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FILED
ENDORSED

2017 JUN 30 PM 3:44

GOSSC COURTHOUSE
SUPERIOR COURT
OF CALIFORNIA
SACRAMENTO COUNTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

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

Plaintiffs and Petitioners,

v.

XAVIER BECERRA, in His Official
Capacity as Attorney General for the State
of California; STEPHEN LINDLEY, in
His Official Capacity as Acting Chief for
the California Department of Justice,
BETTY YEE, in Her Official Capacity as
State Controller, and DOES 1 - 10,

Defendants and Respondents.

Case No. 34-2013-80001667

**PLAINTIFFS' SEPARATE STATEMENT IN
OPPOSITION TO DEFENDANTS' MOTION
FOR SUMMARY ADJUDICATION**

[Filed concurrently with the Memorandum of Points
and Authorities in Support Thereof; Plaintiffs'
Evidence in Opposition to Defendants' Motion for
Summary Adjudication: Declaration of Scott M.
Franklin in Support of Plaintiffs' Opposition to
Defendants' Motion for Summary Adjudication]

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

Plaintiffs David Gentry, James Parker, Mark Midlam, James Bass, and CalGuns Shooting
Sports Association hereby submit this Separate Statement in Opposition to Defendants' Motion
for Summary Adjudication.

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Defendants' Undisputed Material Facts and Supporting Evidence	Plaintiffs' Responses
<p>No. 1: The Legislature first authorized DOJ to charge a DROS fee in 1982 and DOJ first set the DROS fee at \$2.25.</p> <p>Evidence: Stats. 1982, ch. 327, § 129, p. 1473; Haki Decl., Ex. B [Bates no. AGIC007].</p>	<p><i>Undisputed.</i></p>
<p>No. 2: In 1991 the Department set the DROS fee at \$14.00.</p> <p>Evidence: Haki Decl., Ex. B [Bates no. AGIC007].</p>	<p><i>Undisputed.</i></p>
<p>No. 3: In 1995 the Legislature capped the DROS fee at \$14.00 subject to increases to account for inflation.</p> <p>Evidence: Stats. 1995, ch. 901, § 1, pp. 6883-6884.</p>	<p><i>Undisputed</i> that there was a \$14.00 limit included in the relevant statutory change, disputed as to the immaterial legal allegations that the \$14.00 limit was solely meant to account for inflation, or that the statutory change allowed the relevant fee to be charged pursuant to the consumer price index in an amount more than necessary to fund the relevant costs:</p>
<p>No. 4: In 2004 DOJ raised the DROS fee to \$19.00 – its current amount – to account for inflation.</p> <p>Evidence: Cal. Code. Regs. tit. 11, § 4001; Haki Decl., Ex. E [Bauer Bates no. AG-00250].</p>	<p><i>Undisputed</i> that a \$19.00 limit was included in the relevant regulatory change, <i>disputed</i> as to the immaterial factual allegation that the fee amount was changed from \$14.00 to \$19.00 to account for inflation.</p>
<p>No. 5: Plaintiffs filed this suit on October, 16, 2013.</p> <p>Evidence: Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus.</p>	<p><i>Undisputed.</i></p>

Defendants' Undisputed Material Facts and Supporting Evidence	Plaintiffs' Responses
<p>No. 6: If the DROS fee were to be calculated in the manner plaintiffs contend, "it would cost a whole lot more money in order to operate that program which would be passed along to the DROS fee."</p> <p>Evidence: Depo. of Stephen Lindley ("Lindley Depo.") at 64:22-25.</p>	<p><i>Disputed</i>, but immaterial. There is no foundation laid for this vague claim or as to how the deponent is qualified to give either the legal and factual opinions herein. Further, even if it was true that calculating the Fee as required by law—as opposed to how it is calculated now—would cost more, that would have no bearing on the issues currently before the Court.</p>
<p>No. 7: In 2004, the Department engaged in a lengthy rulemaking process, as required by the law, resulting in the regulation setting the DROS fee at \$19.00, where it remains today.</p> <p>Evidence: Haki Decl., Ex. E.</p>	<p><i>Undisputed</i> that the Department engaged in a rulemaking process in 2014 to increase the Fee to \$19.00, its current amount, <i>disputed</i> as the irrelevant and immaterial issues of whether the process was "lengthy" (i.e., it was <i>emergency</i> rulemaking) or the legal assertion that the process performed was that which is "required by the law[.]"</p>
<p>No. 8: Without the 2004 cost of living adjustment the Dealer's Record of Sale Special Account was projected to run out of the cash needed to support the firearms regulatory and enforcement programs mandated by law.</p> <p>Evidence: Haki Decl., Ex. E [<i>Bauer Bates</i> no. AG-00250].)</p>	<p><i>Disputed</i> but immaterial. It is undisputed that the Department believed the DROS Fund was likely to run out of money in the near future in 2004. But the Department's own internal analysis shows that cost cutting was proposed, but rejected, as a way to deal with the dwindling amount of money in the DROS Fund. That is, increasing the Fee was not the sole way to address the problem under discussion, which is what Defendants imply. Further, it is disputed that the 2004 adjustment was a "cost of living adjustment[.]" the document cited provides no comparative data wherein the same specific operations were costing more due to inflation.</p>
<p>No. 9: A series of 2004 reports (and draft reports) prepared by the Department's Budget Office reflect further analysis by the Department supporting the increase of the DROS fee to \$19.00.</p> <p>Evidence: Haki Decl., Ex. B.</p>	<p><i>Disputed</i> but immaterial; the documents cited do not "support[] the increase of the DROS fee to \$19.00[.]" More accurately, the documents cited reflect that raising the fee to \$19.00 was one option to deal with the anticipated shortfall, and option that was not recommended by the specific entity that authored the reports.</p>

