SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE/TIME	**MARCH 4, 2019**	**DEPT. NO**	**28**
JUDGE	**HON. RICHARD K. SUEYOSHI**	**CLERK**	**E. GONZALEZ**

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; MARTIN HORAN, in His Official Capacity as 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**

Nature of Proceedings:	**RULING ON SUBMITTED MATTER RE: PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF – REMAINING CAUSES OF ACTION**

The remaining causes of action in the petition for writ of mandate and complaint for injunctive and declaratory relief came before the Court for oral argument on January 18, 2019. Prior to the hearing, the Court issued an order to appear, with questions it directed the parties to discuss as part of their oral presentations. Upon hearing oral argument, the Court took the matter under submission. Having considered the briefs and arguments pertaining to each motion, the Court now rules as set forth herein.

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. Plaintiffs also contend the DROS Fee is in fact a tax, and as such violates several subdivisions of the California constitution.

Via stipulation filed November 4, 2016, the parties agreed to bifurcate this matter, with motions for summary adjudication concerning Plaintiffs' fifth and ninth causes of action to

proceed first. Both Plaintiffs and Defendants 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."

After a hearing on these causes of action, the Court ruled in favor of Plaintiffs on both causes of action. With regard to the fifth cause of action, the Court found, "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." With regard to the ninth cause of action, the Court found, "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 now seek a writ of mandate and/or declaratory relief and/or injunctive relief as to the remaining causes of action, as well as the causes of action previously adjudicated.[1]

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.

California Penal Code[2] 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.

[1] As the Court only ruled on two of the causes of action, it has not yet issued a writ, an order, or a judgment in this matter.

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

(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.

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.)

On May 1, 2013, the Legislature enacted SB 140, creating Penal Code section 30015, "Reducing backlog in Armed Prohibited Persons System and addressing illegal possession of firearms; Appropriation; Report." Pursuant to section 30015, the Department appropriated $24,000,000 from the DROS account to "address the backlog" in APPS, and "the illegal possession of firearms by those prohibited persons."

As already summarized above, via Ruling on Submitted Matter issued August 9, 2017, the Court granted Plaintiffs' motion for adjudication of their fifth and ninth causes of action. With regard to the fifth cause of action, alleging Defendants failed to comply with their ministerial duty to determine the amount necessary to fund section 28225 activities, the Court held, "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." With regard to the ninth cause of action, alleging Defendants have been using DROS Fee funds for activities beyond their statutory authority, the Court found, "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."

The Court now issues its ruling on the remaining causes of action.[3]

III. Standard of Review

With regard to the determination of whether a statute imposes a tax or fee, the issue is a question of law. (*Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 874.) The plaintiff challenging a fee bears the burden of proof to establish a prima facie case showing that the fee is invalid. (*California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421.) The plaintiff "must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief (commonly by a preponderance of the evidence. The burden of proof *does not shift* ... it remains with the party who originally bears it." (*Id.*)(citations omitted.) If Plaintiffs make their prima facie case, the state bears the burden of evidence production. (*Id.* at 436-37.)

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.)

[3] The Court will only address in this ruling, arguments presented by the parties in their briefs and at oral argument. To the extent a party may have raised an argument at some point in a separate motion during the pendency of this litigation (if any such arguments were raised and are not also argued in the briefs or during oral argument on January 18, 2019) such arguments are not properly before the Court for ruling on the merits.

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

Plaintiffs' briefing focuses almost entirely on the argument that the DROS fee is an illegal tax. However, before addressing the merits of Plaintiffs' arguments, the Court will address Defendants' argument that "Plaintiffs' claim that the DROS fee is an unlawful tax is barred by the doctrine of res judicata."

A. *Bauer v. Becerra*'s impact on the current litigation

Defendants assert that the Court need not address Plaintiffs' argument that the DROS fee is an unlawful tax because *res judicata* via claim preclusion applies in light of the Ninth Circuit's published decision, *Bauer v. Becerra* (9th Cir. 2017) 858 F.3d 1216.

