

By Fax

FILED
ENDORSED

2017 JUN 14 PM 12:10

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 MICHEL & ASSOCIATES, P.C.
4 180 E. Ocean Boulevard, Suite 200
5 Long Beach, CA 90802
6 Telephone: (562) 216-4444
7 Facsimile: (562) 216-4445
8 Email: cmichel@michellawyers.com

9 Attorney for Plaintiffs/Petitioners

10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF SACRAMENTO
13

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

18 Plaintiffs and Petitioners,

19 vs.

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

28 Defendants and Respondents.

CASE NO. 34-2013-80001667

SEPARATE STATEMENT IN SUPPORT
OF MOTION FOR ADJUDICATION OF
PLAINTIFFS' FIFTH AND NINTH
CAUSES OF ACTION PURSUANT TO
THE BIFURCATION ORDER OF
NOVEMBER 4, 2016

Date: August 4, 2017
Time: 9:00 a.m.
Dept.: 31
Judge: Hon. Michael P. Kenny
Action filed: 10/16/13

No.	UNDISPUTED FACT	EVIDENCE
1	To purchase a firearm in California, qualified individuals must pay a transaction fee known as a Dealer Record of Sale ("DROS") fee ("Fee").	GENT002
2	The California Department of Justice (the "Department") performs extensive "background checks" of all applicants seeking to purchase firearms.	GENT002

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3	The primary purpose of the "DROS Process" is to ensure that people seeking to purchase firearms in California are not legally prohibited from possessing them.	GENT002
4	The Fee was \$2.25 in 1982 when it was statutorily created to cover the costs of background checks.	AGIC007
5	In 1990, the amount of the DROS Fee was \$4.25.	GENT003, AGIC007
6	In 1995, the legislature capped the DROS Fee at \$14.00, subject to Consumer Price Index adjustment.	GENT003
7	In 2004, the Department increased the the DROS fee from \$14 to \$19 for the first handgun or any number of rifles or shotguns in a single transaction.	GENT003
8	Section 28225 provides the rules for how the Fee should be set, i.e., that the fee "shall be no more than is necessary to fund the following:" eleven classes of costs, based on what the Department determined to be "actual" or "estimated reasonable" costs to pay for the eleven costs classes identified.	Penal Code § 28225
9	Penal Code section 28225 places a duty on the Department to consider whether the amount currently being charged for the DROS fee is excessive, and the Department; the Department admits it cannot legally increase the DROS fee to an amount the Department believes to be greater than necessary to fund the costs referred to in Penal Code section 28225.	GENT009-10; GENT034; AGRFP000399
10	The Department deposits DROS fee monies in the "Dealers' Record of Sale Special Account of the General Fund" ("DROS Fund").	GENT004
11	Revenue from multiple fees is pooled in the DROS Fund.	GENT051-52

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

12	Because of that pooling, however, it is impossible to trace if money paid in via a particular fee is actually used for costs related to that particular cost. For example, it is impossible to determine if a cost listed in Penal Code Section 28225 is funded from DROS fee funds, money from a mix of fee sources, or from fee sources exclusive of the DROS fee.	GENT035-36; GENT051-952
13	The Department has claimed herein that it is "unable to admit or deny" whether DROS fee money constitutes a certain percentage of the money in the DROS Special Account.	GENT035
14	Internal Department documents the Department was ordered to produce herein show that DROS fee funds are the primary source of money going into the DROS Special Account.	AGICO32
15	The Department contends that Per Transaction Cost (i.e., the average cost of performing a given transaction, including a proportional share of overhead costs) of the DROS process is currently at least \$19.00.	GENT011
16	The Department has not provided any basis, however, for that claim. In fact, the Department originally claimed that it would produce a current per-transaction cost, but after two years of requests from Plaintiffs herein, the Department repudiated its promise during a meeting in chambers.	Franklin Decl. ¶ 30
17	It was only after years of discovery in this action that the Department finally admitted that it does not actually consider any of the specific costs listed in Penal Code section 28225 when evaluating how much should be charged for the DROS Fee.	GENT080-81; GENT110-111

