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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 **NOTICE OF MOTION AND MOTION TO COMPEL FURTHER RESPONSES TO FORM INTERROGATORIES, SET ONE, PROPOUNDED ON DEFENDANTS KAMALA HARRIS AND STEPHEN LINDLEY; MEMORANDUM IN SUPPORT THEREOF** Date: 04/24/15 Time: 9:00 a.m. Dept.: 31 Action filed: 10/16/2013

By Fax

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 24, 2015, at 9:00 a.m. or as soon thereafter as the matter may be heard, in Department 31 of the Sacramento County Superior Court, located at 720 9th Street, Sacramento, CA 95814, Plaintiffs/Petitioners David Gentry, James Parker, Mark Midlam, James Bass, and Calguns Shooting Sports Association (collectively "Plaintiffs") will and hereby do move this Court for an order compelling Defendants/Respondents Kamala Harris and Stephen Lindley ("Defendants") to produce further responses to Plaintiffs' Form Interrogatories,

Set One, propounded on Defendants on May 14, 2014.

This Motion is brought pursuant to Code of Civil Procedure sections 2030.220(a) and 2030.300(a)(1) on the grounds that Defendants have provided evasive and incomplete statements in responses to certain interrogatories propounded by the Plaintiffs. A declaration in conformance with Code of Civil Procedure section 2016.040 is provided herewith.

This Motion is based upon this notice, the attached memorandum of points and authorities, the supporting Declaration of Scott M. Franklin, the separate statement of disputed issues concurrently served and filed with this Motion, upon all papers and pleadings currently on file with the Court, and upon such oral and documentary evidence as may be presented to the Court at the time of the hearing.

Please take further notice that pursuant to Local Rule 1.06(A), the court will make a tentative ruling on the merits of this matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings for the department may be downloaded off the court's website. If the party does not have online access, they may call the dedicated phone number for the department referenced in the local telephone directory between the hours of2:00 p.m. and 4:00 p.m. on the court day before the hearing and receive the tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the court day before the hearing, no hearing will be held.

Dated: February 17, 2015

MICHEL & ASSOCIATES, P.C.

Scott M. Franklin, Attorney for Plaintiffs

I. INTRODUCTION

This Motion concerns certain response(s)[1] to Form Interrogatory No. 17.1. Because Defendants' responses are improperly evasive, the Motion should be granted.

II. STATEMENT OF FACTS

Plaintiffs served a first set of Form Interrogatories ("FI") on Defendants on May 14, 2014, (Declaration of Scott M. Franklin In Support of Motion to Compel Further Responses to Form Interrogatories, Set One, Propounded on Defendants Kamala Harris and Stephen Lindley [the "Franklin Decl."] ¶ 2). Pursuant to a courtesy extension granted by Plaintiffs, Defendants provided responses to the FI on August 1, 2014 (*Id.* ¶ 3). Soon thereafter, Plaintiffs counsel evaluated the responses and determined them to be insufficient, and accordingly, the Plaintiffs sent a letter on October 17, 2014, explaining in detail how the responses provided were insufficient. (*Id.* ¶ 4). On October 29, 2014, counsel for the parties held a telephonic conference to discuss the disputed discovery responses, and Defendants counsel agreed that as to each of the disputed responses, the Defendants would provide some form of further response (be it a substantive response or a statement that no further response would be voluntarily provided) by November 26, 2014. (*Id.* ¶ 5). At the request of Defendants' counsel, that response date was extended to December 9, 2015 (*Id.* ¶ 6).

On December 4, 2014, Defendants' counsel sent a letter to Plaintiffs' counsel proposing that the parties put the dispute concerning Defendants' FI responses on hold. (Franklin Decl. ¶ 7). Defendants based this proposal on a claim that they intended to file a motion for judgment on the pleadings ("MJOP") at some point in the future, and that, if granted, the resolution of such motion could moot some of the dispute concerning purportedly insufficient FI responses. (*Id.*). Plaintiffs' counsel first raised this concept during the phone call of October 29, 2014. (*Id.*). On December 5, 2014, Plaintiffs' counsel emailed Defendants' counsel requesting a further explanation of the argument that Defendants purportedly intended to raise in an MJOP. (*Id.* ¶ 8). Plaintiffs' counsel provided a summary of Defendants' purported MJOP argument in a response email dated December 10, 2014. (*Id.* ¶ 9).

[1] Even though there is technically only one interrogatory at issue here, each relevant subpart is referred to individually herein for clarity's sake.