The plaintiffs in *Bauer* were three individuals (Barry Bauer, Nicole Ferry, and Jeffrey Hacker), the National Rifle Association of America, Inc., the California Rifle and Pistol Association Foundation, and Her Bauer Sporting Goods, Inc. The law firm representing Plaintiffs in the current matter was also involved in representing the *Bauer* plaintiffs.

In *Bauer* the court considered "whether California's allocation of $5" of the DROS fee "to fund enforcement efforts against illegal firearm purchasers violates the Second Amendment." (*Id.* at 1218.) The Ninth Circuit concluded that even if the collection and use of the fee fell within the scope of the Second Amendment, the provision survived intermediate scrutiny and was constitutional. (*Id.*)

In making its ruling, the court considered the plaintiffs' argument that the fee in fact imposed a general revenue tax, instead of being "designed to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." (*Id.* at 1225)(discussing *Cox v. New Hampshire* (1941) 312 U.S. 569, and *Murdock v. Pennsylvania* (1943) 319 U.S. 105.) The court noted that pursuant to federal jurisprudence, "a state may...impose a permit fee that is reasonably related to legitimate content-neutral considerations,

such as the cost of administering the ordinance in question, as long as the ordinance or other underlying law is itself constitutional." (*Id.*)(citations omitted.)

With regard to the DROS fee, the court held "DROS-regulated firearm transactions are in fact a close proxy for subsequent firearm possession, and targeting illegal possession under APPS is closely related to the DROS fee." Further, the court found that 'essentially everyone targeted by the APPS program was a DROS fee payer at the time her or she acquired a firearm...the APPS program therefore, can fairly be considered an expense of policing the activities in question..." (*Id.*)(citations omitted.) The court also considered and rejected the plaintiffs' argument that the fee could not exceed the actual costs of processing a license or similar direct administrative costs. The court held "enforcement costs are properly considered part of the expense of policing the activities in question permitted under *Murdock* and *Cox*. Accordingly, the enforcement activities carried out through the APPS program are sufficiently related to the DROS fee under this line of jurisprudence, and the second prong of the intermediate scrutiny test is therefore satisfied..." (*Id.* at 1226.)

The court summarized, "the use of the DROS fee to fund APPS survives intermediate scrutiny because the government has demonstrated an important public safety interest in this statutory scheme, and there is a reasonable fit between the government's interest and the means it has chosen to achieve those ends." (*Id.*)

Defendants argue claim preclusion applies to prevent the Court from considering Plaintiffs' unlawful tax arguments. Claim preclusion acts to "bar claims that were, or should have been, advanced in a previous suit involving the same parties." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) "Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit."[4] (*Id.*)

Same cause of action

Pursuant to California law, the Court must determine if the same "primary right" is involved in both matters. That is, "if two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." (*Cal. Sierra Dev., Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 675)(citations omitted.)

Defendants contend *Bauer* involved the same cause of action as in *Gentry*, because the Ninth Circuit considered whether California's allocation of a portion of the DROS fee on the APPS program violated the Second Amendment. Defendants cite to the Ninth Circuit's consideration of *Cox* and *Murdock*, and cite to Plaintiffs' arguments that the current amount of the DROS Fee unlawfully exceeded the actual costs for administering the DROS program.

[4] The parties do not dispute that a final judgment was reached in *Bauer*, accordingly the Court will not discuss this prong.

Plaintiffs contend the two cases do not involve the same injury, merely the same *type* of injury, which is insufficient to satisfy the first prong of a claim preclusion analysis. Plaintiffs maintain the plaintiffs in *Bauer* and in this action allege the injury occurred when they *each* purchased a firearm and were forced to pay the challenged levy. Accordingly, Plaintiffs contend each plaintiff has a unique injury, preventing the court from finding there was a single invasion of a primary right upon which the "same action" requirement was met.

In *Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, the court determined whether the "primary rights" theory barred suits brought to attack taxes or charges levied in different years. (*Id.* at 1300.) The Sixth District Court of Appeal determined a suit attacking charges from one year was not based on the same cause of action as a suit attacking charges from the previous year. (*Id.*) "Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit." (*Id.*)(citations omitted.)