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

18	The process used by the Department for at least the last thirteen years (the "Macro Review Process") consists of the following: occasionally, two people in the Department look at (1) how much money is in the DROS Fund, (2) then they estimate the <i>total</i> amount of money going into and coming out of the DROS Fund in the next year, and (3) as long as the DROS Fund will stay in the black and will have a surplus to cover up to one year's worth of operating expenses, the Fee will not be increased.	AGIC007-12; GENT033-34; GENT057; GENT079-80; GENT087; GENT108; GENT110-111
19	The Department does not have protocol for determining when it should examine if the amount currently being charged for the DROS Fee is excessive.	GENT010; GENT139; GENT078; GENT083
20	As to the eleven cost classes referred to in section 28225(b): (1) the Department is unaware of the amount spent yearly for eight of those categories, one of which is the particularly relevant class stated in section 28225(1) (and four of this group concern costs the Department has not been requested to pay since at least 2004), (2) the Department has identified two categories that are funded from a source other than the DROS Special Account, and (3) one is known: the amount spent for electronic information transfer (.83 to 3.53 as of 20__).	GENT012-23; GENT043-47
21	The Department has previously paid Verizon for costs related to electronic information transfer.	GENT045
22	The Department cannot even provide the total amount of section 28225 costs for any year since 2002.	GENT060A
23	The Department claims its process does contemplate the Fee being reduced.	GENT081-83
24	The DROS Fee has never been lowered.	AGIC007; 11 CCR § 4001

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

25	Between 2005 and 2011, the surplus in the DROS Special Account slowly grew to over \$14 million.	GENT124; AGIC007
26	It was only when the Department got pressure from the legislature about the size of the surplus that the Department instituted a rulemaking to reduce the Fee	GENT084-85; GENT131-134
27	The Department abandoned the 2010 rulemaking in secret in October 2011, about two years after David Harper sent his September 9, 2009, letter to then assembly Nielsen.	GENT031; GENT132-34
28	The amount of the Fee was most recently increased in 2005 via an emergency rulemaking ("2005 Rulemaking") intended to resolve an anticipated negative balance in the DROS Fund.	11 CCR § 4001 (emergency regulation permanently instituted on March 1, 2005); AGRFP000391-396
29	At the time, the Department stated that 2005 increase was "only up to a level to cover actual costs as specified in statute."	AGRFP000391-396
30	The Department concedes that the cost of APPS was not a cost considered in the calculation to raise the Fee.	GENT011
31	The Department claims that it "created a written document that utilized specific cost data to provide an explanation as to why a \$19.00 . . . FEE was appropriate[;]" but the Department refuses to produce such material, claiming it is privileged.	GENT027; GENT064-65
32	Documents ordered produced by this Court over the Department's objections, however, show that the Macro Review Process was used in the 2005 Rulemaking.	AGIC007-19; AGIC048; AGIC022-36; GENT026-27; GENT033
33	The Department's own internal audit recommended cost cutting as an element of a solution to the DROS Fund deficit.	AGIC011-12; AGIC034

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

34	The Department chose to not adopt a cost cutting recommendation as a way deal with the low funds in the DROS Fund, and instead raised the Fee as the only measure to address the deficit.	11 C.F.R. § 4001; cf. AGIC0011
35	During the summer of 2009 then-Assemblyman Jim Nielsen contacted the Department about the unchecked growth of the DROS Fund surplus, which was over \$8 million at the time	GENT131
36	As of September 2, 2009, the Department knew the then \$10.5 million-dollar surplus in the DROS Special Account was more than necessary.	GENT131
37	In response to the assemblyman's inquiry, the Department stated that it was "currently exploring numerous administrative and statutory options to reduce the surplus[, and that "[s]hould [the Department] decide to pursue statutory changes to reduced the surplus[, the Department would] "welcome an opportunity to meet with [the assemblyman] to discuss the specifics of any proposal."	GENT131
38	As a result of the pressure from the legislature, on July 9, 2010, the Department formally commenced rulemaking (the "2010 Rulemaking") regarding the possibility of reducing the amount charged for the Fee from \$19.00 to \$14.00.	GENT84-86
39	The 2010 Rulemaking was initiated while the Department was headed by Attorney General Jerry Brown.	GENT005
40	The Department stated the purpose of the 2010 Rulemaking was to make the amount of the Fee commensurate with the actual costs of processing a DROS [application]."	AGRFP000048-49

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

41	The Department did not actually perform an analysis to determine that the proposed \$14.00 DROS Fee would be “commensurate with the actual costs of processing a DROS [application;]” instead, it performed only the Macro Review Process, which necessarily did not include “a specific, more detailed analysis[.]”	GENT56-57; GENT109-11; AGRGP000048
42	Defendant Lindley admitted the 2010 Rulemaking was based on a determination that the surplus in the DROS Fund was “excessive[.]” and that, with the “\$19 fee structure . . . there was a surplus at the end of every fiscal year[.]” Similarly, he said “at that point the \$19 was more than what was needed.”	GENT083; GENT091; GENT132-134; AGRGP000048-49.
43	The Department claimed (1) that it never made even a preliminary determination that \$19 was excessive, and that (2) at the conclusion of the 2010 Rulemaking, the Department was of the opinion that the total amount collected as a result of the \$19.00 fee was reasonably related to the total amount of costs referred to in section 28225 that were being incurred by the Department at the time.	GENT 10; GENT025; GENT030; AGRGP000048-49
44	As to the 2010 Rulemaking, the Department held a public hearing, and even created a final statement of reasons.	AGRFP0000166-174
45	Notwithstanding that the Department had basically completed the 2010 Rulemaking, the Department sat on the rulemaking until SB 819 passed, and then the rulemaking was abandoned in favor of SB 819, without any explanation to the public.	AGRFP000174; GENT030-31; GENT050; GENT054-55; GENT120
46	When Defendant Lindley was asked in a deposition in a different lawsuit why the rulemaking was abandoned, he said it was because all of the public comment was against it.	GENT101

