deny the underlying RFA (Sep. Statement re: FI at 1:22-2:2), but when it came to explaining their denial, the relevant FI response is evasive: "Defendants refer to their answer to Special Interrogatories Nos. 1 & 2, where defendants address the issue of "per transaction cost." (*Id.* at 6:8-9). Furthermore, Defendants' argument on this issue continues to be evasive, as they claim "defendants have answered" "Special Interrogatories Nos. 1 & 2," when in fact, Defendants' response to Interrogatory No. 2 included a promise to provide an estimate of the relevant "per transaction cost[,]" something Defendants have yet to do eight months after the promise was made. It is misleading for Defendants to suggest that a promise to provide information in the future is a actually a complete answer.

The Opposition further ventures into dangerous territory by claiming that the answers to Special Interrogatories Nos. 1 and 2 "sufficiently explain why defendants' cannot state any 'per transaction cost' at this stage of the litigation." (Opp. 9:21-24). That allegation makes little sense

based on Defendants' previous promise, and further, why would the "stage of litigation" be relevant to producing a "per transaction cost" estimate? Plaintiffs are concerned that Defendants' are letting their litigation strategy dictate their level of compliance with certain discovery requests.

Defendants claim the information sought by FI No. 17.1(b) re: RFA No. 38 is "unwarranted" and "unfair[,]" but they never back up their allegations with even a single legal citation. (*Id.* 9:25-26; 10:1-3). Because Defendants cite no authority that exempts them from Code of Civil Procedure section 2030.220's requirement that "[e]ach answer in a response to interrogatories shall be as complete and straightforward as the information reasonably available to the responding party permits[,]" Defendants are required to provide a further response to FI No. 17.1(b) re: RFA No. 38 that actually supports the underlying denial.

3. FI No. 17.1(b) re: RFA Nos. 58 and 68 (Non-MJOP Responses)

The discovery process is not intended to be a shell game, especially on the issue of the costs relied on in setting the Dealers' Record of Sale Fee, a keystone issue herein. Plaintiffs' underlying RFAs ask whether the California Department of Justice was unaware of certain *specific* cost calculations being made. (Sep. Statement re: FI at 6:22-25; 8:10-11). Because Defendants denied the RFAs at issue (Sep. Statement re: FI at 2:1-2), they were required to provide an FI 17.1(b) response as to each denial. But instead of stating the facts that support their denials (which necessarily would have included a reference to the specific cost calculations at issue), Defendants evaded the questions asked and responded based on the premise that "[t]he costs needed to fund the Bureau's programs (both regulatory and enforcement) are publicly available and are contained within the Governor's annual budget." (*Id.* 8:9-11; 9:20-21). Poignantly, Plaintiffs have already pointed out that the Governor's annual budget does not refer to the specific cost calculations at issue for this portion of Defendants' FI response, and yet the Opposition does not even attempt to rebut that claim. (Motion re: RFA at 5:20-22).

Defendants' obfuscatory intention is made clear in the Opposition in at least two ways. First, Defendants state they "have produced numerous pages of budget and financial documents detailing the Legislature's appropriation of funds out of the DROS Special Account and DOJ's expenditure of those funds by line item going back to fiscal year 2003-2004[.]" (Opp. 9:9-13).

Those documents, however, are *macro-level* budgetary documents, meaning that the "line items" therein are not itemized costs (i.e., the type of cost information Plaintiffs seek), they are groups of costs. For example, Defendants position is akin to claiming that a macro-level budget document showing the total amount spent on equipment costs for a given department would also show the total amount spent on pencils alone, which is obviously untrue.

Second, it is at least disingenuous for Defendants to claim "a deposition would be a far better vehicle [than an FI response] for a discussion of the 'costs' referenced in RFA Nos. 58 and 68." (Opp. 10:17-18). Assuming the relevant cost calculations exists (which we must because of Defendants' sworn RFA responses apparently affirming that fact) it is clearly illogical to think the best discovery tool to obtain historical budgetary information is a human being's memory, as opposed to a document review-based FI response.

Put simply, because Defendants were able to respond to the underlying RFAs, that necessarily means that either: (1) they already know the facts upon which such responses were based (so production thereof is no kind of hardship); or (2) the underlying RFA responses were incorrect. Assuming Defendants are not going to amend the underlying RFA responses, a further response to FI No. 17.1(b) re: RFA Nos. 58 and 68 should be ordered.

