SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 04/23/2013 TIME: 09:27:00 AM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **34-2012-00130566-CU-MC-GDS** CASE INIT.DATE: 08/23/2012
CASE TITLE: **Held vs. Kamala D Harris in her official capacity as Attorney General of the State of California**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Judgment on the Pleadings - Civil Law and Motion - Demurrer/JOP

APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Motion for Judgment on the Pleadings) taken under submission on 4/18/2013

TENTATIVE RULING

Defendants' Motion for Judgment on the Pleadings is GRANTED, without leave to amend. As stated in the Notice of Motion, the motion is brought (1) for entry of judgment on the pleadings and against Plaintiffs Anthony E. Held, Ph.D., P.E., Russell Brimer, and John Moore pursuant to Code of Civil Procedure section 438, and (2) issuance of a declaration in Defendants' favor, pursuant to Code of Civil Procedure section 1060, stating that no conflict exists between Title 11 of the California Code of Regulations, section 3003, and Code of Civil Procedure section 1005, subdivision (b). The motion is made on the ground that the complaint does not state facts sufficient to constitute a cause of action.

Defendants' Request for Judicial Notice is GRANTED.

Plaintiffs' Request for Judicial Notice is GRANTED.

The notice of motion does not provide notice of the Court's tentative ruling system as required by with C.R.C., Rule 3.1308 and Local Rule 1.06(D). Local Rules for the Sacramento Superior Court are available on the Court's website at <http://www.saccourt.ca.gov/local-rules/local-rules.aspx> Counsel for moving party is ordered to notify opposing party immediately of the tentative ruling system and to be available at the hearing, in person or by telephone, in the event opposing party appears without following the procedures set forth in Local Rule 1.06(B).

Plaintiffs' Complaint for Declaratory and Injunctive Relief against Defendants Attorney General and the Department of Justice (collectively "Attorney General") seeks a judicial determination invalidating a regulation adopted to implement the Safe Drinking Water and Enforcement Act of 1986 ("Prop. 65") Health & Safety Code, sec. 25249.5, et seq., enacted by the Attorney General in 2003 to implement the notice and reporting provisions of Prop. 65. The regulation, California Code of Regulations, title 11, section 3003, requires that private parties filing motions for judicial approval to settle Proposition 65

actions must serve the notice of motion and supporting materials on the Attorney General "no later than forty-five days prior to the date of the hearing of the motion," unless court rules or applicable orders prohibit a forty-five-day notice period. Plaintiffs claim that the forty-five-day period prescribed by regulation conflicts with Code of Civil Procedure section 1005, subdivision (b), which requires parties to give written notice of a hearing "at least 16 court days before the hearing." Plaintiffs seek a declaration that the regulation is unconstitutional, invalid, and void.

Prop. 65 permits private individuals to bring private actions to enforce Prop. 65. Health & Safety Code, sec. 25249.7(f)(4) ["(4) If there is a settlement of an action brought by a person in the public interest under subdivision (d), the plaintiff shall submit the settlement, other than a voluntary dismissal in which no consideration is received from the defendant, to the court for approval upon noticed motion, and the court may approve the settlement only if the court makes all of the following findings:

(A) Any warning that is required by the settlement complies with this chapter.

(B) Any award of attorney's fees is reasonable under California law.

(C) Any penalty amount is reasonable based on the criteria set forth in paragraph (2) of subdivision (b)."]

In 2001, the Legislature amended the statutory scheme to require that when such private actions are settled, the private enforcers are required to file a noticed motion for judicial approval of any settlement, and required to serve the Attorney General with notice of that motion. Health & Safety Code, sec. 25249.7(f)(5) ["The plaintiff subject to paragraph (4) has the burden of producing evidence sufficient to sustain each required finding. The plaintiff shall serve the motion and all supporting papers on the Attorney General, who may appear and participate in any proceeding without intervening in the case."].

