

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 11/23/2016

TIME: 09:00:00 AM

DEPT: 31

JUDICIAL OFFICER PRESIDING: Michael P. Kenny

CLERK: S. Lee

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT: Larry Moorman

CASE NO: 34-2013-80001667-CU-WM-GDSCASE INIT.DATE: 10/16/2013

CASE TITLE: **Gentry vs. Harris**

CASE CATEGORY: Civil - Unlimited

APPEARANCES

NATURE OF PROCEEDINGS: MOTION TO COMPEL FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET THREE - COURT RULING

At the request of the parties, the court issues the following ruling denying in part and deferring in part Plaintiffs' motion to compel further responses to special interrogatories.

The underlying case involves Plaintiffs challenge to the Department of Justice's expenditure of fees collected from potential firearm purchasers. The fees are collected by firearms dealers, and are sometimes referred to as Dealer Record of Sale or "DROS" fees. (See First Amended Complaint ["Compl."], ¶ 1; Pen. Code § 28225.) By law, the amount of the fee cannot exceed \$14 (subject to an adjustment based on the Consumer Price Index), and "shall be *no more than necessary*" to fund certain specified activities. (Pen. Code § 28225, subds. (a) and (b) [emphasis added]; see also Compl., ¶ 2.) The fee is currently set at \$19 for a single transaction involving one or more firearms, with an additional fee of \$15 for each additional handgun purchased. (Compl., ¶ 47.) The fees are deposited into a special DROS account in the general fund, and are available, upon appropriation by the Legislature, to be used for specified purposes. (Pen. Code § 28235; see also Compl., ¶¶ 40-49.) In summary, Plaintiffs contend the fee is both unnecessarily high and being used for unauthorized purposes.

As relevant to the current discovery dispute, one of the purposes for which DROS fees are currently being used is to fund what is known as the APPS program. APPS stands for Armed Prohibited Persons System. APPS is an online database that cross-references all firearms owners against criminal history and other records to identify people who legally purchased firearms, but who subsequently became prohibited from possessing firearms due to, for example, criminal activity or mental illness. The goal of the APPS program is simple: once a potentially prohibited persons is identified, DOJ and other law enforcement agencies can investigate, and, if appropriate, confiscate that person's firearms. The Legislature first authorized the use of DROS fees to fund the APPS program in 2012. In 2013, it appropriated approximated \$24 million from the DROS account for that purpose. (See generally Compl., ¶¶ 64-70.) Plaintiffs contend that Defendants are inappropriately using DROS fees on cases that are not properly characterized as APPS cases and/or on activities that go beyond the scope of the APPS program.

The parties have stipulated to bifurcate the trial in this action, and to schedule a hearing on the merits and/or motions for summary adjudication on the fifth and ninth causes of action before deciding the merits of the remaining causes of action. (See 11/4/16 Stipulation Re: Bifurcation and Setting Partial Merits Hearing ["Stipulation"].) In the fifth cause of action, Plaintiffs seek a writ of mandate directing Defendants to set the DROS fee in an amount no more than necessary to fund authorized activities. In

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the ninth cause of action, Plaintiffs seek declaratory and/or injunctive relief prohibiting Defendants from utilizing DROS fees on what they contend are unauthorized activities.

The present discovery dispute involves just three special interrogatories (numbers 25, 29, and 30). In the aforementioned Stipulation, Plaintiffs argue these three interrogatories go directly to "elemental issues" in the fifth and ninth causes of action, and they ask the court to rule on their motion to compel now. Defendants, in contrast, argue the motion should be either taken off calendar and rescheduled, declared moot, or otherwise addressed by the court in its ruling on the merits of the fifth and ninth causes of action. They also argue that further answers to these interrogatories are unnecessary for the court to resolve the fifth and ninth causes of action.

For the reasons stated below, the motion to compel a further response to Special Interrogatory 25 is denied, and the motion to compel a further response to Special Interrogatories 29 and 30 is deferred until the court decides the merits of the fifth and ninth causes of action.

Special Interrogatory 25. Plaintiffs contend this interrogatory is relevant to the fifth cause of action, which, as noted above, deals with the amount of the DROS fee. This interrogatory asks Defendants to state the basis for their response to Special Interrogatory 24 (and Plaintiffs do not challenge the response to Special Interrogatory 24). In response to Special Interrogatory 24, Defendants stated the total amount of DROS Fund expenditures for fiscal year 2013-2014 was \$29,144,382. In response to Special Interrogatory 25, Defendants state the basis of this calculation is "laid out in the table and supporting expenditure reports already produced by defendants in this case and Bates numbered AGRFP00002 through AGRFP00011." Code of Civil Procedure section 2030.230 expressly allows such a response. Plaintiffs fail to convince they are entitled to more. The motion to compel a further response to this interrogatory is thus denied.

