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GDSSC COURTHOUSE
SUPERIOR COURT
OF CALIFORNIA
SACRAMENTO COUNTY

1 C. D. Michel - S.B.N. 144258
2 Scott M. Franklin - S.B.N. 240254
3 Sean A. Brady - S.B.N. 262007
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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 FOR THE COUNTY OF SACRAMENTO

13 DAVID GENTRY; JAMES PARKER;
14 MARK MIDLAM; JAMES BASS; and
15 CALGUNS SHOOTING SPORTS
16 ASSOCIATION,

17 Plaintiffs and Petitioners,

18 vs.

19 KAMALA HARRIS, in her official capacity
20 as Attorney General for the State
21 of California; STEPHEN LINDLEY, in his
22 official capacity as Acting Chief for the
23 California Department of Justice; BETTY
24 YEE, in her official capacity as State
25 Controller for the State of California; and
26 DOES 1-10,

27 Defendants and Respondents.

28 CASE NO. 34-2013-80001667

**PLAINTIFFS' NOTICE OF RENEWED
MOTION AND RENEWED MOTION TO
COMPEL FURTHER RESPONSES TO
REQUEST FOR ADMISSIONS, SET ONE,
PROPOUNDED ON DEFENDANTS
KAMALA HARRIS AND STEPHEN
LINDLEY, AND MEMORANDUM IN
SUPPORT THEREOF [CONCURRENTLY
FILED WITH DECLARATION OF SCOTT
M. FRANKLIN IN SUPPORT THEREOF;
{PROPOSED} ORDER; STIPULATION]**

Date: February 19, 2016
Time: 9:00 a.m.
Dept.: 31
Judge: Hon. Michael P. Kenny
Action filed: 10/16/13

21 PLEASE TAKE NOTICE that, unless the Court rules on this matter without oral argument
22 pursuant to the stipulation of the parties, on February 19, 2016, at 9:00 a.m. or as soon thereafter
23 as the matter may be heard, in Department 31 of the Sacramento County Superior Court, located
24 at 720 9th Street, Sacramento, CA 95814, Plaintiffs/Petitioners David Gentry, James Parker, Mark
25 Midlam, James Bass, and Calguns Shooting Sports Association (collectively "Plaintiffs") will and
26 hereby do move this Court for an order compelling Defendants/Respondents Kamala Harris and
27 Stephen Lindley ("Defendants") to produce further responses to Plaintiff's Requests for
28 Admissions, Set One, propounded on Defendants on May 14, 2014.

By Fax

1 Plaintiffs bring this Renewed Motion pursuant to Code of Civil Procedure section
2 1008(b), which allows for a motion to be renewed after denial of said motion when new facts so
3 justify.

4 This Court previously dismissed a portion of Plaintiffs' Complaint in response to a Motion
5 for Judgment on the Pleadings ("MJOP") brought by Defendants. When the MJOP ruling was
6 made, the parties had also submitted all of their briefing as to two motions to compel further
7 discovery responses (regarding Requests for Admissions and Form Interrogatories) that Plaintiffs
8 had filed before the MJOP ruling was issued. The Court thereafter held that its MJOP ruling
9 mooted most of the disputed discovery, and on that basis the Court denied the majority of the
10 relief sought by the two discovery motions.

11 Now, however, Plaintiffs have filed their First Amended Complaint, which includes
12 several new causes of action. The discovery requests previously ruled moot are relevant to the
13 new causes of action, thus those requests are no longer moot, and Plaintiffs accordingly seek to
14 renew the relevant discovery motion pursuant to Code of Civil Procedure section 1008(b).

15 The underlying discovery motion here, i.e., the Motion to Compel Further Responses to
16 Requests for Admissions, Set One, Propounded on Defendants Kamala Harris and Stephen
17 Lindley, was filed on February 17, 2015. That motion was made under Code of Civil Procedure
18 sections 2033.220(c) and 2033.290(a)(1) on the grounds that Defendants have provided evasive
19 and incomplete responses to certain requests propounded by the Plaintiffs. The corresponding
20 "meet-and-confer" declaration in conformance with Code of Civil Procedure section 2016.040 is
21 provided herewith.

