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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

DAVID GENTRY, JAMES PARKER, MARK MID LAM, 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 Director of the California Department of Justice Bureau of Firearms; BETTY T. YEE, in her official capacity as State Controller, and DOES 1-10,

Defendants and Respondents.[1]

Case No. 34-2013-80001667

OPPOSITION TO PLAINTIFFS' MOTION FOR ADJUDICATION OF THE FIFTH AND NINTH CAUSES OF ACTION

Date: August 4, 2017
Time: 9:00 a.m.
Dept: 31
Judge: The Honorable Michael P. Kenny
Action Filed: October 16, 2013

[1] Defendants respectfully request that Stephen Lindley, in his official capacity as Director of the California Department of Justice Bureau of Firearms, be substituted back into this action in the place of his predecessor Martha Supernor. (See Code Civ. Proc., § 368.5.)

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INTRODUCTION

Most of the discussion in plaintiffs' motion for adjudication of the fifth and ninth causes of action is irrelevant to the discreet legal issues currently before this Court. As a result, plaintiffs have failed to meet their burden to show that the Dealer's Record of Sale ("DROS") fee statute (Penal Code, § 28225) imposes on the Department of Justice a ministerial duty to act, and plaintiffs separately have failed to show that they have a clear and beneficial right to the performance of any duty. Plaintiffs argument that the word "possession" in section 28225, subdivision (b)(11) has a special meaning is also unpersuasive. Defining "possession" narrowly like plaintiffs contend is unsupported by the common sense meaning of that word and goes against the public safety purposes of the statute. The Court should deny plaintiffs' motion.

ARGUMENT

I. ON THE FIFTH CAUSE OF ACTION, PLAINTIFFS HAVE FAILED TO MEET THE REQUIREMENTS FOR WRIT OF MANDATE.

A. Plaintiffs have not met their burden to show that defendants have a clear, present and ministerial duty to act.

The requirements for writ of mandate are well known. The writ "may be issued by any court . . . to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station . . . ." (Code Civ. Proc., § 1085, subd. (a).) With respect to this duty, "[t]he *petitioner must demonstrate* the public official or entity had a *ministerial duty* to perform. . . ." (*California Pub. Records Research, Inc. v. Cty. of Yolo* (2016) 4 Cal.App.5th 150, 177, italics added.) In their opening brief, plaintiffs effectively assume the existence of the required duty. But their assumption is unsupported by any argument, which is not surprising because section 28225 simply does not impose a ministerial duty on defendants.

Whether a statute like section 28225 "impose[s] a ministerial duty, for which mandamus will lie, or a mere obligation to perform a discretionary function is a question of statutory interpretation. We examine the language, function and apparent purpose of the statute." (*California Pub. Records Research, supra*, 4 Cal.App.5th at p. 178, citations and internal quotations omitted.)

Section 28225 states that "[t]he Department of Justice may require the dealer to charge each firearm purchaser a fee not to exceed fourteen dollars ($14), except that the fee may be increased at a rate not to exceed any increase in the California Consumer Price Index," and if the Department requires dealers to charge a fee, the fee "shall be no more than is necessary to fund" eleven categories of costs listed in the statute. Nothing in the language of section 28225 imposes the duty, or duties (to be precise), plaintiffs inconsistently assert. (Compare Pls.' Opening Brief at p. 8 [claiming "duty on the Department to consider" whether current fee is "excessive"] with *id.* at p. 19 ["duty to set the Fee" within Department's statutory authority] and with *id.* at p. 21 ["duty to monitor and adjust the amount of the Fee"]; see also Compl. ¶¶ 96, 99 & 100 [varying characterizations of Department's alleged duty].)[2] Indeed, plaintiffs' inability to articulate the precise nature of any duty speaks to the absence of any duty.[3]

Moreover, the Third District Court of Appeal recently concluded that a very similar fee-setting framework regarding copies of documents requested under the Public Records Act does not impose any ministerial duty. (*California Public Records Research, supra*, 4 Cal.App.5th at p. 178.) That framework involved two statutes, although the most pertinent one provided that "[t]he fee . . . shall be set by the board of supervisors in an amount necessary to recover the direct and indirect costs of providing the product or service." (Gov. Code, § 27366.) In concluding that the statutes did not impose a duty on the county to limit copy fees, the Court of Appeal reasoned that even though the statutes "require the Board to charge and set copy fees, the Board must