The court concluded, "those paying charges have a primary right to have the charges properly calculated and imposed *each year*." (*Id.*) Similarly, here, it seems each DROS fee payer has a right to have the fee properly calculated and imposed each time the fee is paid. If nothing else, each different plaintiff suffers their own injury that does not involve the same "primary right" necessary to satisfy the first prong of the test for claim preclusion.

Further, even if the claim in *Bauer* involved the same cause of action, the Court finds *Bauer* and the current matter are not between the same parties, as detailed below.[5]

Between the same parties

Defendants admit that Plaintiffs here are not the same plaintiffs involved in *Bauer*. However, Defendants contend claim preclusion still applies because the parties are in privity with each other. "Under the requirement of privity, only parties to the former judgment or their privies may take advantage of or be bound by it. A party in this connection is one who is directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment. A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." (*Cal. Sierra Dev.*, 14 Cal.App.5th at 672)(citations omitted.) Privity requires "the sharing of an identity or community of interest, with adequate representation of that interest in the first suit, and circumstances such that the nonparty should reasonably have expected to be bound by the first suit...A nonparty should reasonably have expected to be bound if he had in reality contested the prior action even if he did not make a formal appearance, for example by controlling it." (*Id.* at 672-73)(citations omitted.)

[5] As the test is a three-part test, the failure to satisfy even one part of the test bars application of claim preclusion.

Defendants assert that the plaintiffs in *Bauer* were represented by the same law firm, Michel & Associates, P.C., who represented Plaintiffs in this action. Defendants argue this "is a factor this Court should consider in determining privity" along with Defendants' assertion that Plaintiffs in this matter "worked in cooperation with the plaintiffs in *Bauer*" because they indicated that they did not need documents produced as part of discovery if those documents had already been produced to the *Bauer* plaintiffs.

In support of their argument that the Court should consider Plaintiffs' counsel's identity in determining privity, Defendants cite to *Alvarez v. May Dept. Stores Co.* (2006) 143 Cal.App.4th 1223. In *Alvarez*, class certification had been denied in a previous action in which the "interested parties, their claims, and their counsel was the same." (*Id.* at 1238.) The court noted that the only apparent difference between the *Alvarez* plaintiffs and those in the prior litigation was the name of the representative plaintiff. The court went on to find,

> The *Duran* plaintiffs had a strong motive to assert the same interest as appellants, as each group's goal was identical- each wanted its class certified. As noted, the *Duran* plaintiffs had a full opportunity to present their case. The circumstances are such that appellants should reasonably have expected to be bound by the Duran decision. As appellants would have enjoyed the fruits of a favorable outcome, fairness dictates that they should be bound by the effect of the decision against them. Ultimately, applying the doctrine of collateral estoppel does not lead to an unfair result, as appellants remain free to litigate the merits of their personal claims. (*Id.*)

The facts of *Alvarez* are distinct from the comparison Defendants are attempting to make between *Bauer* and Plaintiffs, and consequently, the Court finds *Alvarez's* finding that having identical counsel was a factor in determining collateral estoppel, does not support a finding that Plaintiffs are in privity with the *Bauer* plaintiffs. *Bauer* did not involve a purported class action or attempt to certify a class for purposes of a class action, as was the case in *Alvarez*. As Defendants acknowledge, the plaintiffs in *Bauer* are not the same Plaintiffs currently before this Court. Further, as the First District Court of Appeal held in *Rodgers v. Sargent Controls & Aerospace*, "[t]hat appellant is represented by the same counsel as were the plaintiffs in [a] prior action[] does not , we conclude, suffice to extend the doctrine of privity..." ((2006) 136 Cal.App.4th 82, 93.) The court went on to say that identity of the handling attorney is only relevant if there is evidence that, "through his attorney [the nonparty] participated in or controlled the adjudication of the issue sought to be relitigated."[6] (*Id.*)

