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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 T. YEE, in Her Official Capacity as State Controller, and DOES 1 - 10,

Defendants and Respondents.

Case No. 34-2013-80001667

PLAINTIFFS' MOTION TO COMPEL ADDITIONAL RESPONSES TO SPECIAL INTERROGATORIES (SET FOUR) PROPOUNDED ON DEFENDANTS XAVIER BECERRA AND STEPHEN LINDLEY

Hearing Date: November 3, 2017
Hearing Time: 9:00 a.m.
Judge: Honorable Michael P. Kenny
Dept.: 31

Trial Date: March 16, 2018
Action Filed: October 16, 2013

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I. INTRODUCTION

Defendants do not have any right to special treatment under the Discovery Code. The interrogatories at issue are plainly within the scope of discovery, and there is no authority that provides a defendant, having been served with interrogatories concerning the defendant's legal and factual contentions, can defer the identification and explanation of those contentions until trial. To claim a certain type of discovery is unavailable when the relevant statutory and case law clearly says otherwise is not only insufficient to defeat a motion to compel, it is sanctionable evasive conduction. Because Defendants' objections are without merit and plainly constitute an attempt to avoid confronting issues detrimental to Defendants' defense of this case, the Court should order further responses to the interrogatories at issue, and award sanctions in light of Defendants' intransigence.

II. STATEMENT OF FACTS

On August 31, 2016, Plaintiffs served Requests for Admissions (Set Three) and Special Interrogatories (Set Four) (collectively the "Written Discovery") on Defendants. (Declaration of Scott M. Franklin in support of Plaintiffs' Motion to Compel Additional Responses to Special Interrogatories (Set Three) ("Franklin Decl.") ¶ 2). Plaintiffs granted Defendants a courtesy extension as to the deadline for responding to the Written Discovery, which was extended from October 28, 2016, to November 4, 2016. (*Id.* ¶ 3). Defendants' duty to respond to the Written Discovery was stayed as a part of the Court's November 4, 2016, bifurcation order. (*Id.* ¶ 4). During an informal status conference held September 8, 2017, the Court lifted the stay applicable to the Written Discovery. (*Id.* ¶ 5).

On September 11, 2017, Plaintiffs' counsel sent Defendants' counsel a meet-and-confer letter explaining Plaintiffs' positions on the primary issues expected to be in dispute regarding Defendants' forthcoming responses to the Written Discovery. (*Id.* ¶ 6). Pursuant to an agreement of the parties, Defendants served responses to the Written Discovery on October 4, 2017. (Franklin Decl. ¶ 7). On October 6, 2017, the parties held a telephonic meet-and-confer to discuss Defendants' responses to the Written Discovery; during the conference, counsel were able to

tentatively resolve a few disputed issues, but it was clear that the larger issues, primarily concerning Defendants' refusal to comply with discovery requests seeking to confirm Defendants' legal positions and contentions, were not going to be resolved without a court order. (*Id.* ¶ 9). During the call of October 6, 2017, Defendants' counsel never indicated any change in Defendants' position that requests for admissions cannot be used to force admissions regarding a party's legal contentions. (*Id.* ¶ 10). Thus, although counsel for the parties met and conferred about the current discovery dispute, it could not be resolved informally.

III. ARGUMENT

A. Background Law

> An interrogatory may relate to whether another party is making a certain contention[; a]n interrogatory is not objectionable because an answer to it involves an opinion or contention that relates to fact or the application of law to fact, or would be based on information obtained or legal theories developed in anticipation of litigation or in preparation for trial.

Code Civ. Proc. § 2030.010(b). "If the deposing party wants to know facts, it can ask for facts; if it wants to know what the adverse party is contending, or how it rationalizes the facts as supporting a contention, it may ask that question in an interrogatory." *Rifkind v. Superior Court*, 22 Cal. App. 4th 1255, 1261 (1994); *accord Burke v. Sup.Ct.*, 71 Cal 2d 276, 281 (1969). As a well-regarded treatise on California law points out, "'Contention' interrogatories are one of the most formidable discovery tools because they can force disclosure of your adversary's case." Cal. Prac. Guide Civ. Pro. Before Trial § 8:990 (Rutter 2017).

"On receipt of a response to interrogatories, the propounding party may move for an order compelling a further response if the propounding party deems that [the] answer to a particular interrogatory is evasive or incomplete [or if a]n objection to an interrogatory is without merit or too general." Code Civ. Proc. § 2030.300(a)(1)-(3) Evasive and incomplete interrogatory responses violate the responding party's duty to provide responses that are "as complete and straightforward as the information reasonably available to the responding party permits." *Id.* § 2030.220(a); *accord Guzman v. General Motors Corp.* (1984) 154 Cal.App.3d 438, 442 [noting a responding party must "state the truth, the whole truth, and nothing but the truth in answering written interrogatories"].)

