SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DAVID GENTRY, JAMES PARKER, MARK MIDLAM, JAMES BASS, and CALGUNS SHOOTING SPORTS ASSOCIATION,

Plaintiffs and Petitioners,

v.

XAVIER BECERRA, in His 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, BETTY T. YEE, in her official capacity as State Controller, and DOES 1-10,

Defendants and Respondents.

Case No. 34-2013-80001667-CU-WM-GDS

RULING ON SUBMITTED MATTER: MOTIONS FOR ADJUDICATION OF PLAINTIFFS' FIFTH AND NINTH CAUSES OF ACTION

This matter came on regularly for hearing on August 4, 2017. The parties appeared and presented oral argument, after which the Court took the matter under submission. The Court now issues its ruling on the submitted matter which reflects a revision on the Ninth Cause of Action.

I. Introduction

In this matter, Plaintiffs contend Defendants have been improperly imposing a fee, the Dealer's Record of Sale transaction fee (hereinafter the "DROS Fee") on firearm purchasers without calculating the proper fee amount, and then have been using the funds collected outside

of their statutorily authorized purposes.

Via stipulation filed November 4, 2016, the parties agreed to bifurcate this matter, with motions for summary adjudication concerning Plaintiffs' fifth and/or ninth causes of action to proceed first[1]. Both Plaintiffs and Defendants have timely filed such motions, along with separate statements of undisputed material facts, and oppositions to the others' motion.

The fifth cause of action alleges Defendants have a ministerial duty under Penal Code section 28225, subdivisions (a) and (b) to determine the "amount necessary to fund" the activities enumerated in subdivisions (b)(1) through (11) and to only charge the DROS Fee at that amount. Plaintiffs contend Defendants have not performed this duty.

The ninth cause of action alleges Defendants have been using the DROS Fee funds for activities outside of those statutorily allowed. Plaintiffs seek a declaration that Defendants are not authorized to use DROS Special Account Funds for "some use other than APPS-based law enforcement activities."[2]

II. Factual and Procedural Background

In 1982, the Legislature first authorized the Department of Justice (hereinafter, the "Department") to collect a DROS Fee, to cover the cost of performing background checks on firearms purchasers. The initial DROS Fee was $2.25. Over the years, the amount of the DROS Fee increased, as did the list of activities it funded. In 1995, the Legislature amended the statute to cap the DROS Fee at $14 (the amount it had been since 1991), subject to increases accounting for inflation. In 2004, the Department adopted regulations adjusting the fee to $19. The DROS Fee remains at $19 today, as reflected in Title 11, California Code of Regulations, section 4001.

[1] The Court notes Plaintiffs and Defendants have indicated in their papers that although the motions are titled as seeking summary adjudication, the motions are more akin to merits briefing on bifurcated issues in Plaintiffs' writ petition. Accordingly, the Court will not rule on the objections to the Separate Statements, choosing instead to treat this matter as a ruling on a writ petition, which has been bifurcated into two phases of trial.

[2] In connection with both of these causes of action, Plaintiffs also seek an injunction prohibiting defendants from imposing the current fee and from utilizing the funds for the contested purposes.

California Penal Code[3] section 28225 currently authorizes the Department to require a firearm dealer to charge a purchaser a fee no more than necessary to fund,

"(b)(1) The department for the cost of furnishing this information.

(2) The department for the cost of meeting its obligations under paragraph (2) of subdivision (b) of Section 8100 of the Welfare and Institutions Code.

(3) Local mental health facilities for state-mandated local costs resulting from the reporting requirements imposed by Section 8103 of the Welfare and Institutions Code.

(4) The State Department of State Hospitals for the costs resulting from the requirements imposed by Section 8104 of the Welfare and Institutions Code.

(5) Local mental hospitals, sanitariums, and institutions for state-mandated local costs resulting from the reporting requirements imposed by Section 8105 of the Welfare and Institutions Code.

(6) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (a) of Section 6385 of the Family Code.

(7) Local law enforcement agencies for state-mandated local costs resulting from the notification requirements set forth in subdivision (c) of Section 8105 of the Welfare and Institutions Code.

(8) For the actual costs associated with the electronic or telephonic transfer of information pursuant to Section 28215.