The interest Defendants identify as common between the parties is that the lead organizational plaintiff in *Bauer*, the National Rifle Association, and the lead organizational plaintiff here, Calguns Shooting Sports Association, "maintain a relationship of privity as a practical matter, especially when it comes to lobbying, litigating, and generally advocating to promote firearms rights." (Oppo. p. 23.) Defendants do not identify any evidence that Calguns Shooting Sports Association was involved in any way with *Bauer*, or that the *Bauer* plaintiffs shared the same interest with the present Plaintiffs such that Plaintiffs "should reasonably have

[6] While the Court recognizes that the *Rodgers* court was discussing the application collateral estoppel, it finds the analysis to be relevant to the current matter.

expected to be bound by the first suit." The Court finds this is especially true given the fact that the claims here differ significantly from the claims decided in *Bauer*. The analysis of the *Bauer* court is limited to a discussion of whether the DROS fee violates the Second Amendment of the United States Constitution. None of the claims before the Court in the current matter require the Court to engage in analysis concerning the Second Amendment, or any other provision of the United States Constitution.

The Court finds that Defendants have failed to demonstrate sufficiently that Plaintiffs had "the sharing of an identity or community of interest, with adequate representation of that interest in the first suit, and circumstances such that the nonparty should reasonably have expected to be bound by the first suit." Accordingly, the Court finds this matter is not barred by claim preclusion as a result of the decision in *Bauer v. Becerra.*

B. *Sinclair Paint v. State Board of Equalization*

Plaintiffs argue that the DROS fee operates as an unconstitutional tax instead of a proper regulatory fee. In support of this assertion, Plaintiffs rely heavily upon *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866. In *Sinclair Paint*, the state imposed a fee on the petitioner pursuant to the Childhood Lead Poisoning Prevention Act of 1991 which allowed for fees to be asses on "manufacturers or other persons contributing to environmental lead contamination." (*Id.* at 870.) Specifically, the subject section imposed,

> fees on manufacturers and other persons formerly and/or presently engaged in the stream of commerce of lead or products containing lead, or who are otherwise responsible for identifiable sources of lead, which have significantly contributed and/or currently contribute to environmental lead contamination. The Department must determine fees based on the manufacturer's or other person's past and present responsibility for environmental lead contamination, or its 'market share' responsibility for this contamination. (*Id.* at 872.)

The California Supreme Court discussed the differences between a tax and a fee, for purposes of analyzing whether a violation of article XIII A, section 3 had occurred.

> We first consider certain general guidelines used in determining whether "taxes" are involved in particular situations. The cases agree that whether impositions are "taxes" or "fees" is a question of law for the appellate courts to decide on independent review of the facts.
>
> The cases recognize that "tax" has no fixed meaning, and that the distinction between taxes and fees is frequently "blurred," taking on different meanings in different contexts. In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. Most taxes are compulsory rather than imposed in response to a voluntary decision to develop or to seek other government benefits or privileges. But compulsory fees may be deemed legitimate fees rather than taxes.

(*Id.* at 873-74.)

The court concluded, "the Act imposed bona fide regulatory fees, not taxes, because the Legislature imposed the fees to mitigate the actual or anticipated adverse effects of the fee payers' operations, and under the Act the amount of the fees must bear a reasonable relationship to those adverse effects." (*Id.* at 870.)

Plaintiffs argue *Sinclair Paint* enumerated a standard previously identified in tax versus fee precedent, that "to show a fee is a regulatory fee and not a special tax[7], the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity." (*Id.* at 878.)

C. *California Farm Bureau Federation v. State Water Resources Control Board*

In their opposition brief, Defendants rely repeatedly on *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421. In *California Farm Bureau*, the California Supreme Court determined whether Water Code section 1525, enacted by a majority of the Legislature, not the two-thirds that would be required by a tax increase, was a valid regulatory fee or an improper tax. (*Id.* at 428.) Section 1525 directed the Water Resources Control Board to establish the schedule for a one-time application fee for permits to appropriate water, approval of leases, and for petitions relating to those applications. (*Id.* at 431-32.) The total budgeted costs of the Division's operations were to be recovered from these fees. (*Id.* at 432.)