The next day, Plaintiffs' counsel sent a letter to Defendants' counsel explaining why the MJOP argument did not appear meritorious. (Franklin Decl. ¶ 10). Thereafter, counsel for the parties agreed that Defendants would provide some form of substantive response to each disputed request by January 19, 2015, which was later extended upon Defendants' counsel's request to January 22, 2015. (*Id.* ¶ 11).

Defendants' served their amended responses on January 22, 2015. (Franklin Decl. ¶ 12). On January 28, 2015, Plaintiffs' counsel sent a letter to Defendants' counsel explaining why the amended responses were insufficient. (*Id.* ¶ 13). On February 4, 2015, counsel for the parties held another telephonic meeting to discuss the disputed discovery responses, and counsel confirmed that the parties were at an impasse regarding, among other things, the amended FI responses. (*Id.* ¶ 14).

To facilitate the meet-and-confer process, the parties agreed to extend the filing deadline for the current motion several times, which was most recently extended to February 17, 2015. (Franklin Decl. ¶ 15). But because the Plaintiffs were unable to obtain sufficient, non-evasive responses after multiple attempts to resolve the disputed matter in good faith, the Motion is now required.

III. ARGUMENT

A. Generally Applicable Law Relevant to Responding to Requests for Admissions

Code of Civil Procedure section 2030.220 sets out the boundaries for responding to interrogatories.

> (a) Each answer in a response to interrogatories shall be as complete and straightforward as the information reasonably available to the responding party permits.
>
> (b) If an interrogatory cannot be answered completely, it shall be answered to the extent possible.
>
> (c) If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party.[2]

[2] None of the disputed responses addressed herein include a statement that "responding party does not have personal knowledge sufficient to respond fully[.]" (Sep. Statement *passim*).

If "[a]n answer to a particular interrogatory is evasive or incomplete[,]" "the propounding party may move for an order compelling a further response[.]" Civ. Proc. Code § 2030.300(a)(1).

B. Definitions

The following terms are defined as follows for the purpose of this Memorandum.

APPS: the Armed Prohibited Persons System program, i.e., Prohibited Armed Person File (Penal Code section 30000), and enforcement activities based on data derived from APPS.

DROS Fee/DROS Fee Funds: the fee (which is currently set at $19.00) and funds collected pursuant to Penal Code section 28225 and Code of Regulations, title 11, section 4001.

DROS PROCESS: the background check process that occurs when a firearm purchase or transfer occurs in California.

DROS SPECIAL ACCOUNT: the Dealers Record of Sale Special Account of the General Fund (Penal Code section 28235).

PER TRANSACTION COST: the average cost of performing a given transaction, including a proportional share of overhead costs.

C. Defendants Have Knowingly Refused to Provide Sufficient Responses Notwithstanding Their Ability to Do So–Further Responses Should Be Ordered

All of the responses at issue were served in response to Form Interrogatory No. 17.1. (See Separate Statement in Support of Motion to Compel Further Responses to Form Interrogatories, Set One, Propounded on Defendants Kamala Harris and Stephen Lindley [the "Sep. Statement"] *passim*). Form Interrogatory No. 17.1(b) asks, in relevant part: "Is your response to each request for admission served with these Interrogatories an unqualified admission? If not, for each response that is not an unqualified admission . . . state all facts upon which you base your response . . . [.]" (*Id. passim*). Accordingly, the form interrogatory responses discussed herein concern only request for admission ("RFA") responses that are something other than unqualified admissions (i.e., denials, qualified admissions, or statements of inability to comply).

Though the relevant RFAs, responses, and amended responses are all stated in full and responded to in the Separate Statement filed herewith, Plaintiffs discuss the more salient points of the dispute below.

1. Defendants' Cut-and-Paste Responses Are Insufficient, and Further Responses to FI 17.1(b) (Re: RFA Nos. 18, 19, 21, and 22) Should Be Ordered

Defendants provided the same response to Form Interrogatory No. 17.1(b) regarding Request for Admission Nos. 18, 19, 21, and 22; i.e.,

> [d]epending on the circumstances of a particular case, payment of a DROS fee may ultimately lead to a ***benefit*** realized by the payor vis-a-vis the APPS program. For example, a person who pays a DROS fee may later become prohibited from possessing firearms and have firearms recovered as a result of the APPS program.

(*e.g.,* Sep. Statement 2:15-18) (emphasis added).