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

47	The Calguns Foundation not only stated that it supported a fee reduction, but that it supported an even greater fee reduction than the 2010 Rulemaking proposed.	AGRFP00176
48	When deposed in this matter, however, Defendant Lindley admitted that it was abandoned in favor of SB 819.	GENT090A
49	when Defendant Lindley was asked at deposition who made the decision to abandon the 2010 rulemaking, he indicated the decision had been made by then Attorney General Kamala Harris.	GENT088-90; GENT092
50	Defendant Lindley stated in a discovery response that he made the decision to abandon the rulemaking.	GENT055
51	The initial statement of reasons for the 2010 Rulemaking literally says the purposes of the proposed fee reduction to "\$14, commensurate with the actual cost of processing a DROS[.]"	AGRFP000419
52	Defendants herein admitted during discovery that the Department initiated the 2010 Rulemaking to reduce the amount of the Fee from \$19 to \$14	GENT029
53	Defendant Lindley claims he does not "think there was an intent to lower it to \$14."	GENT067-68
54	By winter 2010/2011, the DROS Fund surplus was over \$14 million.	GENT124
55	In January 2011, newly elected Governor Jerry Brown released his proposed budget, which included almost \$62 million in cuts, over two years, to the Department's Division of Law Enforcement.	GENT135-136
56	In August 2011, the legislature enacted the California state budget for 2011-2, which included a \$71.5 million dollar reduction in the Division of Law Enforcement's budge over two years.	GENT137-38

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

57	The intent behind the \$71.5 million cut to the Division of Law Enforcement's budget was to "[e]liminate General Fund from the Division of Law Enforcement[;]" previously, the General Fund was used to pay for the Division of Law Enforcement's APPS-based law enforcement activities, among other things.	GENT011; GENT40; GENT96-98; GENT137-38
58	Shortly after Kamala Harris became California's Attorney General, the Department, acting on her specific instruction, brought proposed legislation to Senator Mark Leno that ultimately became Senate Bill 819 (Leno, 2011).	GENT154A
59	The first substantive version of SB 819, introduced March 21, 2011, did nothing other than addition the word "possession" to two passages in section 28225.	GENT144-146
60	In the opinion of a Department attorney who was involved in the drafting of SB 819, "as the sponsor I think I can say that we felt that it [i.e., adding only the word "possession"] was a sufficient clarification of existing law."	GENT114-15; GENT119; GENT121-22
61	On April 14, 2011, Senator Leno introduced a new, and what was ultimately the final, version of SB 819.	GENT147-53
62	The April 14, 2011, version of SB 819 included a new section, and specifically the subsection limiting SB 819 to providing a funding source for APPS-based law enforcement activities: Section 1(g).	GENT147-50
63	Senator Leno's "Q&A" packet for SB 189 expressly stated that he "added declarations and findings to make it clear that [SB 819 was] intended to address the APPS enforcement issue."	GENT125-27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

64	A parenthetical note in the "Q&A" packet also shows that the Department was involved in the revision of SB 819 when it the new Section I was added.	GENT125-27
65	AAPS is a system that cross-references (1) firearm purchaser background check records and (2) criminal or other records that indicate if an individual is prohibited from possessing firearms.	GENT102-03; AGIC0050
66	If the system produces a "hit" that is later verified by human analysis, it provides a basis for law enforcement to contact the person identified to determine that person is illegally possessing a firearm.	GENT102-03
67	Senator Leno and the Department worked together extensively in promoting SB 819.	GENT154A
68	While discussing SB 819 with the legislature and the public, Senator Leno and the Department both made it very clear that SB 819 <i>only</i> applied to funding for AAPS-based law enforcement activities.	GENT104; GENT125-127; GENT147-150
69	Further, when the Department and Senator Leno were pushed on why SB 819's proposed statutory change was limited to one word—the addition of the word "possession" to section 28225—the response was clear: SB 819's non-codified provisions provide the needed context to understand what "possession" would mean in section 28225 if SB 819 was enacted.	GENT125-27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