Once plaintiffs established their prima facie case, the test, as defined by the Court was whether the Board could demonstrate "(1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity." (*Id.* at 436-37)(citing *Sinclair Paint, supra* 15 Cal.4th at 878.) In discussing the payor's burdens, the court noted,

> [s]imply because a fee exceeds the reasonable cost of providing the service or regulatory activity for which it is charged does not transform it into a tax. A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors. The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors.
>
> Thus, permissible fees must be related to the overall cost of the governmental regulation. They need not be finely calibrated to the precise benefit each individual fee payor might derive. What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general

[7] The parties argue whether this analysis is limited to a determination concerning a *special* tax versus other categories of taxation. The Court declines to address this argument.

revenue collection. An excessive fee that is used to generate general revenue becomes a tax.

(*Id.* at 438)(citations omitted.)

In applying this test, the court noted that the statutory language at issue "reveal[ed] a specific intention to avoid imposition of a tax." Section 1525 permitted the imposition of fees solely to fund those activities described therein, and not for general revenue purposes. (*Id.*) The fees were also to be deposited in a fund related to the regulated activity, not the General Fund. (*Id.*) The fee schedule was directed to "equal[] that amount necessary to recover costs incurred" in connection with administration of the permit functions. (*Id.* at 439-40.) Accordingly, on its face, the Court determined the statute imposed a regulation, not a tax.

The plaintiffs also alleged the fee operated as an unconstitutional tax because it imposed fees that were "disproportionate to the benefit derived by the fee payors or the burden they place on the regulatory system." (*Id.* at 440.) The Court noted that the applicable test, as identified in *Sinclair Paint* was to "examine the costs of the regulatory activity and determine if there was a reasonable relationship between the fees assessed and the costs of the regulatory activity." (*Id.* at 441.) The court determined the record was insufficient to resolve this issue as it lacked factual findings to determine whether the fees were reasonably proportional to the costs of the regulatory program. (*Id.*)

D. *City of San Buenaventura v. United Water Conservation Dist.*

Lastly, the parties refer to *City of San Buenaventura v. United Water Conservation District* (2017) 3 Cal.5th 1191, in setting forth the prongs the Court must consider to determine whether a "fee" is indeed a fee or whether it is, in practice, a tax. In *City of San Buenaventura*, the City claimed the groundwater pumping charges it paid to the local water conservation district were disproportionate to the benefits it received from the water district's activities. (*Id.* at 1197.) Accordingly, the City argued the charges were in fact an unlawful tax.

In performing its analysis, the California Supreme Court discussed its decisions in *Sinclair Paint* and *California Farm Bureau*. The Court noted that the City did not challenge the Court of Appeal's reliance on *Farm Bureau* in conducting the "reasonable cost" inquiry, but that there remained a separate question whether the allocation of those costs bears a "reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (*Id.* at 1212)(citing Cal. Const., art. XIII C § 1, subd. (e).) The Supreme Court agreed. (*Id.*)

The Court noted that pursuant to *Sinclair Paint*, the "aggregate cost inquiry and the allocation inquiry are two separate steps in the analysis." (*Id.*) The Court went on further to note,

> To qualify as a nontax "fee" under article XIII C, as amended, a charge must satisfy *both* the requirement that it be fixed in an amount that is "no more than necessary to cover the reasonable costs of the governmental activity," *and* the requirement that "the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits received

from, the governmental activity." We must presume the Legislature intended each requirement to have independent effect.

As noted, the Court of Appeal did mention the reasonable-relationship requirement, if only to observe that the District's volume-based charges mean that the District "largely does charge individual pumpers in proportion to the benefit they receive from the District's conservation activities." But this observation misses the entire basis of the City's argument: namely, that the City does not receive the same benefit from the District's conservation activities as other pumpers, and that it is required to bear a disproportionate share of the fiscal burden by virtue of Water Code section 75594's three-to-one ratio. We thus remand the case to the Court of Appeal with instructions to consider whether the record sufficiently establishes that the District's rates for the 2011–2012 and the 2012–2013 water years bore a reasonable relationship to the burdens on or the benefits of its conservation activities, as article XIII C requires. In making this determination, the Court of Appeal may consider whether the parties should be afforded the opportunity to supplement the administrative record with evidence bearing on this question.