22 This Renewed Motion is based upon this notice, the attached memorandum of points and
23 authorities, the supporting Declaration of Scott M. Franklin, the underlying discovery motion, the
24 Stipulation of the parties submitted contemporaneously herewith, all other papers and pleadings
25 currently on file with the Court, and upon such oral and documentary evidence as may be
26 presented to the Court at the time of the hearing, if a hearing is held.

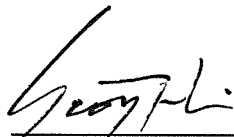
27 Please take further notice that, unless the Court issues a ruling without a hearing pursuant
28 to the stipulation of the parties, then

1 [p]ursuant to Local Rule 1.06 (A), the court will make a tentative ruling on the
2 merits of this matter by 2:00 p.m., the court day before the hearing. The complete
3 text of the tentative rulings for the department may be downloaded off the
4 court's website. If the party does not have online access, they may call the
5 dedicated phone number for the department as referenced in the local telephone
6 directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the
7 hearing and receive the tentative ruling. If you do not call the court and the
8 opposing party by 4:00 p.m. the court day before the hearing, no hearing will be
9 held.

6 Sac. Super. Ct. L.R. 1.06(A).

7 Dated: January 22, 2016

MICHEL & ASSOCIATES, P.C.

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10 Scott M. Franklin, attorney for Plaintiffs

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Court denied the Motion to Compel Further Responses to Request for Admissions,
4 Set One, Propounded on Defendants Kamala Harris and Stephen Lindley (the “Motion to
5 Compel”), based on the grounds that Plaintiffs’ discovery requests therein became moot when
6 certain causes of action were dismissed. Plaintiffs’ recent filing of their First Amended Complaint
7 (“FAC”), however, effectively negates any “mootness” because the discovery requests at issue are
8 relevant to active causes of action pleaded in the FAC. Accordingly, this Renewal Motion should
9 be granted, and the Court should order further responses as previously sought in the Motion to
10 Compel.

11 **II. STATEMENT OF FACTS/PROCEDURAL HISTORY**

12 On February 17, 2015, Plaintiffs filed and served the Motion to Compel, which sought
13 further responses to their Requests for Admissions (“RFAs”) numbered 83-86 and 88-89.
14 (Declaration of Scott M. Franklin in Support of Renewed Motion to Compel [the “Franklin
15 Decl.”] at Ex. 1 [Motion to Compel]). Defendants filed their Opposition on April 6, 2015. (*Id.* at
16 Ex. 2 [Opposition]), and Plaintiffs’ Reply was filed on April 14, 2015. (*Id.* at Ex. 3 [Reply].) The
17 Court issued its Order After Hearing (the “July 20 Order”) in response to Defendants’ MJOP. (*Id.*
18 at Ex. 4 [July 20 Order].) In that order, the Court dismissed two claims (the “Proposition 26
19 Claims”), both of which were based on the allegation that the Department of Justice’s use of
20 money collected as the Dealers’ Record of Sale (“DROS”) fee, constitutes an illegal tax that
21 violates article XIII A, section 3, subsection (a), of the California Constitution. (*Id.* at 2:11-21.)
22 The July 20 Order also states that, as to the Motion to Compel, it was “submitted for decision by
23 the Court on the briefs already filed.” (*Id.* at 3:5-6.) Ultimately, by way of the Court’s Ruling after
24 Additional Briefs, dated August 31, 2015, the Court held that the Motion to Compel was moot
25 because it sought discovery that was relevant to the recently dismissed Proposition 26 claims. (*Id.*
26 at 3:5-7 of Ex. 5 [Ruling after Additional Briefs].)

27 A few months later, Plaintiffs sought leave to file their First Amended Complaint for
28 Declaratory and Injunctive Relief and Petition for Writ of Mandamus (“FAC”), which, among

1 other things, included new causes of action alleging that the DROS fee is an illegal tax under
2 article XIII, sections 1(b), 2, and 3 of the California Constitution. (*Id.* at ¶¶ 101-135 of Ex. 6
3 [FAC].) The Court’s Order After Hearing, dated December 23, 2015 (the “December 23 Order”),
4 granted Plaintiffs leave to file the FAC (*id.* at 1:22-23 of Ex. 7 [December 23 Order]), which was
5 filed December 30, 2015. (*Id.* at Ex. 6.) The December 23 Order also clarified that, when the
6 Court issued the July 20 Order, “the Court did not make any findings concerning any
7 constitutional provisions other than Article XIII A, section 3, subdivision (a)[,]” i.e., the Court
8 only made findings as to the Proposition 26 Claims. (*Id.* at Ex. 5 [at 3 of attachment included
9 therein].)