B. Defendants' Claim that Multiple[1] Interrogatories Seek Irrelevant Information, but they do not Provide an Explanation—Doing so would Have Shown the Relevance Objection Is Unfounded

Defendants claim the requests at issue are "irrelevant" to the remaining causes of action in this case because, Defendants contend, those causes of action "involve legal questions, as opposed to factual ones. (Response to Special Interrogatories (Set Four), *passim*). "For discovery purposes, information is relevant if it 'might reasonably assist a party in *evaluating* the case, *preparing* for trial, or *facilitating* settlement....' [Citation.] Admissibility is not the test and information unless privileged, is discoverable if it might reasonably lead to admissible evidence. [Citation.] *Stewart v. Colonial W. Agency, Inc.*, 87 Cal. App. 4th 1006, 1013 (2001). "These rules are applied liberally in favor of discovery[.]" *Id.*; *see also* Civ. Proc. Code § 2017.010.[2]

Plaintiffs' meet-and-confer letter of September 22, 2017, expressly explained why Defendants' relevancy objections are meritless. The letter notes that, although Plaintiffs had not completed their legal research for the merits briefing in this case, it "seems likely *Sinclair Paint* will be a major guidepost[,]" citing multiple cases wherein the issue under review was "whether a purported regulatory fee is instead a tax[.]" (Franklin Decl., Ex. 1, at 4, referring to *Sinclair Paint v. State Bd. of Equalization*, 15 Cal.4th 866 (1997)).

In the letter, Plaintiff stated that "Defendants claim that discovery on any 'benefits' or 'burdens' related to the DROS Fee and the use thereof is inappropriate because distinguishing a tax from a regulatory fee is a question of law." *Id.* Defendants' counsel did not dispute that this is Defendants' position during the parties' meet-and-confer teleconference held October 6, 2017

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[1] I.e., Defendants' provide several version of their relevancy objection as stated in their responses to Special Interrogatory Nos. 33, 35, 37-41 (Defendants have agreed to provide further responses to these interrogatories, but such further responses have not yet been provided), 45-48, and 53.

[2] Code of Civil Procedure section 2017.010 states:

> any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action.

(Franklin Decl. ¶ 2), even though that position is plainly wrong.

Sinclair Paint provides the "general guideline" "that whether impositions are 'taxes' or 'fees' is a question of law for the *appellate* courts to decide on *independent review of the facts*." *Sinclair Paint*, 15 Cal. 4th at 873-74 (emphasis added). *Sinclair Paint* conclusively holds that facts and legal contentions related to "benefits" and "burdens" are plainly at issue (and thus subject to discovery per Code of Civil Procedure section 2017.010) in an illegal tax case. It states "that 'to show a fee is a regulatory fee and not a special tax, the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity.'" *Id.* at 878; *accord Cal. Ass'n of Prof. Scientists v. Dep't of Fish & Game*, 79 Cal. App. 935, 945 (2000).

Defendants try to paint the "tax vs. fee" question as a pure question of law ("the causes of action remaining in this case . . . involve legal questions, as opposed to factual ones") (Defs.' Resp. to Spec. Int., Set No. 4, *passim*), but that characterization would only apply if the relevant facts were not in dispute, and such facts are most certainly in dispute here, making the issue a mixed question of law and fact. *Cf. Oliver & Williams Elevator Corp. v. State Bd. of Equalization*, 48 Cal. App. 3d 890, 894 (1975) ("Since the issues here involve the applicability of taxing statutes to uncontradicted facts, we are confronted purely with a question of law"); *accord Neecke v. City of Mill Valley*, 39 Cal. App. 4th 946, 953 (1995); *see also Crocker Nat'l Bank v. City & Cty. of San Francisco*, 49 Cal. 3d 881, 888 (1989) ("Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied."). And even assuming arguendo the issue before the Court was a pure question of law where no fact discovery was necessary, that circumstance would not prevent Plaintiff from using interrogatories to prepare for trial on the legal issues (see *infra* Section III.C.) that are necessary—and therefore relevant—to proving Plaintiffs' case. Put simply, Defendants' desire to limit discovery is contrary to well-established law.

Determining whether the DROS Fee, or a portion thereof, constitutes a tax is a mixed question of law and fact that can only be established by looking at who pays the fee, what they

purportedly are paying for, and what they are actually funding. *Sinclair Paint*, 15 Cal. 4th at 878. Without the foundational facts, there is no context within which the legal question can be answered. Thus, to the extent the pending discovery concerns these factual issues, or the Defendants' legal positions as to these issues, these are proper topics for discovery in an illegal tax case. Accordingly, the Court should overrule Defendants' relevancy objection.