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Defendants' Undisputed Material Facts and Supporting Evidence	Plaintiffs' Responses
<p>No. 10: The number of programs funded from DROS fee revenues (i.e., the costs specified in the statute) had grown before the Department revised the DROS fee rate in 2004 and has grown further since then.</p> <p>Evidence: <i>Compare</i> Stats. 1995, ch. 901, § 1, pp. 6883-6884 [the law in 1995] <i>with</i> former § 12076, as amended (Stats. 2003, ch. 754, § 2 [the law in effect as of the 2004 fee setting] <i>and with</i> § 28225 [effective today].</p>	<p><i>Undisputed</i> but immaterial.</p>
<p>No. 11: In 1995 the Legislature enacted Senate Bill 670 and codified the \$14.00 figure that was later adjusted to \$19 in 2004. At that time (i.e., in 1995) the Legislature recognized the Department's explanation that \$14.00 was "sufficient to fund the existing authorized programs."</p> <p>Evidence: Assem. Com. on Appropriations, Analysis of Senate Bill No. 670 (1995-1996 Reg. Sess.) Aug. 23, 1995; Sen. Third Reading, Analysis of Senate Bill No. 670 (1995-1996 Reg. Sess.) Aug. 29, 1995.</p>	<p>Sentence 1: <i>undisputed</i>. Sentence 2: <i>disputed</i> and immaterial. (1) Whether or not the legislature recognize a particular fee amount as "sufficient" does not provide a factual basis that the fee amount was proper, and the Department has produced no direct evidence as to that issue, (2) this case is not about whether a decision over twenty years ago was financially justified, and (3) this case is not about whether the amount of a fee is "sufficient[,]" it is about whether the fee currently being charged is <i>excessive</i>, and "proof" that it sufficient sheds no light on whether it was excessive in 1995.</p>

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Defendants' Undisputed Material Facts and Supporting Evidence	Plaintiffs' Responses
<p>No. 12: The Department regularly monitors the number of firearms transactions in California; the amount of DROS fee revenues being generated; the condition of the Dealer's Record of Sale Special Account; the annual state budget process, particularly as it impacts the Department, and the resulting appropriations by the Legislature; each and every expenditure by the Department to ensure that it is authorized by law; and the anticipated future needs of the Department based on myriad policy and legal considerations.</p> <p>Evidence: See, e.g., Lindley Depo. at pp. 64:9-65:65-10; 72:3-73:15; 74:2-79:25 [Hakl Decl., Ex M]; Depo. of David Harper at pp. 54:14-55:17; 58:24-59:20; 60:6-61:24; 63:5-64:8; 65:2-67:23 [Hakl Decl., Ex N].</p>	<p><i>Disputed</i> as to the claim that the Department "regularly monitors . . . each and every expenditure by the Department to ensure that it is authorized by law[;]" the documents cited do not support this, and as was confirmed during the deposition of Stephen Lindley, the Department does not consider the "nitty gritty" specific cost classes identified in Penal Code section 28225, which means the Department is not actually considering whether "each and every" cost within those categories are appropriately being funded pursuant to section 28225. <i>Undisputed</i> as to the remainder, which is immaterial.</p>
<p>No. 13: Chief Lindley has testified regarding APPS that "95% of the of the cases that we work would be system-generated cases," meaning that "[t]he APPS system generated the hit . . . identifying the person as being armed prohibited. Analysts confirm that, agents confirm that, and they go out into the field and investigate that individual."</p> <p>Evidence: Lindley Depo. at pp. 26:23-27:10.</p>	<p>Though Plaintiffs have no independent verification of the claim that approximately 95% of the relevant investigations are based on information obtained from "hits" generated by the APPS system, in light of Defendants' steadfast claim that information related to specific "APPS cases" is confidential. Nonetheless, it is <i>Undisputed</i> that the 95% estimate is the estimate made by Stephen Lindley in this action, and that Plaintiffs assume it to be true for the purpose of Defendants' Motion.</p>

