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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.

Case No. 34-2013-80001667

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION AS TO 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

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INTRODUCTION

The two causes of action currently before the court involve questions of statutory interpretation. With respect to the fifth cause of action, the questions are whether the Dealer's Record of Sale ("DROS") fee statute (i.e., Penal Code section 28225) imposes a ministerial duty that defendants have failed to perform, and whether plaintiffs had a beneficial right to the performance of any such duty. The answer to both of these questions is "no." There is also an issue as to whether the fifth cause of action is timely, which it is not.

With respect to the ninth cause of action, the question for this Court is whether the word "possession" as it is used in section 28225 has the narrow, special meaning attributed to it by plaintiffs. The answer to this question is also "no." "Possession" means what that word usually means, and the Legislature knew what it was doing when it used that term.

Accordingly, and for all of the reasons discussed below and in defendants' other papers filed in connection with this matter, the Court should grant defendants' motion and dismiss the fifth and ninth causes of action.

I. THE FIFTH CAUSE OF ACTION IS TIME BARRED.

Defendants' statute of limitations argument is relatively straightforward. The complaint's fifth cause of action is captioned "Writ of Mandate – Review Proper *Amount* of DROS Fee." (Compl. at p. 18, italics added.) The corresponding request for relief seeks a writ of mandate directing defendants "to review the DROS Fee as currently imposed *to determine whether the amount* is 'no more than is necessary' to cover its costs for the DROS program." (*Id.* at p 26, italics added.) Thus, the heart of the fifth cause of action is a challenge to the *amount* of the DROS fee.

It is undisputed that the Department raised the fee to its current amount (i.e., $19.00) in connection with the relevant rulemaking process in 2004. (See *Pena v. City of Los Angeles* (1970) 8 Cal. App. 3d 257, 262 ["A cause of action accrues when a suit may be maintained thereon, and the statute of limitations begins to run on the date of the accrual"].) It is also undisputed that the amount has not changed in the approximately thirteen years since that time.

Thus, plaintiffs' current challenge to the amount of the $19.00 DROS fee, initiated in 2013, is well beyond the applicable three-year limitations period. (See Code Civ. Proc., § 338, subd. (a) [three-year period applies to "[a]n action upon a liability created by statute"].)[1]

Plaintiffs' argument that the fifth cause of action is accruing continuously depends on an emphasis of the cause of action as stemming from an alleged "ongoing duty" to "properly review" the amount of the DROS fee, and it necessarily downplays plaintiffs' fundamental concern that the DROS fee is too high. (Pls.' Open at p. 8.) In other words, and assuming for the moment that their is such a duty as plaintiffs contend,[2] plaintiffs invite the Court to construe their claim as all about the "review" issue and having nothing to do with the "amount" issue. The Court should reject that invitation. If this case were not really about the amount of the DROS fee, would plaintiffs still have filed suit? No. To ask it somewhat differently, if plaintiffs thought that the DROS fee was artificially *low*, would they still have filed suit seeking a fresh "review" of the fee? No. Plaintiffs cannot hide from the fact that the fifth cause of action is, at bottom, a challenge to the $19.00 *amount*, which the Department set more than a decade ago. Their claim is therefore barred by the applicable statute of limitations.

Plaintiffs' continuous accrual argument also relies on various decisions in tax-collection cases and the application of the continuous accrual doctrine in that context. (See Pls.' Opp'n at pp. 8-9.) But that same context does not exist here, at least with respect to the fifth cause of action. A claim that the DROS fee is an "illegal tax" imposed and collected by the Department may be encompassed by the other causes of action in the complaint, but it is not part of the fifth cause of action.

Nor does the fifth cause of action challenge the validity of SB 819, the enactment of which plaintiffs argue somehow triggered the fifth cause of action. (See Pls.' Opp'n at pp. 9-10.) The validity of SB 819 (i.e., "claims based on the impact of SB 819," see Pls.' Opp'n at p. 9) is challenged by way of other causes of action in the complaint, but not the fifth cause of action.

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[1] There is no dispute that this three-year limitations period applies to plaintiffs' fifth cause of action based on the DROS fee statute.

[2] As explained below, plaintiffs have not met their burden to show a ministerial duty of any kind.