(9) The Department of Food and Agriculture for the costs resulting from the notification provisions set forth in Section 5343.5 of the Food and Agricultural Code.

(10) The department for the costs associated with subdivisions (d) and (e) of Section 27560.

(11) The department for 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 pursuant to any provision listed in Section 16580."

In 2001, The Legislature established the Armed Prohibited Persons System (hereinafter, "APPS"). Via APPS, the Department maintains a database of persons prohibited from possessing firearms, and uses the database to investigate, disarm, apprehend, and prosecute those prohibited persons.

[3] All subsequent statutory references are to the Penal Code, unless otherwise indicated.

Prior to 2011, subdivision (b)(11) did not include the word "possession." In 2011, the Legislature passed Senate Bill 819, adding "possession" to the pre-existing list allowing the DROS Fee calculation to include the cost of the Department's "firearms-related regulatory and enforcement activities related to the sale, purchase, *possession*, loan, or transfer of firearms pursuant to any provision listed in Section 16580." (emphasis added.)

III. Standard of Review

In a motion for summary adjudication, the moving party must demonstrate that the material facts are undisputed and the party is entitled to judgment as a matter of law. (Code Civ. Proc., § 473c.) In this matter, the parties are proceeding via motions for summary adjudication on the merits of Plaintiffs' fifth and ninth causes of action. Accordingly, the motions are viewed within the context of the standard of review for the subject writ petitions.

The interpretation of statutes is an issue of law on which the court exercises its independent judgment. (See, *Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1082.) In exercising its independent judgment, the Court is guided by certain established principles of statutory construction, which may be summarized as follows. The primary task of the court in interpreting a statute is to ascertain and effectuate the intent of the Legislature. (See, *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.) This extends to a challenge that a regulation exceeds the agency's authority, although the Court gives great weight to the agency's interpretation. (*Nick v. City of Lake Forest* (2014) 232 Cal.App.4th 871.)

The starting point for the task of interpretation is the words of the statute itself, because they generally provide the most reliable indicator of legislative intent. (See, *Murphy v. Kenneth Cole Productions* (2007) 40 Cal.4th 1094, 1103.) The language used in a statute is to be interpreted in accordance with its usual, ordinary meaning, and if there is no ambiguity in the statute, the plain meaning prevails. (See, *People v. Snook* (1997) 16 Cal.4th 1210, 1215.) The

court should give meaning to every word of a statute if possible, avoiding constructions that render any words surplus or a nullity. (See, *Reno v. Baird* (1998) 18 Cal.4th 640, 658.) Statutes should be interpreted so as to give each word some operative effect. (See, *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 390.)

Beyond that, the Court must consider particular statutory language in the context of the entire statutory scheme in which it appears, construing words in context, keeping in mind the nature and obvious purpose of the statute where the language appears, and harmonizing the various parts of the statutory enactment by considering particular clauses or sections in the context of the whole. (See, *People v. Whaley* (2008) 160 Cal.App.4th 779, 793.)

IV. Discussion

A. Fifth Cause of Action

Timeliness

Defendants first argue Plaintiffs are not entitled to the relief requested because their request is untimely. To support this argument, Defendants cite to Code of Civil Procedure section 338 providing a three-year limitations period for "an action upon a liability created by statute..." Defendants argue that because the DROS Fee last increased in 2004, the statute of limitations to challenge the fee amount ran in 2007. Plaintiffs did not file this matter until 2013.

Defendants' argument assumes Plaintiffs are challenging the increase, instead of the continued imposition of a $19 DROS Fee. Under Defendants' interpretation, after 2007 a person would be barred from challenging whether $19 was the amount "necessary to fund" the categories enumerated in section 28225, subdivision (b). Also, the Court would have to assume the costs in subdivision (b) will only increase, with no possibility that they may be reduced subsequent to 2004. Such a reading of the "no more than necessary" requirement eliminates it from the statute post-2007. Defendants have provided no statutory language or legislative intent to support such a

reading.