Special Interrogatories 29 and 30. Plaintiffs contend these interrogatories are relevant to the ninth cause of action, which deals with what DROS fees can be spent on. These interrogatories are similar. Both refer to specific statements made in a "Biennial Report" of "Major Activities 2013-2014" prepared by DOJ. Among other things, the Report provides information on "significant APPS cases." Plaintiffs are particularly interested in two of those cases, because they believe, based on the description of the cases contained in the Report, that they are not appropriately classified as APPS cases, and thus should not have been funded by DROS fees. The following details how the two cases are described in the Report:

Ex-Felon in Possession of Firearm at Local Gun Range. In June 2013, agents received an anonymous tip that an ex-felon was working as the manager and firearms instructor at his family's shooting range in Corona. The business is located on a 1,200-acre ranch and is well known to local shooting enthusiasts. Agents confirmed the subject worked at the business and was in possession of firearms and ammunition, and obtained search warrants for the business and the subject's residence. In August 2013, agents executed search warrants and seized 28 rifles, 50 shotguns, 10 handguns, and over 10,000 rounds of ammunition. The subject was arrested and charged as being an ex-felon in possession of firearms and ammunition.

Parents Jailed after Agents Find Guns and Drugs in Home with Small Children. In November 2013, agents followed up on a possible "straw purchase." This term refers to the purchase of a firearm by a "straw buyer" on behalf of someone who is either legally prohibited from making the purchase or wishes to acquire the firearm anonymously. Agents executed a search warrant on the straw buyer's residence and recovered the handgun in question, a second stolen handgun and a shotgun, and discovered a marijuana extraction lab and marijuana. The loaded firearms, lab, and marijuana were accessible to three minor children. The straw buyer and prohibited person (wife and husband, respectively) were arrested and charged with furnishing a firearm to a prohibited person, being a felon in possession of a firearm, operating a chemical extraction of a controlled substance lab, and child endangerment.

(Franklin Decl., Ex. 3.) In Special Interrogatories 29 and 30, Plaintiffs ask Defendants to explain what made each scenario an APPS case, "including, but not limited to, how data from the Armed Prohibited Persons System was used in this case."

Defendants provided no substantive responsive to these two interrogatories and instead objected to both on the same six grounds: (1) lack of relevance; (2) attorney-client privilege; (3) work product doctrine; (4) official information privilege; (5) law enforcement privilege; and (6) executive privilege. Their opposition focuses on the official information privilege,[1] which is codified in Evidence Code section 1040, and which provides that a public entity may refuse to disclose official information if "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." Defendants argue that answering these interrogatories would require disclosing confidential information about how criminal investigations are conducted, and that doing so would compromise both the efficacy of those investigations and officer safety. To support their argument they cite *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759, 765, where the court held that "the contents of police investigative files sought in civil discovery must remain confidential so long as the need for confidentiality outweighs the benefits of disclosure in any particular case." They also cite *People v. Jackson* (2003) 110 Cal.App.4th 280, 290, where the court held, "It is true that as time passes and an investigation lapses or is abandoned, the need for confidentiality in police files wanes. [Citation.] However, this decline never renders law enforcement investigative files automatically discoverable and is but one factor to consider when weighing a defendant's right to otherwise privileged information." Defendants thus argue that Plaintiffs' "asserted need to understand the confidential, intricate details of Bureau of Firearms law enforcement operations totally unrelated to this case is grossly outweighed by the Bureau's need to maintain the safety, security, integrity, and efficacy of those and similar operations."

Plaintiffs disagree. They argue, in effect, that the confidentiality cat is out of the bag because Defendants have already disclosed certain facts about the two cases at issue -- in other words, Defendants have already disclosed information they now claim is confidential, and the two interrogatories simply seek the same information "on a more granular level." (Reply a 9:14.) Plaintiffs also argue that at least one of the cases is not an APPS case because it arose from an anonymous tip rather than a hit from the APPS database, and because news reports suggest the Department made an arrest based not on an APPS hit but on an agent seeing an ex-felon working around firearms.