(See Compl. at pp. 20-22.) Additionally, plaintiffs' contention in this regard depends on the idea that the Department *could*, as a result of SB 819, raise the DROS fee *in the future* based on APPS-related costs. Such speculation cannot support any cause of action, much less the fifth cause of action, which is the one at issue.[3]

Finally, with respect to the laches issue plaintiffs do not meaningfully dispute that if the Department were directed to "review" the amount of the DROS fee in the precise manner plaintiffs demand – which would be a considerable departure from what the law has required for decades – then defendants will suffer prejudice in the form of considerably increased financial expenditures. (See Depo. of Stephen Lindley ("Lindley Depo." at 64:22-25.) Thus, defendants have established the required prejudice. (See *Johnson v. Loma Linda* (2000) 24 Cal. 4th 61, 69 [finding prejudice where reinstating plaintiff to employment position would require defendant to significantly alter its new management structure and award back pay]; see also *Vernon Fire Fighters Assn. v. City of Vernon* (1986) 178 Cal.App.3d 710, 726 ["It has been held that the requirement that a public agency pay money to the retirement fund could constitute prejudice in and of itself"].)

Because the fifth cause of action is untimely, the Court should dismiss it entirely.

II. PLAINTIFFS HAVE FAILED TO MEET THE REQUIREMENTS FOR A WRIT OF MANDATE.

The Court should dismiss the fifth cause of action also because plaintiffs have failed to meet their burden of demonstrating a clear, present and ministerial duty that defendants have failed to perform, and that plaintiffs had a beneficial right to the performance of that duty. (See *Santa Clara Cty. Counsel Attys. Assn. v. Woodside* (1994) 7 Cal. 4th 525, 539-40 ["What 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. . . .'"]; *20th Century Ins. Co. v. Quackenbush*

[3] Plaintiffs also briefly argue that the so-called "abandonment" of the 2010 rulemaking triggered an accrual date for the fifth cause of action. But this argument is undeveloped and unsupported by any citation to legal authority. Additionally, the law simply does not require that a particular rulemaking, solely by virtue of its initiation, continue unless and until a regulation is finalized and adopted.

(1998) 64 Cal. App. 4th 135, 139 [petitioners bear burden of demonstrating writ of mandate requirements].)

With respect to any beneficial right, plaintiffs continue to fail to even attempt to articulate such a right. And neither defendants nor the Court should have to guess at what that right might be. For this reason alone, the fifth cause of action should be dismissed.

With respect to any ministerial duty, plaintiffs unpersuasively attempt to distinguish the Third District Court of Appeal's decision in *California Pub. Records Research, Inc. v. Cty of Yolo* (2016) 4 Cal.App.5th 150, which is the most salient, controlling authority on this issue. Plaintiffs argue that the comparatively lengthy DROS fee statute contains a "level of detail" that the California Public Records Act provisions at issue in *California Public Records Research* did not contain. (Pls.' Opp'n at pp. 13-14, n. 5.) But that distinction is of no consequence. It does not matter which statute contains more words. Rather, what matters is that the statute at issue in *California Public Records Research* required the setting of a fee only "in an amount necessary" to recover specified costs (i.e., "direct and indirect costs" associated with providing copies) and did not require that the fee be set "in any particular amount." (4 Cal.App. 5th at p. 178.) The same can be said for the DROS fee statute, which also does not require the Department to set the fee in any particular amount, but only in an amount "no more than is necessary" to fund specified costs (i.e., the costs listed in section 28225, subdivision (b)). If the statutory framework at issue in *California Public Records Research* did not give rise to a ministerial duty, which it did not, then the DROS fee statute does not impose on the Department a ministerial duty to calculate the DROS in the manner urged by plaintiffs.

Indeed, plaintiffs claim that section 28225 requires the Department to "periodically review" the amount of the DROS fee. (Pls.' Opp'n at p. 14.) At what periods or intervals this is supposed to occur, plaintiffs do not say. But how could they? Nothing in the language of the statute requires it. Elsewhere plaintiffs state that section 28225 requires "that the amount charged for the Fee should be subject to ongoing monitoring by the Department." (*Ibid.*) Again, though, nothing in the statute speaks to "ongoing monitoring." And these kinds of directions (i.e., instructions that a state agency perform some vaguely phrased act in a particular manner at a particular time)

are precisely *not* what a writ of mandate is supposed to encompass. (See *Sprague v. Fawcett* (1879) 53 Cal. 408, 408 ["This Court cannot by mandamus compel him to determine the question in a particular manner"]; *Friedland v. Superior Court* (1945) 67 Cal.App.2d 619, 623 ["It is said . . . that mandamus may not be used to compel the exercise of official discretion in any particular manner; that it may only direct that an officer act, and must leave the matter as to what action he will take, to his discretion"]; see also *Pich v. Lightbourne* (2013) 221 Cal.App.4th 480, 493 ["It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion"].) One authority has even recognized a general rule, subject to a limited exception not applicable here, that mandamus "is not an appropriate remedy to compel a general course of official conduct or a long series of continuous acts. One rationale for the rule is that it is generally impossible for a court to oversee the performance of continuous duties." (See 55 C.J.S. Mandamus § 76, footnotes omitted.)