4. FI No. 17.1(b) re: RFA No. 78 (Non-MJOP Response)

Defendants claim the relevant underlying RFA response, "is sufficiently unqualified so as to make any response Form Interrogatory 17.1 (b) unnecessary." (Opp. 10:24-25). FI No. 17.1 responses, of course, are required for any underlying RFA responses that is not "an unqualified admission[.]" (Sep. Statement FI *passim*). Whether or not an admission is "unqualified" is a binary inquiry, so because the underlying RFA admission was qualified ("Admitted, although . . . ."), Defendants should be ordered to provide a further response to FI No. 17.1(b) re: RFA No. 78.

5. FI No. 17.1(b) re: RFA Nos. 83-86 and 88-89

Because the insufficient responses to FI No. 17.1(b) re: RFA Nos. 83-86 and 88-89 are expressly based on the "no higher tax" argument discussed in detail in the Plaintiffs' Motions and Section II.A. above, Plaintiffs request the Court order further response to FI No. 17.1(b) re: RFA Nos. 83-86 and 88-89 for the reasons previously stated as to Defendants'

responses to RFA Nos. 83-86 and 88-89.

6. FI No. 17.1(b) re: RFA Nos. 92-96 and 99 (Non-MJOP Response)

Defendants' argument concerning FI No. 17.1(b) re: RFA Nos. 92-96 and 99 is basically reiteration of the arguments already dismantled above in Section II.B.3. The Court need look no further than the relevant RFAs and the text of Defendants' responses to FI No. 17.1(b) re: RFA Nos. 92-96 and 99 to know that Defendants' responses were not "as complete and straightforward as the information reasonably available to the responding party permits[,]" meaning Defendants should be required to produce further responses to FI No. 17.1(b) re: RFA Nos. 92-96 and 99. Civ. Proc. Code § 2033.220(a).

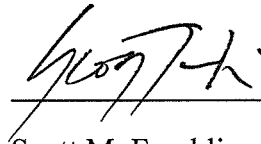
III. CONCLUSION

Defendants' opportunity to raise their "no higher tax" argument, as it relates to the disputed discovery responses, came and went long ago. Defendants' failure to timely obtain a protective order staying discovery pending resolution of the "no higher tax" argument precludes that argument from being raised now. Furthermore, the Opposition does not provide any evidence to substantively support Defendants' "no higher tax" argument, in stark contrast to Plaintiffs' extensive briefing on the issue. Indeed, the Opposition does not provide a compelling argument to excuse any of Defendants disputed discovery responses.

Because Defendants have failed to raise a legitimate argument to justify their non-compliance with the discovery propounded by Plaintiffs, the Court should grant the relief sought. Further, in an effort to avoid the substantial waste of time that Defendants' proposed MJOP represents, Plaintiffs respectfully request that, on or about April 24, 2015, the Court issue a tentative ruling on Plaintiffs' Motions so Defendants will have the chance to delay or abandon the proposed MJOP upon consideration of the tentative ruling. The issuance of a tentative ruling will not prejudice Defendants and it may prevent an entire round of unnecessary motion practice.

Dated: April 14, 2015

MICHEL & ASSOCIATES, P.C.



Scott M. Franklin, attorney for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Laura L. Quesada, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, CA 90802.

On April 14, 2015, the foregoing document(s) described as

REPLY IN SUPPORT OF MOTIONS TO COMPEL FURTHER RESPONSES TO: (1) REQUEST FOR ADMISSIONS, SET ONE; AND (2) FORM INTERROGATORIES, SET ONE, BOTH PROPOUNDED ON DEFENDANTS KAMALA HARRIS AND STEPHEN LINDLEY

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Kamala D. Harris, Attorney General of California
Office of the Attorney General
Anthony Hakl, Deputy Attorney General
1300 I Street, Suite 1101
Sacramento, CA 95814

_X_ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on April 14, 2015, at Long Beach, California.

_X_ (VIA ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission. Said transmission was reported and completed without error.
Executed on April 14, 2015, at Long Beach, California.

__ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on April 14, 2015, at Long Beach, California.

_X_ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

__ (FEDERAL) I declare that I am employed in the office of the member of the bar of this court at whose direction the service was made.

LAURA L. QUESADA