10 III. ARGUMENT

11 Because there is once again an active illegal tax claim in this litigation, the discovery
12 requests previously identified as moot due to the dismissal of the Proposition 26 claims are now
13 relevant and may be substantively ruled on pursuant to section 1008(b). Section 1008(b) provides:

14 [a] party who originally made an application for an order which was refused in
15 whole or part, or granted conditionally or on terms, may make a subsequent
16 application for the same order upon new or different facts, circumstances, or law,
17 in which case it shall be shown by affidavit what application was made before,
18 when and to what judge, what order or decisions were made, and what new or
19 different facts, circumstances, or law are claimed to be shown.

20 Here, there exists a “new or different fact” that justifies Plaintiffs making a subsequent
21 application for the relief originally sought in the Motion to Compel. Namely, when the Court
22 denied Plaintiffs’ request for further responses to RFAs Nos. 83-86 and 88-89 on mootness
23 grounds, this group of RFAs no longer had an illegal tax claim “anchor” in the Complaint. The
24 Proposition 26 Claims had been dismissed. Now, however, Plaintiffs have several extant illegal
25 tax claims in the operative complaint, i.e., the FAC. The existence of an illegal tax claim is a
26 “new or different fact” that resolves the prior mootness issue and justifies a substantive ruling on
27 the Motion to Compel.

28 To be clear, though Plaintiffs’ current constitutional claims and the dismissed Proposition
26 Claims are distinct, they are all based on the same initial premise: that the DROS fee is not
solely a regulatory fee, but that it is also, at least in part, a tax. Defendants have taken the position

1 that “the use of DROS funds does not operate as a tax[.]” (Franklin Decl. at 34:17-18 of Ex. 8
2 [Defendants’ Amended Responses to Requests for Admissions (Set One)].) As such, the RFAs at
3 issue seek to set “at rest . . . triable issue[s,]” specifically that, contrary to Defendants’ stated
4 position, the factual indicia of taxation all indicate the DROS fee *does* operate as a tax. *Cembrook*
5 *v. Super. Ct.*, 56 Cal. 2d 423, 429 (1961).

6 “The general rule is that a regulatory fee must not exceed the sum reasonably necessary to
7 cover the costs of the regulatory purpose sought in order to be considered as a fee rather than a
8 guise for a tax.” *Mills v. Cnty. of Trinity*, 108 Cal. App. 3d 656, 661 (1980) (citation omitted)
9 (quotation marks omitted). The intended regulatory purpose of the DROS fee was to cover the
10 costs of performing firearm purchase background checks. *See* Penal Code § 28225 (section
11 28225’s heading is “[F]ee charged to firearm purchaser for processing information; maximum
12 rate”). But, as a result of Senate Bill 819 (Leno, 2011), the Department of Justice is now
13 improperly using DROS fee funds to also pay for general law enforcement activities that are
14 neither regulatory nor have a logical link to the vast majority of DROS fee payers. Plaintiffs’
15 RFAs seek to confirm that Defendants recognize there is no regulatory link between DROS fee
16 payers and the law enforcement activities now being funded by DROS fees, a key issue in proving
17 Plaintiffs’ illegal tax allegations.

18 For example, Plaintiffs’ RFA No. 83 is intended to obtain a binding admission that the
19 Defendants recognize that “law-abiding citizens who participate in the DROS PROCESS [i.e., the
20 background check process that occurs as a part of most firearm transfers in California] do not
21 place an unusual burden on the general public as to the illegal possession of firearms.” (Franklin
22 Decl. at 34:13-15 of Ex. 8.) If Defendants respond to this RFA with an admission, it helps prove
23 that the DROS fee funds are being used for purposes that are unrelated to the background check
24 process—e.g., they are being used for general law enforcement activities aimed at the illegal
25 possession of firearms. This would tend to show that the DROS fee is operating as a tax, because
26 the use of DROS fee funds for non-regulatory activities necessarily means the fee “exceed[s] the
27 sum reasonably necessary to cover the costs of the regulatory purpose.” *Mills*, 108 Cal. App. 3d at
28 661 (citation omitted). And if Defendants’ respond to this RFA with a denial, Plaintiffs will be

1 able to use followup discovery (e.g., Form Interrogatory 17.1) to vet whether that denial was
2 based on legitimate grounds. Either way, because RFA no. 83, and all the other RFAs at issue in
3 the Motion to Compel, are likely to lead to admissible evidence or set an issue to rest prior to trial,
4 the Court should grant the Motion to Compel.