C. Plaintiffs Ignore Relevant Law in Making a Legally Unsupported Objection that Interrogatories[3] Propounded by Plaintiff Constitute "an Inappropriate Use" of a Discovery Device

The objection at issue is stated as follows:

The interrogatory is also tantamount to demanding defendants brief the merits of the remaining causes of action in this case . . . . The . . . matter will be briefed in due course according to the applicable rules. This interrogatory is therefore burdensome and oppressive and an inappropriate use of the discovery device.

(Defs.' Resp. to Spec. Int., Set No. 4, at pp. 7-8, 12). Defendants objection is a complete fabrication, stitching together an actual discovery objection ("burdensome and oppressive") with a factual scenario that, as far as Plaintiffs can tell, has never been identified as either burdensome or oppressive in a published California case. Surely this is because the practice of using interrogatories to flush out legal contentions is consistently recognized by the courts as legitimate. See, e.g., *Rifkind v. Superior Court*, 22 Cal. App. 4th 1255, 1261 (1994); accord *Burke v. Sup.Ct.*, 71 Cal 2d 276, 281 (1969).

Furthermore, the three contention interrogatories at issue are substantively reasonable; two ask Defendants to explain the basis for a particular contention (assuming either contention is even a contention Defendants agree with), and the other interrogatory, at most, requires Defendants to describe "all APPS-related benefits resulting from the payment of the DROS fee"—and Defendants have not identified a single benefit, let alone a (partial) list of benefits so extensive that it proves full compliance with the interrogatory would unduly burden Defendants.

Defendants' objections are not based in the law, they are based in an attempt to

[3] I.e., Special Interrogatory Nos. 42, 43, and 52.

improperly avoid compliance with "one of the most formidable discovery tools[.]" Cal. Prac. Guide Civ. Pro. Before Trial § 8:990 (Rutter 2017). Because Defendants conduct on this issue is well beyond zealous advocacy, and because the relevant law is crystal clear, Defendants' conduct justifies not only the granting of this Motion (Code Civ. Proc. § 2030.220(a)); but an award of sanctions as well. *Id.* §§ 128.7(b)(1)-(2); 2023.010 (d)-(f), (g).

D. Defendants Response and Objections Regarding Interrogatory No. 33 Are Evasive

The response at issue includes a surprisingly bold-faced falsehood. Defendants claim that "[t]he operative answer in this matter does not contain a denial of Paragraph 97 of the First Amended Complaint." (Defendants' Response to Special Interrogatory No. 33). But immediately after making this claim, Defendants quote the relevant answer, which literally includes a denial (*Id.*). It is worth examining the relevant portion of the operative answer in the context of Defendants' response, because it is further evidence of duplicitous conduct intended to allow Defendants to "have their cake and eat it too." The operative answer states:

> Answering paragraph 95 through 100, respondents state that the matters asserted therein constitute legal argument and conclusions, as opposed to material allegations of fact. No response to such arguments and conclusions is required. To the extent paragraphs 95 through 100 contain any material allegations of fact, respondents deny the allegations.

(Id.). The first sentence of this quotation is a rouse; Paragraph 97 of the First Amended Complaint ("Paragraph 97") plainly contains a material allegation of fact—"the current amount of the DROS Fee exceeds DOJ Defendants' actual costs for lawfully administering the DROS program." (FAC ¶ 97). But because failure to controvert a material allegation results in the judicial admission of the allegation (Code Civ. Proc. Section 431.20(a)), Defendants added a caveat to protect themselves that, in reality, is the salient passage: "respondents deny the allegations." *Cf.* Cal. Prac. Guide Civ. Pro. Before Trial § 6:401 ("do not base your decision about whether to deny something in the complaint on your judgment that it is an 'immaterial' allegation and hence need not be denied. A judge might disagree. The safe practice is to deny all allegations that you do not intend to admit."). Notwithstanding Defendants' knowing attempt to cloud the issue, the predicate denial exists, and Defendants' objection alleging the contrary necessarily fails.

Finally, Plaintiffs must point out the insincerity of Defendants' strawman argument suggesting that Plaintiffs should have demurred to the operative answer to resolve the issue now under discussion. ((Defendants' Response to Special Interrogatory No. 33). Though Plaintiffs find Defendants' response to Paragraph 97 is intentionally evasive, it does contain a denial, so in that regard, there was no reason to raise a pleading challenge on that point. Certainly, had Plaintiffs done so, Defendants would have pointed to the denial, and would have—correctly—prevailed on a demurrer. But now that the time to demurrer has passed, Defendants, having not been forced to admit they denied the material allegations in Paragraph 97, make a contention to the contrary. This is endemic of Defendants overall strategy in this case: never take a position unless forced to by motion or by the Court, so that when it becomes beneficial to repudiate that position, there will be no potentially binding statement to the contrary. The purpose of the discovery rules is to eliminate this type of gamesmanship. See *Juarez v. Boy Scouts of Am., Inc.*, 81 Cal. App. 4th 377, 389 (2000) ("The purpose of the discovery rules is to 'enhance the truth-seeking function of the litigation process and eliminate trial strategies that focus on gamesmanship and surprise."). "[T]he discovery process is designed to 'make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'" *Id.* Therefore, the Court should order a further response to the relevant interrogatory based on the existence of Defendants' denial of the material allegations in Paragraph 97.