70	In 2011, the Legislature passed SB 819, which added the word "possession" to Section 28225, with the following uncodified intent language: "it is the intent of the Legislature in enacting this measure to allow the DOJ to utilize the Dealer Record of Sale Account for the additional, <i>limited</i> purpose of funding enforcement of the Armed Prohibited Persons System."	GENT151-53
71	Since 1999, the Department has been using the DROS Fund to pay for attorney services in over 50 cases.	GENT073-74
72	In fiscal year 2013/2014, \$181,486.29 of DROS Fund money was spent on attorneys.	GENT59-60
73	The total costs of attorney services paid for out of the DROS Fund is in the millions.	GENT075
74	Five positions within the Department, but outside the Bureau, were being funded from the DROS Fund.	AGIC010
75	The State's auditor stated the DROS Fund was a "dubious funding source for these [five abovementioned] positions. While they may somewhat contribute to the goals of the DROS program, an overwhelming majority of their time is spent on non-DROS workload."	AGIC010
76	And once SB 819 became law, the Department started to use the DROS Fund not only to fund APPS-based law enforcement activities, it also used DROS Fund money to pay for APPS itself (e.g., generating the APPS list).	AGRFP0017; GENT041

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


77	Once SB 819 became law, the Department started to use the DROS Fund for investigations of people who were <i>not</i> on the APPS list. The Department claims SB 819 authorized DROS Fund money to be spent on law enforcement activities related to removing firearms from the possession of prohibited persons, whereas Plaintiffs contend SB 819 is expressly limited to funding APPS-based law enforcement activities.	GENT069-71; GENT077 (See also the First Amended Complaint and Answer to the First Amended Complaint.)
78	Prior to SB 819, APPS and APPS-based law enforcement activities were funded out of the General Fund	GENT40; GENT011; GENT076; GENT095-96; GENT098-99
79	The list of costs funded from the DROS Fund but not referred to in section 28225 also includes the cost of legislative analysis done by the department.	GENT076
80	The list of costs funded from the DROS Fund but not referred to in section 28225 also includes the cost of certain high-level Bureau executives' entire salaries.	AGROG000016
81	The Bureau does not just perform the DROS Process (and the extent relevant, APPS-based law enforcement); it administers over thirty state mandated programs.	GENT139-143
82	Approximately 25% of Defendant Lindley's time as chief of the Bureau was spent working on matters related to APPS.	GENT074A
83	The Department does not separately record expenses for non-APPS-based law enforcement activities and APPS-based law enforcement activities.	GENT077
84	Approximately 5% of the "APPS Cases" handled by the Department concern individuals not identified via APPS.	GENT071-72

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

85	Based on the Department's own data and estimation, and assuming both kinds of enforcement activities take the same time, the amount spent on non-APPS-based law enforcement activities by the Department is somewhere between \$131,272.16 to 262,859.04 (the total yearly salary for approximately 2.84 special agents)—depending on pay grade—not to mention overtime and support staff (e.g., non-sworn criminal identification specialists).	GENT154; GENT156
86	Support staff do a large amount of investigatory work prior to special agents going into the field to contact people who may be armed but legally prohibited from possessing firearms.	GENT100

Dated: June 13, 2017

MICHEL & ASSOCIATES, P.C.



Scott M. Franklin
Attorneys for the Plaintiffs/Petitioners

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Laura Palmerin, 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 Boulevard, Suite 200, Long Beach, California 90802.

On June 13, 2017, I served the foregoing document(s) described as

SEPARATE STATEMENT IN SUPPORT OF MOTION FOR ADJUDICATION OF PLAINTIFFS' FIFTH AND NINTH CAUSES OF ACTION PURSUANT TO THE BIFURCATION ORDER OF NOVEMBER 4, 2016

on the interested parties in this action by placing

- the original
- a true and correct copy

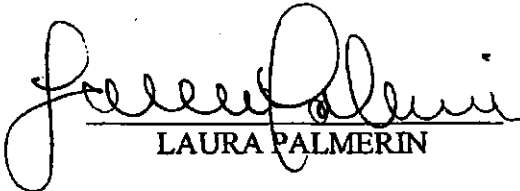
thereof by the following means, addressed as follows:

Office of the Attorney General
Anthony Hakl, Deputy Attorney General
1300 I Street, Suite 1101
Sacramento, CA 95814
Anthony.Hakl@doj.ca.gov

X (BY OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on June 13, 2017, at Long Beach, California.

X (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission. Said transmission was reported and completed without error.
Executed on June 13, 2017, 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.


LAURA PALMERIN