RFA Nos. 18, 21, and 22 do not concern a "benefit" at all, and as the response provided concerns only a supposed "benefit[,]" the responses plainly do not actually respond to the question asked. In fact, it is clear that the response provided for FI 17.1 (re: RFA Nos. 18, 21, and 22) was copied from Defendants' response to FI 17.1 (re: RFA No. 17) where a special benefit *was* at issue.[3] (Franklin Decl. ¶¶ 21, 22; Sep. Statement *passim*).

And as to Request No. 19, that request does concern a "benefit[,]" but the question at issue inquires whether one class of individuals get a different "benefit" than another class of individuals. (Sep. Statement 3:4-6). Because the response provided has nothing to do with the comparative question being asked, a further response is required. Civ. Proc. Code § 2030.220(a).

The relevant RFAs and FIs go to one of the issues at the core of this case, e.g., whether the DROS Fee has become, at least in part, an illegal tax under article XIII A, section 3, of the California Constitution (i.e., Proposition 26). The California Constitution clearly excludes certain levies from being characterized as taxes if the payor gets a "special benefit" or "special government service[,]" and it appears Defendants are attempting to avoid providing "complete and straightforward" responses because doing so would be damaging to their case. Further responses should be ordered. Civ. Proc. Code § 2030.220(a).

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[3] Because of the possibility that Defendants were treating the relevant terms as synonymous ("benefit[,]" "special privilege," and "APPS-related service"), Plaintiffs expressly explained to Defendants how, by simply swapping the relevant terms for the oft repeated "benefit[,]" the amended responses would be legally compliant, even if Plaintiffs substantively disagreed with such responses. (Franklin Decl. ¶ 13 [Ex. 5 at 3-4]). No (additional) amended responses were provided, however, confirming Defendants do *not* treat the terms at issue as synonymous, and that further responses should be ordered.

2. Defendants' Cannot Use Evasive Responses to Avoid Answering Relevant Questions—Further Response to FI 17.1(b) (Re: RFA No. 38) Should Be Ordered

Here, Plaintiffs asked Defendants to "[a]dmit that the PER TRANSACTION COST of the DROS PROCESS is less than $19.00." (Sep. Statement 5:26-6:2). Defendants denied this request, which obviously means Defendants contend the cost at issue is $19.00 or more. Plaintiffs believe the denial provided may be untrue. Regardless, as stated in a well-regarded practice guide, when a responding party provides an unqualified denial to an RFA that does not appear true, "[t]he proper procedure in such a case is to serve interrogatories on the responding party asking him or her to state the facts upon which the denials are based." Hon. William F. Rylaarsdam, et al., Cal. Practice Guide: Civil Procedure Before Trial ¶ 8:1378-81 (The Rutter Group 2014).

The FI response at issue does not provide any facts that support Defendants' claim that the cost at issue is at least $19.00. Indeed, Defendants' response consists of a reference to special interrogatory responses, which is in and of itself improper. *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 783-784 (1978). Furthermore, the cited special interrogatory responses, produced more than six months ago, specifically state that Defendants are going to produce a estimate of the relevant cost. (Sep. Statement 6:8-9); Franklin Decl. ¶ 23 [Ex. 12 at 2:1-16]). No such production has occurred as of the date of this filing.

A key allegation in this lawsuit is that the DROS Fee being charged is not justified based on the list of costs to be considered in setting such cost. *See* Penal Code § 28225. FI No. 17.1(b) (re: RFA No. 38) seeks facts supporting the contention that the current fee is properly set based on relevant costs incurred by the California Department of Justice (the "Department" or "CAL DOJ"). If Defendants have facts to support their contentions, they must produce them, as such facts are indisputably relevant. And if Defendants do *not* have such facts, that too is clearly relevant to Plaintiffs' claim that the amount of the DROS Fee is unfounded, and in that situation, Defendants should be required to provide a further response that reflects their lack of factual support on this issue. Civ. Proc. Code § 2030.220(a).

3. Vague, Obfuscatory Responses Are Insufficient—Defendants Should Be Ordered to Provide Further Responses as to FI No. 17.1(b) (Re: RFA Nos. 58 and 68)

Defendants provided the same response to FI No. 17.1(b) regarding RFA Nos. 58 and 68, i.e.:

> The Bureau of Firearms is aware of the amount of money necessary to fund its program costs and meet its statutory obligations. The costs needed to fund the Bureau's programs (both regulatory and enforcement) are publicly available and are contained within the Governor's annual budget.