In this regard it is noted that in 2001 the Office of the Attorney General began to receive and review numerous settlements, along with their supporting papers. It is further noted that over the last four years alone the Attorney General received 1,008 private Proposition 65 settlements: 187 in 2008, 314 in 2009, 180 in 2010, and 327 in 2011. (See RJN, paras. 1.1, 1.2, 1.4, and Exs. A-D.) Between the years 2002 and 2011, Plaintiffs reported a combined total of at least 493 Proposition 65 settlements to which they are a party. (See RJN, para 1.3 and Exs. A-J.) According to the moving papers, in 2003, the Attorney General, after receiving many such noticed motions regarding Prop. 65 settlements, amended 11 C.C.R. 3003(a), the regulation at issue here, to provide, in pertinent part, as follows: "The motion and all supporting papers and exhibits shall be served on the Attorney General *no later than forty-five days prior to the date of the hearing of the motion*. If court rules or other applicable orders do not permit a forty-five day period, the Private Enforcer shall apply for permission to file the motion with a forty-five day notice period. " 11 C.C.R. 3003(a) [emphasis added]. As explained in the Initial Statement of Reasons for the amended regulation, the goal in adopting the 45-day requirement was to "provide the Attorney General with sufficient time to conduct the proper review." (Initial Statement of Reasons for the Revision of Chapter 1 and Adoption of Chapters 2 and 3 of Title 11, California Code of Regulations, pub. March 1, 2002; see RJN, para. 2.1 and Ex. K, at p. 2.)

It bears noting that the regulation contains an exception, where court rules or other applicable orders do not permit the full 45-day notice to be provided to the
Attorney General prior to the hearing. In such a case, the plaintiff must seek permission from the court to comply with the 45-day notice requirement. If the plaintiff is unable to obtain court permission, it must comply with the court's notice requirements, and need not provide the 45-day notice to the Attorney General. (§ 3003, subd. (a))

In this action, plaintiffs seek to invalidate this regulatory provision for Prop 65 settlement approvals, which requires a minimum of 45 days' notice to the Attorney General, as being in conflict with the regular

notice provisions of C.C.P., sec. 1005 which requires a minimum of 16 court days' notice of motion.

Moving parties seek Judgment on the Pleadings on the grounds set forth below.

Alleged Conflict Between C.C.P., sec. 1005 and 11 C.R.C., Rule 3003

Moving party Attorney General asserts that there is no conflict between a statute that requires "at least" 16 court days' notice and a regulation that requires 45 days' notice, particularly where the regulation expressly defers to any court that does not permit the 45 day notice period.

In opposition, plaintiffs assert that section 3003 "clearly conflicts" with C.C.P., sec. 1005(b) as the regulation requires a longer notice period than the minimum amount provided by the statute.

However, the statute provides no outside or maximum limitation on the amount of notice required. There is no absolute "right" of plaintiffs to have their motions heard exactly 16 Court days after filing. The Court retains the authority to manage its own calendar at all times, and the historical (and continuing) impact of the budget crisis have increased the delays in processing documents and having motions heard. The 45 day notice period to the Attorney General minimizes, but does not exacerbate the delays.

It is possible to both serve the Attorney General 45 days in advance of the hearing date, and serve and file the motion for approval of the Prop. 65 settlement in at least 16 Court days (plus 5) prior to the hearing date. These are not mutually inconsistent.

The Court cannot conclude that there is any conflict between the regulatory requirement of at least 45 calendar days notice to the Attorney General and the requirement of C.C.P., sec. 1005(a) for least 16 Court days' notice for law and motion matters.

Separation of Powers Doctrine

As noted by the California Supreme Court, "Article III, section 3 of the California Constitution-the state constitutional separation of powers clause-provides: "The powers of State government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." As we observed in Superior *Court v. County of Mendocino* (1996) 13 Cal.4th 45: Although the language of ... article III, section 3, may suggest a sharp demarcation between the operations of the three branches of government, California decisions have long recognized that, in reality, the separation of powers doctrine '"does not mean that the three departments of our government are not in many respects mutually dependent"' [citation], or that the actions of one branch may not significantly affect those of another branch. ... Such interrelationship ... lies at the heart of the constitutional theory of 'checks and balances' that the separation of powers doctrine is intended to serve." (*Id.* at pp. 52-53.)" *Strauss v. Horton* (2009) 46 Cal. 4th 364, 463.