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[2] In connection with these inconsistent assertions, plaintiffs continue to repeatedly refer to a DROS fund "surplus," which plaintiffs describe as "in excess of" or "over" $14 million. (See Pls.' Opening Brief at pp. 7, 9, & 12.) To be clear, though, whatever the condition of the relevant fund in the past, there is no DROS "surplus" at this time. According to the January 10, 2017 Governor's Budget, the DROS fund balance for fiscal year 2017-2018 was only $1.2 million. (See http://www.ebudget.ca.gov/2017-18/pdf/GovernorsBudget/0010/0820FCS.pdf [as of June 29, 2017] [Proposed Budget Detail. Legislative, Judicial, and Executive. Department of Justice. Fund Condition Statements.]; see also Depo. of Stephen Lindley at pp. 74-77 [discussing need for "backup" in DROS fund]; Depo. of David Harper at p. 71 [discussing "carry forward balance"].)

[3] Even plaintiffs' proposed remedy misses the mark. (See Pls.' Opening Brief at p. 23 [proposing that the Court "order the Department to individually calculate the incurred and estimated cost categories in section 28225 and to make the documents reflecting such calculations public"].) Such a writ would not track any statutory requirements of section 28225. As mentioned, a writ of mandate can only require the performance of a ministerial duty. It follows that such a writ cannot create a duty that is not reflected in statute.

exercise significant discretion in deciding how much to charge." (*California Public Records Research*, 4 Cal.App.5th at p. 178.) The court explained: "Neither statute requires the Board to set fees in any particular amount. Rather, section 27366 requires the Board to set fees 'in an amount necessary to recover the direct and indirect costs of providing the product or service.'" (*Ibid.*) And the court had explained elsewhere in its opinion that the terms "direct costs" and "indirect costs" indicate the Legislature intended for boards of supervisors to consider "a wide range of indirect costs in actually setting copy fees, including overhead and other operating costs not specifically associated with the actual production of copies." (4 Cal.App.5th at p. 173.)

Here, section 28225 is akin to the statute in *California Public Records Research*. The DROS fee statute does not require the Department to set the DROS fee at any particular amount. Rather, if a fee is charged, it is "not to exceed fourteen dollars ($14)," except that it may be increased to account for inflation. (§ 28225, subd. (a).) In other words, the fee can be non-existent (i.e., $0.00) or it can fall within the range of $0.01 up to and including $14.00, and even beyond in the event of inflation.[4] Additionally, like the statute in *California Public Records Research*, section 28225 authorizes the Department (and other state agencies) to consider a wide range of costs in setting the DROS fee. No less than eleven subdivisions list those costs, but subdivision (b)(11) perhaps illustrates this point the best, considering its broad language encompassing "costs *associated with* funding Department of Justice firearms-*related* regulatory and enforcement activities *related to* the sale, purchase, possession, loan, or transfer of firearms." Indeed, the statute goes on to say that these costs need only be "the estimated reasonable costs" of the Department. (See Merriam-Webster.com (2017) https://www.merriam-webster.com/dictionary/estimate [as of June 29, 2017] ["to judge tentatively or approximately the value, worth, or significance of"; "to determine roughly the size, extent, or nature of"]; Merriam-Webster.com (2017) https://www.merriam-webster.com/dictionary/reasonable [as of June 29, 2017] ["not extreme or excessive"; "moderate, fair"].) This language shows that section 28225

[4] In this regard, the current fee is $19.00, and it has been that amount since approximately 2004.

calls for the exercise of significant discretion in deciding the amount of the DROS fee, just like the situation in *California Public Records Research.*

Because plaintiffs have not met their burden to show that defendants have a ministerial duty to act, the Court should deny plaintiffs' motion as to the fifth cause action.

B. Plaintiffs have not met their burden to show a beneficial right.

Plaintiffs assert that they are entitled to writ relief because "Defendants have not produced any evidence to dispute Plaintiffs' 'beneficial right.... to the performance of that duty' via past and likely future payment of the Fee." (Pls.' Opening Brief at p. 18.) Yet that is not the applicable legal standard. The law is clear that "[w]hat is required to obtain writ relief is *a showing by a petitioner* of '(1) A clear, present and usually ministerial duty on the part of the respondent . . .; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty . . . .'" (*Santa Clara Cty. Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539–40, overruled by statute on other grounds as recognized in *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077; see *Riverside Sheriff's Ass'n v. Cty. of Riverside*, 106 Cal.App.4th 1285, 1289 ["The petitioner bears the burden of pleading and proving the facts upon which the claim is based"]; *MacLeod v. Long*, 110 Cal.App. 334, 339 ["The burden is, therefore, upon the plaintiff to prove the existence of such right rather than upon the defendants to disprove the same."])