(Sep. Statement 7:5-8, 8:18-22).

This response is improperly evasive. The underlying RFAs ask Defendants about whether Defendants are aware of (a) what the Department paid for "electronic or telephone transfer of information pursuant to Penal Code section 28215," and (b) a calculation being performed "to determine the sum of the estimated costs listed in [Penal Code] SECTION 28225(c)." (Sep. Statement 6:22-25, 8:9-11).

As to issue (a), the response provided does not actually give any facts to support the relevant RFA responses. Instead, the Defendants make a blanket statement that, *in total*, the Department knows what its "program costs" are. (*Id.* at 6:22-25). Plaintiffs did not ask for "total" information, as their claim that the DROS Fee is too high hinges on the specific costs that are considered in setting the DROS Fee. (Compl. 18:20-19.21). And regardless, had Defendants identified where in the "publicly available" material relevant *specific* facts are contained, Plaintiffs would not need to pursue a further response. But, of course, the Governor's Budget does not go into the level of detail Defendants implicitly claim, meaning Defendants' "misdirect" to the Governor's budget was inappropriate.

Issue (b) is a similar matter. Based on Defendants' denial of RFA No. 68, the Department is aware "of a calculation being performed after January 1, 2005, to determine the sum of costs and estimated costs listed in [Penal Code] Section 28225(C)." (Sep. Statement 8:9-11). Again, the response provided says nothing about the calculation at issue. It may well be that the calculation at issue was part of a bigger determination, but as it appears Defendants are attempting to avoid direct responses by providing general (and thus non-responsive) statements, the responses cannot

withstand a challenge.

Defendants should be ordered to provide further responses that are "straighforward[,]" as required by law. Civ. Proc. Code § 2030.220(a).

4. Defendants' Response to RFA No. 78 Is Not an "Unqualified Admission[,]" Thus a Response to FI 17.1 (Re: RFA No. 78) Is Required

RFA No. 78 asks Defendants to admit if the current DROS Fee was set based on a comparison of the money that went into, and flowed out of, the DROS Special Account. (Sep. Statement Sep. Statement 9:24-26). In response, Defendants stated "[a]dmitted, although that comparison was not the sole basis for setting the fee at $19.00." (*Id.* at 9:27-10:1). That response is clearly not a an "unqualified admission[,]" meaning that Defendants were required to provide the facts supporting their RFA response pursuant to FI 17.1(b) (re: RFA No. 78). They did not. A further response is required. Civ. Proc. Code §§ 2030.290(b),[4] 2030.300(a)(1).

5. Defendants Cannot Avoid Providing Discovery Responses Based on a Hypothetical Argument—Further Responses to FI 17.1 (Re: RFA Nos. 83-86, 88, and 89) Are Required

Defendants provided the same response to FI No. 17.1(b) regarding RFA Nos. 83, 84, 85, 86, 88, and 89, i.e.:

> This request for admission goes to plaintiffs' claim alleging a violation of Proposition 26. However, defendants' position is that Proposition 26 simply does not apply. This is because Senate Bill 819 does not "result[] in any taxpayer paying a higher tax[.]" Cal. Const., art. XIIIA § 3(a). Thus, ***at this time*** defendants have no position either way on the precise issue identified in this request for admission.

(*E.g.,* Sep. Statement 11:2-5) (emphasis added).

This response is based on an argument that is fully debunked in the Motion to Compel Further Responses to Request for Admissions, Set One, Propounded on Defendants Kamala Harris and Stephen Lindley that is being filed contemporaneously herewith. That motion concerns insufficient responses to RFA Nos. 83, 84, 85, 86, 88, and 89, the same RFAs that provide the foundation for the disputed response(s) quoted above. Put simply, Defendants are trying to avoid providing a handful of responses that, apparently, will be detrimental to Defendants' case.

[4] Because Defendants failed to provide a response to one specific interrogatory subsection, but otherwise responded, Plaintiffs contend their motion is properly heard under Code of Civil Procedure section 2030.300(a). Plaintiffs only raise Code of Civil Procedure section 2030.290(b) in an abundance of caution.

Defendants cannot have their cake and eat it too by failing to provide proper responses now *but also* leaving themselves a window to provide compliant responses at some time in the future (e.g., "***at this time*** defendants have no position either way on the precise issue identified in this request for admission." (*E.g.,* Sep. Statement 11:2-5)) (emphasis added). The Discovery Act does not provide that an inchoate mootness argument is a sufficient justification for a court to disregard the normal rules of discovery.