Opposing party asserts that the Attorney General has violated the Separation of Powers Doctrine, by adopting a regulation, usurping the function of the Legislature.

However, the purpose of the doctrine is to prevent one branch of government from exercising the complete power constitutionally vested in another; it is not intended to prohibit one branch from taking action properly within its sphere that has the *incidental* effect of duplicating a function or procedure delegated to another branch. *In re M.C.* (2011) 199 Cal. App. 4th 784, 804.

As the Court finds no conflict between 11 C.R.C., § 3003, and C.C.P., § 1005, it does not find that the enactment of § 3003 has interfered with any state statute, nor violated the Separation of Powers Doctrine.

Although the Attorney General correctly point out that the Complaint does not address plaintiff's contention that the defendant has no authority to enact § 3003, the Court finds that even if that had been properly raised by the pleadings, the Attorney General had the *implied* authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute. Gov Code § 11342.2; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal. 3d 805, 824.

No Circumstances Under Which The Regulation Valid

Attorney General contends that the plaintiffs have not met their burden of showing that there is no set of circumstances under which the regulation could be valid.

A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. *Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084.

A facial challenge is the most difficult challenge to mount successfully, since the *challenger must establish that no set of circumstances exists under which the regulation would be valid*. The moving party must show that the challenged statutes or regulations inevitably pose a present total and fatal conflict with applicable prohibitions. *T.H. v. San Diego Unified School Dist*. (2004) 122 Cal. App. 4th 1267, 1281.

No authority has been cited by plaintiffs in opposition to support their contention that this standard is not applicable to a declaratory relief action. Government Code, sec. 11350 provides for a declaratory relief challenge to the validity of a regulation. It does not address a facial vs. an as-applied challenge to the regulation.

Plaintiffs' assertion that no authority has been cited by the Attorney General for the standard for a facial challenge to a regulation, as opposed to a statute, is inaccurate, as the case of *T.H. v. San Diego supra,* clearly addressed a regulation.

Here, where the complaint alleges no facts relating to any specific case or cases, but considers only the text of the measure itself, not its application to any specific individual, it is a facial challenge to section 3003.

Although opposing party requests leave to amend their complaint to allege as-applied challenge, where the Court has concluded that there is no conflict between section 3003 and C.C.P., sec. 1005, any amendment would be futile.

Statute Of Limitations

The statute of limitations for an action upon a liability created by statute, other than a penalty or forfeiture, is three years. Code Civ Proc § 338(a). Alternatively, the four year statute of limitations under C.C.P., sec. 343 applies.

The statute of limitations began to run on plaintiffs' facial challenge to the Prop. 65 regulation on the date it became effective. *County of Sonoma v. Superior Court* (2010) 190 Cal. App. 4th 1312, 1324.

Moving parties assert that as the regulation was enacted in 2003, over 10 years ago, under either the three year or the four year limitations period, the facial challenge to it is untimely.

In opposition, plaintiffs assert that their cause of action continuously accrues, as separate recurring invasions of the same right, each time a Prop. 65 action in the public interest commences.

As the Court has concluded that there is no conflict, this issue need not be addressed in ruling on the instant motion.

Defendant shall submit a formal order and judgment of dismissal.

COURT RULING

The matter was argued and submitted. The matter was taken under submission.