In this section, and throughout their brief, Defendants argue section 28225 "does not impose a ministerial duty to calculate, review, or reassess the amount of the DROS fee at the time, in the manner, or under the circumstances that plaintiffs contend. On the contrary, the Legislature left those particulars to the discretion of the Department and other public agencies mentioned in the statute." (Def. MPA, p. 20.) However, Defendants do not identify a policy, regulation, or even internal practice which they contend triggers the need for review of the DROS Fee amount. At times, it seems Defendants argue there is no obligation to further review the amount, as the Department "discharged that duty" by engaging in the rulemaking process in 2004 to set the fee at $19.

The Court finds the statute of limitations does not preclude Petitioner's challenge to whether the current $19 fee is "no more than necessary" to fund the subdivision (b) activities. The 2004 regulatory activity does not bar challenges to the current imposition of an annual fee.

Laches

Defendants next argue laches bars the fifth cause of action because Plaintiffs have unreasonably delayed their claims for nine years (considering the 2004 date) and because doing the review Plaintiffs urge will be costly, resulting in "prejudice if the desired writ issues."

The Court has already rejected Defendants' argument that the 2004 date is relevant in determining the timeliness of Plaintiffs' claims. This appears to be the only argument supporting their claim of laches. Costliness of remedy alone is insufficient.

Ministerial Duty

Defendants contend, "[s]ection 28225 does not impose a ministerial duty on [D]efendants, and [P]laintiffs misconstrue the statute in contending the contrary." Defendants then assert the statute does not mention any sort of "'reassessment' being required upon any kind of change in

circumstances, or a 'review' of whether the use of DROS fee revenues on an authorized program amounts to a 'tax.'" (Def. MPA, p. 18-19.) There is no ministerial duty to reassess the DROS Fee as urged by Plaintiffs, instead "the Legislature left [the decision of time, manner, and circumstances of reassessment] to the discretion of the Department and other public agencies mentioned in the statute." (Def. MPA, p. 20.)

In determining the existence of a mandatory ministerial duty, the Court is guided first by the statute's plain language. (*People v. Snook* (1997) 16 Cal.4th 1210, 1215.) While the statute does not provide a specific time or circumstance triggering the need for reassessment of the DROS Fee, inherent in the phrase "no more than necessary" is an ongoing obligation to make such a determination. Defendants have not identified any way in which they can ensure the fee is "no more than necessary" without collecting some sort of data and making some sort of ongoing determination. While the Department *may* have discretion to determine the process by which it makes such a review, including determining what time interval is appropriate between reviews, clearly the statute imposes a ministerial duty to perform a review at some point so long as the DROS Fee is being charged.

Defendants provide that if the Court finds section 28225 imposes a ministerial duty, then such a duty was discharged by way of the 2004 rulemaking. Defendants also appear to claim there is an ongoing review process:

> "[the Department] expends considerable resources regularly monitoring, for example: the number of firearms transactions in California; the amount of DROS fee revenues being generated; the condition of the Dealer's Record of Sale Special Account, the annual state budget process, particularly as it impacts the Department, and the resulting appropriations by the Legislature; each and every expenditure by the Department to ensure that it is authorized by law; and the anticipated future needs of the Department based on myriad policy and legal considerations." (Def. MPA, p. 21; Sep. Statement, No. 12.)

However, again, Defendants have not identified a regular interval within which the Department performs any sort of review of the DROS Fee to confirm it is "no more than

necessary." Defendants have also not identified any activities they claim trigger a DROS Fee review. "Regularly monitors" is vague and provides no indication as to the level of review, steps completed, and Defendants do not identify any sort of documentation produced from the "regular monitoring."

The only evidence before the Court is that the last time the DROS Fee was analyzed as to whether it is "no more than necessary" was in 2004 via the rulemaking process. The Court finds evaluating the DROS Fee to make sure it is "no more than necessary" every thirteen years is insufficient to comply with the ministerial duty section 28225 imposes. Plaintiffs' motion for adjudication is **GRANTED** as to the fifth cause of action. Defendants' motion for adjudication is **DENIED** as to the fifth cause of action.

Plaintiffs further argue, to the extent the Department has been calculating the DROS Fee, it has been using an improper Macro Review Process, instead of complying with the statutory direction of section 28225, subdivision (c), including that they consider the "estimated reasonable costs of department firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms..." Plaintiffs contend the statutory authorization is narrow, and the Department has only looked at the total amount of money going into and out of the DROS Fee account, instead of analyzing the specific categories. However, as the Court has already found, the Department has failed to provide evidence of *any* calculations being done sufficient to discharge the review section 28225 requires. Accordingly, it will not opine as to whether a particular potential calculation method is appropriate.