Because plaintiffs have failed to demonstrate both a ministerial duty and a beneficial right, the Court should dismiss the fifth cause of action.[4]

III. PLAINTIFFS' READING OF SECTION 28225 AS IT RELATES TO APPS IS WRONG.

Plaintiffs' argument in support of the ninth cause of action depends on a distinction, manufactured by plaintiffs, between "APPS-based" and "non-APPS-based" law enforcement activities. (Compare Pls.' Opp'n at p. 19 with *id.* at p. 20.) It also depends on plaintiffs' particular definitions of those terms. More specifically, plaintiffs argue that SB 819 authorized the expenditure of DROS fee revenues only on law enforcement activities that are "APPS-based," with that phrase being limited to, according to plaintiffs, cases involving armed and prohibited persons identified as a result of the ordinary course of the APPS program proper (i.e., the cross-referencing of databases, the creation of an official list of armed and prohibited persons, and law enforcement's actions in response to that list). On the other hand, plaintiffs argue that SB 819 did *not* authorize any expenditures on law enforcement activities that are "non-APPS-based," which

[4] Plaintiffs briefly argue in the alternative, and without citation to authority, that defendants have somehow abused their discretion in setting the DROS Fee at $19.00. (Pls.' Opp'n at p. 18.) But defendants have waived this argument, expressly stating in their opening papers that "the abuse of discretion standard does not apply here." (Pls.' Opening Brief at p. 18, n. 7.)

plaintiffs essentially define as any other law enforcement activity related to firearms possession, including but not limited to any efforts to disarm prohibited persons who may have come to the attention of the Department in some other manner (e.g., a tip from a member of the general public or a concerned relative). These distinctions and definitions created by plaintiffs are beside the point.

In relevant part, section 28225 speaks generally in terms of "possession," not "APPS" and certainly not "APPS-based" and "non-APPS-based" law enforcement activities. Additionally, while the uncodified language of SB 819 refers to a legislative intent to allow the Department to utilize the DROS account for "funding enforcement of the Armed Prohibited Persons System" (Senate Bill 819 (Leno), Stats. 2010, ch. 743, § 1(g)), there is no indication that the Legislature understood that phrasing to mean the same narrowly-defined categories of armed and prohibited cases plaintiffs contend. On the contrary, SB 819 as a whole shows a legislative intent to fund enforcement activities related to the illegal possession of firearms by prohibited persons more generally. (See *id.*, § 1(d) & (f).).

Finally, even if the Court were to take plaintiffs' narrow view of what the word "possession" means in the context of section 28225, it is worth reiterating that only a small percentage (i.e., approximately five percent) of the law enforcement activities at issue fall outside of that definition. (See Lindley Depo. at pp. 26:23-27:10.) In other words, plaintiffs have no objection to ninety-five percent of the activities at issue. These circumstances, along with the public safety risks if the Department were directed *not* to enforce the law with respect to a certain subset of armed and prohibited persons, counsel against declaratory relief. (See Civ. Proc. Code, § 1061 ["The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances"]; *Pac. Elec. Ry. Co. v. Dewey* (1949) 95 Cal.App.2d 69, 71 ["Permission to resort to declaratory relief is a matter of sound discretion of the court"].)

CONCLUSION

For the reasons set forth above, the Court should grant defendants' motion and dismiss the fifth and ninth causes of action.

Dated: July 21, 2017

Respectfully Submitted,

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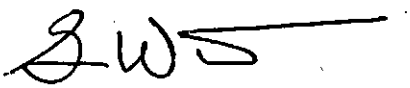

per ANTHONY R. HAKL
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SA2013113332

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 July 21, 2017, I served the attached **REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION AS TO 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:

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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 July 21, 2017, at Sacramento, California.

Tracie L. Campbell
Declarant

Tracie Campbell
Signature

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