Moreover, plaintiffs have not even attempted to articulate what their beneficial right might be, much less demonstrated the required "direct" and "substantial" beneficial right. (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1233.) And to be sure, a general interest in having the laws of the State upheld is not special or unique. Rather, it is shared by the public at large. Such a broad interest does not amount to a beneficial right. (See *Holbrook v. City of Santa Monica* (2006) 144 23 Cal.App.4th 1242, 1254 [interests "pertain[ing] to the effective operation of government and the rights of the public, not to specific interests or rights of [the petitioners] individually," are not beneficial interests]; *Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83, 89 [taxpayer's interest in minimizing traffic congestion, though legitimate, was not a beneficial interest "over and above the public at large" because

"hundreds of thousands of people" shared the interest].) For this additional reason, the Court should deny plaintiffs' motion as to the fifth cause action.

II. THE COURT SHOULD REJECT PLAINTIFFS' NARROW CONSTRUCTION OF SECTION 28225 AND DISMISS THE NINTH CAUSE OF ACTION.

Turning to the ninth cause of action defendants agree that the central issue is a matter of statutory interpretation. Yet plaintiffs' interpretation of the relevant statute fails to adhere to the basic tenets of statutory construction. (See *Elsner v. Uveges* (2004) 34 Cal.4th 915, 920 [courts "begin with the language of the statute" to "ascertain the Legislature's intent so as to effectuate the purpose of the law"].) Plaintiffs narrowly focus on an isolated phrase in the uncodified language of SB 819 to the exclusion of everything else, including the definition of the word "possession," the actual statutory term at issue. Plaintiffs do not even address the plain meaning of the word "possession" much less explain how the Department's common sense interpretation of that word (see Defs.' Opening Brief at pp. 21-24) is in any way inconsistent with that meaning. For this reason alone, plaintiffs' argument is unavailing.

Nor is it relevant, as plaintiffs contend (see Pls.' Opening Brief at p. 17), what the Department may have "publicly acknowledged" in the legislative run-up to SB 819. (See *In re Marriage of Siller* (1986) 187 Cal.App.3d 36, 46, fn. 6 [declining to consider "two documents from the sponsoring entity, the State Bar of California . . . as they are not cognizable indicia of legislative intent"].) It is not relevant what a staffer of the authoring legislator of the bill might have said during the same period in an alleged informational handout intended for an unknown audience. (See *People v. Garcia* (2002) 28 Cal.4th 1166, 1176, fn. 5 [denying request to take judicial notice of authoring legislator's press releases and letters, explaining "we do not consider the objective of an authoring legislator when there is no reliable indication that the Legislature as a whole was aware of that objective and believed the language of the proposal would accomplish it"]; see also Decl. of Anthony R. Hakl in Supp. of Defs.' Mot. for Summ. Adjud. ("Hakl Decl."), Exh. O at pp. 54-58 [discussing the nature of "Q & A" document relied upon by plaintiffs].) And while courts may consider different versions of a bill as a general matter (see *Quintano v. Mercury Cas. Co.* (1995) 11 Cal.4th 1049, 1062, fn. 5 (1995) [taking judicial notice of "various

versions" of bill]), none of the versions of SB 819 offered by plaintiffs can change the plain meaning of the word "possession," which itself appeared in earlier versions of the bill. Indeed, it is hardly inconsistent for the Legislature to have "intended to address the APPS enforcement issue," as plaintiffs claim (see Pls.' Opening Brief at p. 17), and also more broadly intend to support "enforcement activities related to *possession*" and reduce the number of illegally possessed firearms that "present[] a substantial danger to public safety," which the uncodified language of SB 819 emphasized by plaintiffs also states. (Senate Bill 819 (Leno), Stats. 2010, ch. 743, § 1(f), italics added.) On the contrary, these intentions are compatible, APPS being a major component of enforcement activities related to possession.

Plaintiffs cursory argument in support of the ninth cause fails to persuade. The Court should deny plaintiffs' motion as to that claim as well.

CONCLUSION

For the reasons set forth above, the Court should deny plaintiffs' motion in its entirety.

Dated: June 30, 2017

Respectfully Submitted,

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DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Gentry, David, et al. v. Kamala Harris, et al.**
No.: **34-2013-80001667**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 30, 2017, I served the attached **OPPOSITION TO PLAINTIFFS' MOTION FOR ADJUDICATION OF THE FIFTH AND NINTH CAUSES OF ACTION** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Scott Franklin
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Long Beach, CA 90802
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 30, 2017, at Sacramento, California.

Tracie L. Campbell
Declarant

Tracie Campbell
Signature

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