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Defendants' Undisputed Material Facts and Supporting Evidence	Plaintiffs' Responses
<p>No. 14: The "vast majority" of APPS enforcement efforts by the Department fall within a category of enforcement with which plaintiffs take no issue.</p> <p>Evidence: Lindley Depo. at p. 17:25.</p>	<p><i>Disputed.</i> Even if Mr. Lindley's approximation is correct that approximately 95% of the relevant cases are based on data generated by APPS, there is no evidence presented that there APPS-based and non-APPS cases, on average, require the same level of "enforcement efforts[.]" For example, it is reasonable to assume that information taken from the APPS list will include contact information, whereas, in matters where the Department is following up on a vague tip, finding the relevant individual may require an exponential amount of work.</p>
<p>No. 15: With respect to the five percent of APPS cases plaintiffs challenge (i.e., cases that are not "true" APPS-list cases), Chief Lindley testified about a typical example. He explained that on occasion the Department might "get a call from a citizen, an ex-wife, sometimes, you know, family members about an individual who is now prohibited for one reason or another and that they have firearms that the department might not necessarily know about." In that instance the Department has "a duty for public safety" to follow up on that call.</p> <p>Evidence: Lindley Depo. at p. 18:9-18.</p>	<p><i>Undisputed</i> that the example provided is an example of a non-APPS case the Department is funding with DROS Fund money. <i>Disputed</i> as to whether it is "typical" because the Department refuses to provide information about its investigations based on, inter alia, a law enforcement privilege claim. Also <i>disputed</i> as to the claim that the Department has a duty for public safety to investigate non-APPS matters within the jurisdiction of local law enforcement. No statute or other law is cited by the Department for this proposition, and the deponent's speculation is insufficient evidence to support the claim.</p>

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Plaintiffs' Additional Material Facts	Defendants' Response
<p>Additional Material Fact ("AMF") No. 1: The relevant emergency rulemaking was effectively complete in 2004, but it was not finalized until 2005.</p> <p>Evidence: Declaration of Scott M. Franklin in Support of Plaintiffs' Separate Statement in Opposition to Defendants' Motion for Summary Adjudication ("Franklin Decl. ISO Opp.") at Exhibit 1 (AGRFP000380, AGRFP000390).</p>	
<p>AMF No. 2: Prior to the adoption of SB 819 the Department expressly asserted that SB 819 would not result in the DROS Fee being increased.</p> <p>Evidence: GENT124 (Part of Exhibit 14 to the Declaration of Scott M. Franklin in Support of Plaintiffs' Motion for Adjudication of Plaintiffs' Fifth and Ninth Causes of Action Pursuant to the Bifurcation Order of November 4, 2016 ["Franklin Decl."])</p>	
<p>AMF No. 3: The Department now contends that it can raise the Fee based on costs related to APPS-based law enforcement activities.</p> <p>Evidence: Franklin Decl. ISO Opp. at Exhibits 2 & 3 (GENT157-62).</p>	
<p>AMF No. 4: The Department was involved in the revision of SB 819 when it the new Section 1 was added, so the Department knew SB 819 was being revised to include a specific limitation on SB 819's scope.</p> <p>Evidence: GENT125-27 (part of Exhibit 15 to the Franklin Decl.)</p>	

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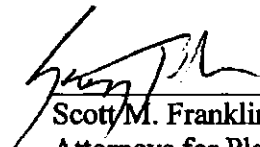
Plaintiffs' Additional Material Facts	Defendants' Response
<p>AMF No. 5: During a recent deposition, the Department, for the first time, clearly admitted that it is funding non-APPS based law enforcement activities out of the DROS Fund based on the contention that SB 819's revision of section 28225 authorized such expenditures.</p> <p>Evidence: GENT069-71; GENT077 (part of Exhibit 9 to the Franklin Decl.)</p>	
<p>AMF No. 6: In the course of sponsoring SB 819, the Department made repeated representations that SB 819 money was needed to pay for APPS-based law enforcement activities performed by both the Department and local law enforcement agencies. For example, in one communication from the Department to a member of Senator Leno's staff dated February 16, 2011, the department claimed would use \$1.5-2.5 million of money obtained via (what would later be named) SB 819 to reimburse local law enforcement, and \$1 million a year to pay for the Department's employees to perform APPS-based law enforcement activities.</p> <p>Evidence: GENT124 (Exhibit 14 to the Franklin Decl.); see also GENT 128-130 (Exhibit 16 to the Franklin Decl.), Franklin Decl. ISO Opp. at Exhibit 4 (GENT163-64).</p>	
<p>AMF No. 7: As of 2017, the Department has not paid local law enforcement any money out of the DROS Fund to local law enforcement regarding its APPS-based law enforcement work.</p> <p>Evidence: GENT072 (part of Exhibit 9 to the Franklin Decl.)</p>	

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Plaintiffs' Additional Material Facts	Defendants' Response
AMF No. 8: The Department has spent tens of millions of dollars pursuant to SB 819 in the last six years. Evidence: Franklin Decl. ISO Opp. at Exhibit 5 (GENT165-167).	

Dated: June 30, 2017

MICHEL & ASSOCIATES, P.C.



Scott M. Franklin
Attorneys for Plaintiffs/Petitioners

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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 30, 2017, I served the foregoing document(s) described as

PLAINTIFFS' SEPARATE STATEMENT IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION

on the interested parties in this action by placing
[] the original
[X] 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 30, 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 30, 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