Plaintiffs do not want to burden the Court by repeating the argument stated in the motion filed herewith, but they nonetheless must emphasize that the argument framed in the response(s) quoted above appears to be a facial challenge that could have been brought in a demurrer or motion for judgment on the pleadings at any time since this action was filed, which occurred in late *2013*. (Compl.) Defendants, however, did not raise this argument until Plaintiffs challenged Defendants' insufficient discovery responses. (Franklin Decl. ¶ 7).

It is quite hard to accept Defendants' statement that they "have no position either way on the precise issue identified in this request for admission." (*E.g.,* Sep. Statement 11:2-5). The underlying requests all refer to certain classes of levies that are excluded from being classified as taxes under Proposition 26. Cal. Const. art. XIII A, § 3(b) (Sep. Statement 10:19-21, 11:16-17, 12:12-14, 13:8-10, 14:4-6, 14:28-15:2). Clearly, Defendants contend that at least one of the Proposition 26 exclusions applies. That is, because Defendants contend "that the use of DROS funds does not operate as a tax[,]" they have, necessarily, already made a determination that one of the exclusions applies, or else they would be precluded from contending "that the use of DROS funds does not operate as a tax." (Sep. Statement *passim*).

Defendants clearly *do* have a position on the relevant issue, and there is no justification for their failure to provide support for their questionable responses to the underlying RFAs (e.g., "Unable to admit or deny."). Because Defendants' response is evasive and appears to be based on a false premise, further responses should be ordered. Civ. Proc. Code § 2030.220(a).

6. Defendants' Responses Are Prolix But Fail to Actually Provide Responsive Facts as Required: Further Responses to FI No. 17.1(b) (Re: 92-96 and 99) Should Be Ordered

Defendants provided the same response to FI No. 17.1(b) regarding RFA Nos. 92, 93, 94,

95, 96, and 99, i.e.:

> The California Department of Justice in general, and its Bureau of Firearms in particular, serves law enforcement, legislators and the general public by engaging in a wide array of education, regulation, and enforcement activities regarding the manufacture, sales, ownership, safety training, transfer and possession of firearms. The Department and its Bureau receive funding for these activities from the DROS special account, within which the DROS fees are deposited.

(*E.g.*, Sep. Statement 16:2-5).

All of the underlying RFAs were denied by Defendants, meaning Defendants were required to provide facts that support the denial, per the terms of FI No. 17.1(b). Once again, Defendants provided a general statement that might theoretically incorporate a reference to a responsive fact, but because such facts would be indistinguishable assuming they exist, the response above is clearly not "as complete and straightforward as the information reasonably available to the responding party permits." Civ. Proc. Code § 2030.220(a).

For example, RFA No. 93 ask Defendants to "[a]dmit that CAL DOJ has not spent any DROS SPECIAL ACCOUNT money to regulate firearm possession, other than costs arising from APPS." By denying this RFA, Defendants were effectively claiming that some DROS Account money was spent to regulate firearm possession, in addition to such funds spent APPS-based costs. The interrogatory response provided, however, does not identify the type of facts that would support the denial, e.g., a list of non-APPS costs that were both: (a) funded from the DROS Account; and (b) related to the regulation of firearm possession.

As specifically described in the Separate Statement filed herewith, the responses provided to FI No. 17.1(b) (re: RFA Nos. 92, 93, 94, 95, 96, and 99) are evasive. Accordingly, there is ample justification for the Court to order the further responses requested by Plaintiffs. Civ. Proc. Code § 2030.220(a).

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IV. CONCLUSION

As explained above, the disputed responses concern key aspects of this action, and Defendants responses appear impermissibly crafted to evade. Plaintiffs respectfully request the Court grant this Motion and provide the relief requested hereby.

Dated: February 17, 2015

MICHEL & ASSOCIATES, P.C.

Scott M. Franklin, Attorney for the Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Christina Sanchez, 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 February 17, 2015, the foregoing document(s) described as

NOTICE OF MOTION AND MOTION TO COMPEL FURTHER RESPONSES TO FORM INTERROGATORIES, SET ONE, PROPOUNDED ON DEFENDANTS KAMALA HARRIS AND STEPHEN LINDLEY; MEMORANDUM IN SUPPORT THEREOF

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 February 17, 2015, at Long Beach, California.

__ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on February 17, 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.

CHRISTINA SANCHEZ