B. Ninth Cause of Action

The ninth cause of action alleges Defendants have been using the DROS Fee funds for activities outside of those statutorily authorized. Plaintiffs seek a declaration that SB 819 does not permit Defendants to use DROS Special Account Funds for "some use other than APPS-based

law enforcement activities."

The debate between the parties here centers on the word "possession" in the phrase "costs associated with funding Department of Justice firearms-related regulatory and enforcement activities related to the sale, purchase, possession, loan, or transfer of firearms pursuant to any provision listed in Section 16580." (§ 28225, subd. (b)(11).) Plaintiffs contend "possession" was added via SB 819 solely for the "limited purpose of funding enforcement of the Armed Prohibited Persons System" and consequently possession refers only to the potential or actual possession of firearms by someone on the APPS list. (citing to SB 819, § 1, subd. (g).)

Defendants argue additional language in SB 819 section 1 clarifies that "the Legislature's overarching concern was not solely the functioning of APPS, but more broadly the growing number of 'armed prohibited persons in California' and their possession of 'over 34,000 handguns and 1,590 assault weapons.'" (Def. MSA, p. 23)(citing to SB 819, §1, subd. (d).) Defendants also point to subdivision (f) which provides,

> "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."

Defendants contend this language reflects the overall concern with illegal possession of firearms in general, instead of being limited to APPS related enforcement. Defendants argue ninety-five percent of APPS cases fall within the definition of possession Plaintiffs advance, while the remaining five percent are calls from citizens about an "individual who is now prohibited for one reason or another and that they have firearms that the department might not necessarily know about." (Lindley Depo, p. 8:9-18.) Defendants also contend the Court should look no further than the plain language of the statute itself, which does not contain the limiting language found in SB 819.

The starting point for the task of statutory interpretation is the language of the statute itself, because it generally provides the most reliable indicator of legislative intent. (See, *Murphy v. Kenneth Cole Productions* (2007) 40 Cal.4th 1094, 1103.) The language used in a statute is to be interpreted in accordance with its usual, ordinary meaning, and if there is no ambiguity in the statute, the plain meaning prevails. (See, *People v. Snook* (1997) 16 Cal.4th 1210, 1215.) The Court must also consider any uncodified statutory language because "an uncodified section is part of the statutory law." (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 925.) Although statements of intent "in an uncodified section do not confer power, determine rights, or enlarge the scope of a measure, they properly may be utilized as an aid in construing a statute." (*Id.*)

Section 1, subdivision (g) is clear that the Legislature amended section 28225 to include "possession" solely for the "limited purpose of funding enforcement of the Armed Prohibited Persons System." While subdivisions (d) and (f) may discuss an overall concern with illegal possession of firearms, this general language does not overcome the specific intent declared in subdivision (g). Based on the uncodified declaration of legislative intent, is clear that "possession" as used in section 28225, subdivision (b)(11) is limited to APPS-based activities. Accordingly, Plaintiffs' motion for adjudication as to the ninth cause of action is **GRANTED**. Defendants' motion for adjudication as to the ninth cause of action is **DENIED**.

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V. Conclusion

The phrase "no more than necessary" as used in section 28225 imposes a ministerial duty to perform a reassessment of the DROS Fee more frequently than every thirteen years. Defendants have failed to perform this duty, consequently Plaintiffs' motion for adjudication is **GRANTED** as to the fifth cause of action, while Defendants' is **DENIED**.

The plain language of subdivision (b)(11) does not specify to what "possession" activities it refers. However, SB 819, section 1, subdivision (g) makes clear that "possession" is limited to APPS-based enforcement. Plaintiffs' motion for adjudication is **GRANTED** as to the ninth cause of action, while Defendants' is **DENIED**.

DATED: August 9, 2017

Judge MICHAEL P. KENNY
Superior Court of California,
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

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Superior Court of California,
County of Sacramento

Dated: August 9, 2017

By: S. LEE
Deputy Clerk