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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JEFF SILVESTER, et al.,
Plaintiffs

v.
KAMALA HARRIS, Attorney General of California, and DOES 1 to 20,
Defendants

CASE NO. 1:11-CV-2137 AWI SAB
ORDER ON MOTIONS IN LIMINE

(Doc. Nos. 51, 53, 54, 55, 56)

On March 11, 2014, the Court held a hearing on the parties’ motions in limine. This order memorializes the rulings made.

I. Plaintiffs’ Motions
1. P’s MIL #1 (Doc. No. 53) Exclude Witnesses From The Courtroom

Plaintiffs’ request that the Court exclude witnesses pursuant to Federal Rule of Evidence 615. Defendant filed a statement of non-opposition.

Ruling

This motion is in limine is GRANTED and witnesses from the courtroom will be excluded pursuant to Rule 615.

1 **2. P’s MIL #2 (Doc. No. 54)**

2 **Exclude Expert Witness Evidence & Limit Lay**
3 **Opinion Testimony**

4 Plaintiffs argue that neither side has disclosed expert witnesses, received expert reports, or
5 deposed experts. However, Defendants have disclosed a number of witnesses who are employees
6 of the California Department of Justice – Firearms Bureau. Plaintiffs anticipate that Defendant
7 will attempt to introduce expert opinion evidence in the form of lay testimony that does not meet
8 the requirements of FRE 701. Although the “balls & strikes” of what is an expert opinion and
9 what is lay opinion may have to wait for an offer of proof or in testimony as it is given at trial, it is
10 prudent for the Court to be aware of and on watch for this issue at trial.

11 Harris argues *inter alia* that she does not oppose the exclusion of expert testimony, as she
12 has filed a similar motion. However, the request to limit lay opinion testimony, untethered to any
13 suspected testimony, is improper.

14 Ruling

15 There is no dispute that neither side disclosed or designated experts as required by Federal
16 Rule of Civil Procedure 26(a)(2). Because no designation/disclosures were made, the Court will
17 follow Federal Rule of Civil Procedure 37(c)(1). Therefore, expert testimony will be excluded
18 unless the proponent of the testimony can show either an absence of harm or substantial
19 justification for failing to disclose the expert under Rule 26(a)(2). See Fed. R. Civ. Pro. 37(c)(1).
20 At trial, the Court will address objectionable testimony as it occurs, and the Court will be
21 cognizant of Federal Rule of Evidence 701. Accordingly, this motion is reserved.

22 **3. P’s MIL #3 (Doc. No. 55)**

23 **Burden of Proof**

24 Plaintiffs argue that the summary judgment order found that the 10-day waiting period
25 burdens the Second Amendment. Accordingly, it is Defendant’s burden to show that the Second
26 Amendment, as historically understood, did not apply for a period of time between the
27 purchase/attempted purchase of a firearm and possession of that firearm. Further, it is the
28 Defendant’s burden to show that the laws at issue are constitutional through either intermediate
 scrutiny or strict scrutiny. Rational basis review does not apply. Plaintiffs request that the Court

1 make three rulings: (1) Plaintiffs will have met their burden by setting forth evidence that (a) at
2 all relevant times the Plaintiffs have each owned at least one firearm, (b) at all relevant times, one
3 effect of Penal Code §§ 26815 and 27540 has been that all California residents lawfully
4 purchasing firearms must wait a minimum of 10 days between applying to purchase the firearms
5 and receiving delivery of them, (c) unless the purchases are statutorily exempt. (2) The level of
6 scrutiny will not be rational basis; and (3) the defendants have the burden of proving that the
7 waiting period laws pass the appropriate level of scrutiny.

8 Harris argues that this MIL is inappropriate because it does not seek to resolve any
9 evidentiary issues ahead of trial. Non-evidentiary issues should not be raised in a MIL, but in a
10 bench trial should be resolved and explored through trial briefs and at trial. If the Court wishes to
11 address these issues, briefing can be submitted with respect to the recent Ninth Circuit cases of
12 *United States v. Chovan* and *Peruta v. County of San Diego* (petitions for rehearing or en banc
13 review are pending in both of these cases).