The response at issue is also troubling because it raises an objection that Interrogatory No. 33 is cumulative, but the objection is based on another less than candid argument. Defendants claim that, in a discovery response dated May 26, 2015 ("May 26 Response") (Franklin Decl. ¶ 12, at Ex.2), they have effectively responded to this interrogatory previously because, in response to Form Interrogatory No. 15.1, they "have already '[i]dentified each denial of a material allegation' and 'state[d] all facts upon which [defendants] base[d] the denial" of Paragraph 111 of the original complaint herein, which is the same as Paragraph 97. ((Defendants' Response to Special Interrogatory No. 33; *compare* Compl. ¶ 111; *with* FAC.¶ 97). The May 26 Response, however, does not identify any facts upon which the denial is based. Defendants do not explain this, and rather imply that they have stated some factual material in support of the relevant denial,

which they did not. Accordingly, Defendants' effectively admitted that, as of the May 26 Response, the denial of Paragraph 111 was not based on even a single fact.

Plaintiffs suppose that if the Court finds the May 2016 Response constitutes a judicial admission that that Defendants have no facts to support the denial of Paragraph 111, then Interrogatory No. 33 might be unnecessary. But that seems unlikely; Defendants themselves recognized that Defendants' filing of an "amended answer will supersede . . . this interrogatory [i.e., Form Interrogatory 15.1]." (Franklin Decl. ¶ 13, at Ex. 3). When, as here, the amendment of the complaint includes substantial changes (e.g., the deletion of a cause of action and the addition of new causes of action), the amended complaint supersedes the prior complaint. *See Mock v. Santa Monica Hosp.*, 187 Cal. App. 2d 57, 60 (1960). Because Defendants' cumulative objection, like all of their objections to Interrogatory No. 33, is an improper attempt to avoid providing discovery responses detrimental to Defendants' case, a further response to that interrogatory should be ordered.

Had Plaintiff demurred based on the fact that this response claims Paragraph 97 both does not require a response and that factual contentions therein are denied, the Court would have surely.

E. Unless a Supplemental Response Is Provided, Defendants Fail to Provide any Factual Basis, let alone a Convincing One, to Support the Claim that Compliance with Interrogatory No. 35 Would Be Unduly Burdensome

The parties have discussed this interrogatory, and Defendants' counsel has informally asserted that the California Department of Justice has no system for tracking the type of information sought in this interrogatory. (Franklin Decl. ¶ 10). Without accepting that claim as a sufficient basis for Defendants' overburden objection, Plaintiffs have offered to compromise and accept, in lieu of a response directly addressing what the interrogatory seeks, a good faith estimate from the Department as to the number of lawsuits since January 1, 2006, that "resulted in money being transferred from the DROS SPECIAL ACCOUNT to the Legal Services Revolving Fund to pay for legal services provided by an attorney."

If Defendants do not accept that compromise and fail to timely produce a further response accordingly, then the initial response, which provides no factual basis as to why searching for the

information sought would be burdensome (other than that they cover "more than a decade"), is an objection that should be overruled. *See Mead Reinsurance Co. v. Super. Ct.*, 188 Cal. App. 3d 313, 320–21 (1986) ("[o]ppression must not be equated with burden [all discovery imposes some burden on the opposition] y(4)27 [sic] to support an objection of oppression there must be some showing ... that the ultimate effect of the burden is incommensurate with the result sought.").

IV. CONCLUSION

"One key legislative purpose of the discovery statutes is 'to educate the parties concerning their claims and defenses so as to encourage settlements and to expedite and facilitate trial.'" *Puerto v. Super. Ct.*, 158 Cal. App. 4th 1242, 1249 (2008). Thus, even though "the discovery process is 'designed to eliminate the element of surprise'" (*id.*), Defendants ask the court to ignore Plaintiffs' right to fairly educate themselves on Defendants' defenses in advance of trial. Because "[m]atters sought are properly discoverable if they will aid in party's preparation for trial" (*id.*), and because the interrogatories at issue will help narrow the issues and define the contours of Defendants' defense, the Court should order further responses to the interrogatories discussed herein, and should award sanctions based on Defendants' refusal to comply with the well-established rules of discovery.

Dated: October 12, 2017

MICHEL & ASSOCIATES, P.C.

Scott M. Franklin
Attorney for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

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

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☒ a true and correct copy
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Anthony R. Hakl
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Attorney for Defendants

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