Whatever the merits of the parties' arguments, the court is not convinced that Plaintiffs need answers to these two interrogatories in order to proceed to trial on the ninth cause of action. This is because the ninth cause of action appears to raise a pure question of law. In it, Plaintiffs state they seek a judicial declaration regarding the "scope of Senate Bill 819's 'possession' provision." (Compl. at 24:2.) SB 819 added the word "possession" to two subdivisions of Penal Code section 28225 -- and that is all it did. Following the enactment of SB 819, section 28225, subdivision (b)(11) provides that DROS fees shall be no more than necessary to fund certain enumerated activities, including "the costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, **possession**, loan, or transfer of firearms" (Emphasis added.) And section 28225, subdivision (c) provides that DROS fees shall not exceed the estimated costs of, among other things, "department firearms-related regulatory and enforcement activities related to the sale, purchase, **possession**, loan, or transfer of firearms" (Emphasis added.) According to Plaintiffs, there is a dispute between the parties about whether DROS fees can be used for enforcement activities related to the possession of firearms in general (Defendants' position), or whether it can only be used for enforcement activities related to the possession of firearms if the enforcement activities are based on data generated via the APPS system (Plaintiffs' position). (Compl., ¶¶ 137-39.) Plaintiffs thus seek a judicial declaration about what section 28225, as amended by SB 819, authorizes DROS fees to be used for. Plaintiffs also seek related injunctive relief prohibiting Defendants from using DROS fees for

unauthorized purposes.

Although the language of section 28225 would appear to support Defendants' position,[2] Plaintiffs point to SPB 819's Legislative findings and declarations, which state, in full, as follows:

- (a) California is the first and only state in the nation to establish an automated system for tracking handgun and assault weapon owners who might fall into a prohibited status.
- (b) The California Department of Justice (DOJ) is required to maintain an online database, which is currently known as the Armed Prohibited Persons System, otherwise known as APPS, which cross-references all handgun and assault weapon owners across the state against criminal history records to determine persons who have been, or will become, prohibited from possessing a firearm subsequent to the legal acquisition or registration of a firearm or assault weapon.
- (c) The DOJ is further required to provide authorized law enforcement agencies with inquiry capabilities and investigative assistance to determine the prohibition status of a person of interest.
- (d) Each day, the list of armed prohibited persons in California grows by about 15 to 20 people. There are currently more than 18,000 armed prohibited persons in California. Collectively, these individuals are believed to be in possession of over 34,000 handguns and 1,590 assault weapons. The illegal possession of these firearms presents a substantial danger to public safety.
- (e) Neither the DOJ nor local law enforcement has sufficient resources to confiscate the enormous backlog of weapons, nor can they keep up with the daily influx of newly prohibited persons.
- (f) A Dealer Record of Sale fee is imposed upon every sale or transfer of a firearm by a dealer in California. Existing law authorizes the DOJ to utilize these funds for firearms-related regulatory and enforcement activities related to the sale, purchase, loan, or transfer of firearms pursuant to any provision listed in Section 16580 of the Penal Code, but not expressly for the enforcement activities related to possession.
- (g) Rather than placing an additional burden on the taxpayers of California to fund enhanced enforcement of the existing armed prohibited persons program, *it is the intent of the Legislature in enacting this measure to allow the DOJ to utilize the Dealer Record of Sale Account for the additional, limited purpose of funding enforcement of the Armed Prohibited Persons System.*

(SB 819, [Chapter 743, Statutes of 2011], Sec. 1 [emphasis added].) Presumably, Plaintiffs will argue that these findings and declarations show that the only additional purpose for which SB 819 allows DROS fees to be used is "funding enforcement of the Armed Prohibited Persons System." (See Compl., ¶¶ 64-66, 137-139.)

Deciding the merits of the ninth cause of action will thus involve interpreting Penal Code section 28225, as amended by SB 819. Interpreting a statute is a "pure question[] of law." (*Chawanakee Unified School Dist. v. County of Madera* (2011) 196 Cal.App.4th 1016, 1020.) In this case, that pure question of law will involve (1) interpreting the phrase "enforcement activities related to the . . . possession . . . of firearms" in Penal Code section 28225, and (2) determining whether and/or how the Legislature's findings and declarations in enacting SB 819 inform that interpretation. Special Interrogatories 29 and 30 deal with why DOJ identified two particular cases as APPS cases. Why DOJ identified *any* case as an APPS case has no bearing on the purely legal issues raised by the ninth cause of action. The court thus agrees with Defendants that deferring the motion to compel further responses to Special Interrogatories 29 and 30 is appropriate, at least until the court rules on the merits of the ninth cause of action. Depending on the court's ruling, it may be appropriate for Plaintiffs to renew the motion.

[1] Although they mention the deliberative process privilege in their opposition, none of the cases they cite deal with this privilege, and, in any event, they did not assert the deliberative process privilege in response to the interrogatories themselves. (See *Stadish v. Superior Court* (1999) 71 Cal.App.4th 1130, 1141 [failure to assert privilege in response to discovery constitutes waiver].)

[2] Or, perhaps more precisely, Defendants' position as characterized by Plaintiffs' complaint.

Certificate of Service by Mailing is attached.

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing MINUTE ORDER DATED NOVEMBER 23, 2016 by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each which envelopes was addressed respectively to the persons and addresses show below:

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I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: November 23, 2016

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

/s/ S. Lee

By S. Lee, Deputy Clerk



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