E. The DROS Fee

With the framework identified in *Sinclair Paint*, *California Farm Bureau Federation,* and *City of San Buenaventura*, the Court now turns to application of the fee versus tax test with regard to the DROS Fee. The Court finds it must engage in a two part analysis: (1) What are the estimated costs of the service or regulatory activity and does the amount being charged approximate this estimated cost; and (2) Does the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits received from, the governmental activity?

i. *Estimated costs of the service or regulatory activity compared to the funds generated by the DROS Fee.*

Plaintiffs argue Defendants cannot meet the "reasonable cost prong" of the analysis. Plaintiffs assert Defendant must provide evidence "as to the estimated cost of any service or regulatory activity attributable to [Plaintiffs]." (Op. Br., p. 17)(citing *Northwest Energetic Services, LLC v. Cal. Franchise Ta Bd.* (2008) 159 Cal.App.4th 841, 858.) Plaintiffs cite to the Court's August 9, 2017 ruling in this matter, wherein it found the Department has not determined whether the DROS Fee is "not more than necessary" as required by section 28225 for over thirteen years. Plaintiffs contend this establishes that the Department cannot establish that specific costs justify the $19 DROS Fee. Plaintiffs argue that in addition to the analysis being too old to be relevant, it was also performed prior to SB 819, and APPS-related costs were not considered when the DROS Fee was last changed. Accordingly, Defendants are unable to demonstrate that the DROS Fee is an approximation of the reasonable cost of providing the enumerated services.

In their opposition brief, Defendants provide data as to the "approximate annual revenue generated from the DROS fee, calculated by multiplying the total number of DROS transactions processed by DOJ annually by $19.00." (Oppo., p. 29.) The calculations are:

2012: $15,537,022
2013: $18,243,401
2014: $17,689,703
2015: $16,731,457
2016: $25,295,118

Defendants then state "DOJ's expenditure of DROS Special Account funds on authorized firearms-related programs from the fiscal years covering the same period was as follows:

FY 2012/2013: $22,741,838
FY 2013/2014: $29,144,382
FY 2014/2015: $28,616,077
FY 2015/2016: $28,394,683[8]

"In other words, during the approximately five years following the passage of SB 819, all of the costs associated with funding the relevant firearms-related regulatory and enforcement activities actually exceeded the amount of DROS fee revenue. This demonstrates that the $19.00 DROS fee is proportional to the costs of the regulated activities." (Oppo., p. 29.)

In reply, Plaintiffs argue that this data includes expenditures that "Plaintiffs have already explained are not authorized to be funded via the DROS Fee."

The Court has reviewed the arguments made by both parties, as well as the cited evidence. The Court finds Defendants have adequately demonstrated that the funds generated by the DROS Fee are a reasonable approximation of the costs of the government-provided regulatory service/activity. With regard to the relationship of this finding to the prior ruling entered by Judge Kenny on August 9, 2017, the Court finds the current ruling does not contradict or otherwise conflict with the prior findings. That is, the Court finds that as of August 9, 2017, Defendants had failed to demonstrate that the amount collected for funding section 28225 activities was "no more than necessary." The Court also finds that as of the date of this ruling, almost one and a half years later, Defendants have sufficiently established that the funds generated by the DROS Fee are a reasonable approximation of the section 28225 costs.

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[8] While Plaintiffs argued this data is incorrect in that it contains costs that are in excess of the section 28225 activities (an argument the Court has considered and rejected) Plaintiffs did not object to the presentation of this data as being new evidence that is being improperly placed before this Court. Accordingly, the Court does not question or discuss whether this data was before the Court for purposes of the August 9, 2017 ruling.

ii. *Does the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits received from, the governmental activity?*

Plaintiffs argue the percentage of DROS Fee payors that end up on the APPS list is small, with most fee payors never becoming legally prohibited from possessing firearms. Defendants do not dispute this characterization of the data. Plaintiffs argue therefore that most DROS Fee payors are never a burden with regard to the APPS process. Defendants argue that it is immaterial what percentage of DROS Fee payors end up on the APPS list, as DROS Fee payors create a burden even if they never become legally prohibited from possessing a firearm. Defendants argue the APPS program is just an extension of the DROS Fee background check program.