14 Ruling

15 The Court is generally in agreement with Defendant that a ruling on the burden of proof
16 issues is not appropriate at this time through a motion in limine. The burden of proof issues will
17 be determined through briefing and during the course of trial. Accordingly, the Court reserves
18 ruling on this motion.¹ However, irrespective of where various burdens lie, the parties are to be
19 prepared to present the entirety of their case starting on March 25, 2014.²

21 4. P's MIL #4 (Doc. No. 56) Exclusion of Documents

22 Plaintiffs move to exclude any and all evidence and reference to legislative history, court
23 filings, books, government and NGO reports, scholarly articles, magazine articles, and newspaper

24 ¹ With respect to any further briefing or arguments regarding the burden of proof, in addition to *United States v.*
25 *Chovan*, 735 F.3d 1127 (9th Cir. 2013) and *Peruta v. County of San Diego*, 2014 U.S. App. LEXIS 2786 (9th Cir.
26 2014), the Court requests that the parties also address *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) and
United States v. Chester, 628 F.3d 673 (4th Cir. 2010).

27 ² At the hearing, defense counsel informed the Court that a critical witness may not be available due to a medical
28 condition. As the Court explained at the hearing, there are options regarding obtaining this witness's testimony,
including deposition and taking the testimony at a separate time when the witness becomes available. Otherwise, the
parties are expected to be prepared to present their respective cases.

1 articles. Exclusion is appropriate because such evidence lacks the necessary foundation, lack
2 proper authentication, lacks relevance, and is hearsay.

3 Defendant argues that this motion is premature. The pre-trial order provides a mechanism
4 for the parties to meet and confer regarding marking and stipulating as to evidence. Plaintiffs seek
5 to circumvent this and exclude all of Harris's evidence. Further, Defendant also argues that it is
6 inappropriate for Plaintiffs to make broad and sweeping arguments without identifying a particular
7 offending document.

8 In reply, Plaintiffs agree that a meet and confer would be useful. Plaintiffs request that the
9 Court withhold a ruling at this time.

10 *Ruling*

11 The Court reserves ruling on this motion. The parties will meet and confer regarding the
12 exhibits. The Court will address further evidentiary objections as they arise. Accordingly, this
13 motion is reserved.

14
15 **II. Defendant's Motions**

16 **1. D's MIL #1 Exclude Expert Testimony of Messrs. Gottlieb & Hoffman**

17 Defendant argues that Alan Gottlieb is the corporate representative of Plaintiff The Second
18 Amendment Foundation, Inc., and Gene Hoffman is the corporate representative of Plaintiff The
19 Cal Guns Foundation, Inc. Neither Gottlieb nor Hoffman have been designated as experts in this
20 matter. Accordingly, it is inappropriate for Gottlieb or Hoffman to offer expert testimony.

21 Plaintiffs argue that the request to exclude expert testimony is almost a mirror image of
22 their own MIL. As such, the request to exclude expert testimony is unopposed.

23 *Ruling*

24 The Court's ruling on this motion will be the same as that made for Plaintiffs' second
25 motion in limine. Expert testimony will be excluded unless the failure to disclose an expert was
26 either harmless or substantially justified, as provided by Rule 37(c)(1). At trial, the Court will
27 address objectionable testimony as it occurs, and the Court will be cognizant of Federal Rule of
28 Evidence 701. Accordingly, this motion is reserved.

1 **2. P's MIL #2** **Exclude Hearsay Testimony**

2 Harris argues that she expects Gottlieb and Hoffman to testify as to anecdotes of the
3 purported effects of the 10-day waiting period on certain of their members. For example,
4 Hoffman explained during his deposition that he was made aware of situation in which someone
5 was attempting to obtain a firearm because of stalker. However, Hoffman did not speak with that
6 person and was informed about the situation from a member. Such evidence is hearsay and is
7 inadmissible.

8 Plaintiffs argue that the request to exclude hearsay testimony is almost a mirror image of
9 their own MIL regarding experts. As such, the request to exclude expert testimony is unopposed.

10 *Ruling*

11 The Court will follow the federal rules of evidence with respect to hearsay testimony. If
12 testimony is hearsay and no exception applies, the testimony will be excluded. At trial, the Court
13 will address objectionable testimony as it occurs. Accordingly, this motion is reserved.

14
15 **ORDER**

16 IT IS HEREBY ORDERED that:

- 17 1. Plaintiffs' first motion in limine is GRANTED;
- 18 2. All other motions in limine are reserved, consistent with the above discussion.

19 IT IS SO ORDERED.

20 Dated: March 12, 2014

21 
22 _____
23 SENIOR DISTRICT JUDGE