5 IV. STIPULATION TO EXPEDITE

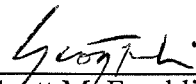
6 The parties met and conferred concerning this Renewal Motion. (Franklin Decl. at ¶ 10.)
7 Specifically, they have discussed whether a renewal motion is available here, and whether
8 Plaintiffs will obtain any additional value if they repropound the relevant discovery in an
9 abundance of caution, even though it is clear that doing so will not change the positions taken in
10 the parties' previously filed Motion to Compel briefing. Inasmuch as the Motion to Compel has
11 already been fully briefed by the parties, the parties believe it would waste the Court's and the
12 parties' time and resources for Plaintiffs to propound "new" discovery requests that mirror those
13 the Court previously identified as moot. Therefore, in this admittedly unusual situation, the parties
14 have stipulated to submit this matter to the Court without any further argument. Accordingly,
15 based on the stipulation of the parties submitted contemporaneously herewith, Plaintiffs request
16 the merits of the underlying matter now be decided on the parties' previously submitted discovery
17 dispute briefing (e.g., Plaintiffs' Motion to Compel and Reply in support thereof, and Defendants'
18 Opposition).

19 V. CONCLUSION

20 The Renewed Motion should be granted for the reasons stated herein. Plaintiffs
21 respectfully request the Court now issue a substantive ruling granting the Motion to Compel for
22 the reasons stated in Plaintiffs' previous briefing in support of that motion.

23
24 Dated: January 22, 2016

MICHEL & ASSOCIATES, P.C.

25
26 
27 _____
28 Scott M. Franklin,
attorneys for Plaintiffs

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA

3 COUNTY OF LOS ANGELES

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

7 On January 22, 2016, the foregoing document(s) described as

8 **PLAINTIFFS' NOTICE OF RENEWED MOTION AND RENEWED MOTION TO
9 COMPEL FURTHER RESPONSES TO REQUEST FOR ADMISSIONS, SET ONE,
10 PROPOUNDED ON DEFENDANTS KAMALA HARRIS AND STEPHEN LINDLEY,
11 AND MEMORANDUM IN SUPPORT THEREOF [CONCURRENTLY FILED WITH
12 DECLARATION OF SCOTT M. FRANKLIN IN SUPPORT THEREOF; {PROPOSED}
13 ORDER; STIPULATION]**

14 on the interested parties in this action by placing

15 the original

16 a true and correct copy

17 thereof enclosed in sealed envelope(s) addressed as follows:

18 Kamala D. Harris, Attorney General of California
19 Office of the Attorney General
20 Anthony Hakl, Deputy Attorney General
21 1300 I Street, Suite 1101
22 Sacramento, CA 95814

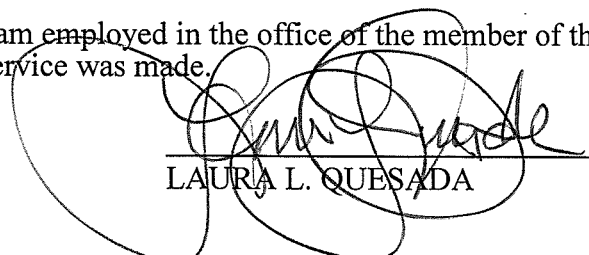
23 X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and
24 processing correspondence for mailing. Under the practice it would be deposited with the
25 U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach,
26 California, in the ordinary course of business. I am aware that on motion of the party
27 served, service is presumed invalid if postal cancellation date is more than one day after
28 date of deposit for mailing an affidavit.
Executed on January 22, 2016, at Long Beach, California.

X (VIA ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic
transmission. Said transmission was reported and completed without error.
Executed on January 22, 2016, at Long Beach, California.

— (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the
addressee.
Executed on January 22, 2016, at Long Beach, California.

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

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


LAURA L. QUESADA