The Court finds DROS Fee payors create a unique burden by way of their firearm ownership. The need for APPS only arises by way of the existence of lawful firearm purchasers and owners. This burden is reinforced by the fact that "only those who have completed the DROS Process can end up on the APPS List." (Pet. Br., p. 20.) The purchase of a firearm necessitates a background check (which is funded by part of the DROS Fee) and the APPS program constitutes a continuation of this background check. Essentially, APPS provides a tool for Defendants to continue to determine whether firearm purchasers are lawfully entitled to possess the firearms they have purchased. The burden that these firearm purchasers impose on the government is clearly not a burden that is created by society as a whole, but instead is a burden unique to those engaging in the firearm purchase activity. Accordingly, the Court finds the allocation of the costs associated with APPS to *all* DROS Fee payors as opposed to only those eventually determined to no longer be lawfully entitled to firearm ownership, bears a reasonable relationship to the burden firearms purchasers place on the government.

F. Retroactive Conversion of Monies Collected

Plaintiffs next argue SB 819 did not allow for retroactive conversion of money collected to be used to fund post-SB 819 activities. Specifically, Plaintiffs argue that statutes do not operate retrospectively unless the Legislature plainly intended them to do so, and "neither SB 819 nor SB 140 uses clear language to show that the Legislature intended to retroactively reclassify previously collected DROS Fee money for those new laws' purposes...Yet the Department has undeniably used such funds to do so." (Pet. Br., p. 26.) Petitioner then cites generally to Exhibit 10 attached to the Franklin Declaration filed in support of the Opening Brief. Exhibit 10 is a letter from then-Attorney General Kamal Harris to the Legislature dated January 21, 2016.

This general citation fails to demonstrate sufficiently that SB 140 operated to appropriate funds illegally that had been collected for a pre-SB 819 purpose and use them for SB-819 activities. As it is Plaintiffs' burden to so demonstrate, the Court will not search the evidence in an attempt to prove Plaintiffs' arguments for them. The Court finds Petitioners have failed to demonstrate sufficiently that the Department used funds pursuant to SB 140 that were collected prior to SB 819 and that the use of such funds (if any) was improper.

V. Conclusion

The petition for writ of mandate and complaint for declaratory and injunctive relief is **GRANTED** in part and **DENIED** in part. In accordance with Judge Kenny's ruling dated August 9, 2017, the petition and complaint is **GRANTED** as to the fifth cause of action and the ninth cause of action. The petition and complaint is **DENIED** as to the remaining causes of action.

The fifth cause of action requests a writ of mandate. In light of the Court's ruling above regarding the application of this ruling to Judge Kenny's prior ruling on the fifth cause of action, the Court finds there is no longer a necessity for a writ to issue as to the fifth cause of action. The ninth cause of action is for declaratory and injunctive relief. The Court **GRANTS** the request for declaratory relief based upon Judge Kenny's prior finding that Possession as used in Penal Code section 28225, subdivision (b)(11) is limited to APPS-based enforcement.

Counsel for Plaintiffs is directed to prepare an order incorporating this ruling as an exhibit to the order, and a judgment; submit them to counsel for Defendants for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

Certificate of Service by Mail attached.

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

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 **RULING ON SUBMITTED MATTER RE: PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF – REMAINING CAUSES OF ACTION** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at 720 9th Street, Sacramento, California, 95814 each of which envelopes was addressed respectively to the persons and addresses shown below:

SCOTT M. FRANKLIN
MICHEL & ASSOCIATES, P.C.
180 EAST OCEAN BLVD., SUITE 200
LONG BEACH, CA 90802

ANTHONY R. HAKL
SUPERVISING DEPUTY ATTORNEY GENERAL
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

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

Dated: March 4, 2019

Superior Court of California, County of Sacramento

By: _____
E. Gonzalez , Deputy Clerk