Having taken the matter under submission on 4/18/2013, the Court now rules as follows:

SUBMITTED MATTER RULING

The Court affirms the Tentative Ruling with the following additional comment:

At oral argument plaintiffs proffered a supplemental request for judicial notice, specifically addressed to one decision: *Iverson v. Superior Court* (1985) 167 Cal. App. 3d 544. In *Iverson*, the court of appeal held that a local rule which requires motion papers to be filed at least five court days before hearing is inconsistent with Code of Civil Procedure section 1005 which just requires filing five (calendar) days in advance of a hearing. The Court here determines that nothing in section 3003 of the Attorney General's regulations is inconsistent with, or interferes with, CCP section 1005 . Requiring Proposition 65 plaintiffs to serve approval motions on the Attorney General at least 45 days before a hearing date is not inconsistent with the requirement to file motions at least 16 days before a hearing, and it neither amends nor interferes with such a requirement. *Iverson* is therefore inapplicable. In short, because a litigant can comply with the Attorney General's regulation and Code of Civil Procedure section 1005, subdivision (a), there is no conflict.

As discussed at oral argument, the Attorney General's Proposition 65 regulations, including section 3003, "fill up the details" of how private enforcers are to comply with the requirements, and how the Attorney General is to fulfill his or her statutory duties. The Attorney General has authority to promulgate regulations implementing duties expressly given to him or her by statute. In this regard, it is noted that the Legislature adopted SB 471 - which established the requirement for private plaintiffs to obtain judicial review of proposed settlements and to serve the approval motion on the Attorney General - after the Attorney General adopted the initial regulation requiring plaintiffs to serve proposed settlements on the Attorney General before filing them in court. (See Plaintiffs RJN, Ex. 4 [version of Cal. Code Regs., title 11, § 3003, adopted June 1, 2001]; Stats. 2001, ch: 578 (SB 471) [passed in September 2001].)

At oral argument, Plaintiffs further address their request for leave to amend the complaint, and the Court will turn to this issue. In their opposition papers, plaintiffs state "Should the Court find any merit to the Attorney General's argument, however, plaintiffs are prepared to amend the complaint to allege dozens of actual instances where 11 CCR § 3003, as actually applied to plaintiffs, has required plaintiffs to provide 45 days' notice of motions to approve settlements, and precluded plaintiffs' ability to file and serve the motions on 16 court days' notice as allowed under CCP § 1005(b). Plaintiffs are also prepared to amend the complaint to add further allegations regarding how 11 CCR § 3003 violates the Separation of Powers doctrine." At oral argument, counsel for plaintiff claims that future amendment will include claims for civil rights violations, and due process violations, *inter alia*, without addressing the factual bases therefor.

In addressing the request for leave to amend the Court notes that a motion for judgment on the pleadings is analogous to a general demurrer. If the facts alleged in the complaint do not support any valid cause of action against the defendant, the inquiry is whether the complaint could *reasonably* be

amended to do so. It is to be noted that the trial court abuses its discretion if it denies leave to amend when there is a reasonable possibility the defect in the pleading could be cured by amendment. *Bettencourt v. Hennessy Industries, Inc*. (2012) 205 Cal. App. 4th 1103, 1111.

In response to plaintiffs' request, Defendants assert the Court should deny Plaintiffs' request for leave to amend the Complaint to add the proposed new allegations. There is no requirement that a court grant leave to amend a complaint
where to do so would be futile. (See *Association of Community Organizations for Reform Now v. Department of Industrial Relations* (1995) 41 Cal.App.4th 298, 302 & fn. 2). The Defendants further note that even assuming, *arguendo*, that Plaintiffs could avoid the statute of limitations bar to their facial challenge by pleading an as-applied challenge (see Opp. at pp. 14-15), or invoke a
different standard for reviewing the regulation (*Id.* at p. 13), that does not change the fact that, under every possible theory Plaintiffs could assert, not a single one renders the Attorney General's regulation invalid. (Reply, pg. 9)

Defendants are persuasive. Therefore, the Court affirms its denial of the request for leave to amend.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: April 23, 2013

E. Brown, Deputy Clerk _____s/ E. Brown_____

LAURENCE D. HAVESON
THE CHANLER GROPU
81 THROCKMORTON AVENUE., SUITE 203
MILL VALLEY, CA 94941

LAURA J ZUCKERMAN
DEPUTY ATTORNEY GENERAL
P.O. BOX 70550
OAKLAND, CA 94612-0550