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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

ALBERT PARRA, KAREN PARRA and MARTIN CORDOVA, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY, and JOHN DREW, in his official capacity as Director,

Defendants.

CASE NO. A414764
DEPT. NO. II

PLAINTIFFS' REPLY TO OPPOSITION TO APPLICATION FOR PRELIMINARY INJUNCTION

Plaintiffs, individually and on behalf of all others similarly situated, by and through counsel, Barbara E. Buckley, Esq., and Dan L. Wulz, Esq., Clark County Legal Services Program, Inc., pursuant to NRCP 65, hereby reply to "Opposition To Plaintiffs' Application For Preliminary Injunction," filed on or about February 24, 2000, herein.

POINTS AND AUTHORITIES

I. INTRODUCTION

To their credit, defendants do not manufacture any false disputes about the facts or federal odometer law. That much is conceded. The only issues raised by the opposition are that plaintiffs do not meet the state law requirements for issuance of a preliminary injunction and the practicality of issuance of a preliminary injunction.

One point to keep in mind that may be lost in all the details of argument is that plaintiffs are seeking *inter alia* to enjoin violations of their federal rights pursuant to 42 U.S.C. § 1983. Federal odometer law gives plaintiffs the federal right to certain disclosures, and federal law provides that DMV may not license a vehicle unless there is compliance with those laws. Defendants are violating the federal rights of no doubt hundreds of members of the plaintiff class every week without the knowledge of those class members. If this Court will not protect them, no one else will.

Apparently also not stressed enough is why this is important and why it is urgent. Congress insisted that federal odometer disclosures be made on the title to the buyer for many reasons. One of the reasons is that "one of the major barriers to decreasing odometer fraud is the lack of evidence or 'paper trail' showing incidence of rollback." [52 Fed.Reg. 27,022 (July 17, 1987), partial reprint from National Consumer Law Center, Automobile Fraud (1998), attached as Exhibit # 1, at page numbered 239]. Second, "not requiring the buyer to sign the title would mean that only the transferor is aware of previous mileage disclosures."[1] (Id.). Third, under the requirement for disclosure on the title, "consumers will be able to see the disclosures and examine the titles for alterations, erasures, or other marks." [53 Fed.Reg. 29,464 (Aug. 5, 1988), partial reprint from National Consumer Law Center, Automobile Fraud (1998), attached as Exhibit # 1, at page numbered 242). Fourth, "consumers will learn the names of previous owners that appear on the title." (Id.). This means that consumers are able to see (perhaps contrary to an oral representation by the dealer that the car is a local, one-owner vehicle) that an insurance

[1] A point directly applicable to the Parra facts.

sense consideration. However, what plaintiffs seek is not that difficult.[2] First, carrying out the Preliminary Injunction would require the Department to train its Registration and Title clerks. This could be done in a one hour training session.[3] If there are multiple shifts of clerks, multiple training sessions could be held on the same day. Second, the Preliminary Injunction would require the Department to fax the requested memorandum to each of the state's licensed dealers. The Department indicates the State of Nevada has "hundreds" of licensed automobile dealers. If there are three hundred dealers, and if it takes two minutes for each fax to go through, then it would take 10 hours to complete the faxing. In any event, such could be accomplished in two days or so. These are foot-dragging bureaucratic excuses, not absolute obstacles to issuance of the Preliminary Injunction.[4]

There is no doubt plaintiffs have shown a probability of success on the merits of their federal claims.

2. Submission of Dealer's Report of Sale Within 30 Days

Defendants correctly point out that dealers' failures to submit the Dealer's Report of Sale (DRS) within 30 days as required by Nevada statute is a violation committed by the dealer, not by the Department. Plaintiffs acknowledge the Court in its discretion could deny issuance of this portion of the Preliminary Injunction on this basis. Nevertheless, the Legislature did enact NRS 482.424 requiring dealers to submit DRSs within 30 days of the date of sale and DMV is the only entity in a position to enforce same. DMV's failure to require adherence to

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[2] It is important to note that no regulation need be amended or adopted. Any lengthy regulatory process is not required. All the acts of which complaint are made are simply done as a matter of Department practice and procedure, not state regulation.

[3] If the Department will defray expenses, the undersigned will volunteer his time to travel to Carson City and present the training.

[4] DMV and the dealers already have the secure power of attorney required by federal law when the title is held by a lien holder. (See pp. 3-20 and 3-21 of the DMV Registration and Title Guide, attached as Exhibit # 2). All they have to do is use it.

same *ab initio* results in other frauds and deceptive trade practices requiring action by DMV Enforcement after the sale. (See discussion and examples at pp. 12-13 of "Plaintiff's Application For Preliminary Injunction."). Defendants should be required to inform dealers of their obligations under NRS 482.424 to submit the DRS within 30 days of the date of sale.

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B. Irreparable Harm.

1. Proof of Irreparable Harm Not Required.

In their Application, plaintiffs pointed out that in cases where an injunction is sought against continued violations of statutory law, the applicant may not even be required to prove irreparable harm, citing Nevada Real Estate Commission v. Ressel, 72 Nev. 79, 294 P.2d 1115 (1956) (proof of irreparable damage not required to grant an injunction against real estate brokers' continued violation of the provisions of the Nevada Real Estate Brokers Act). In Opposition, defendants observed that in Ressel the Real Estate Brokers Act specifically provided for injunctive relief. While true, that fact does not undermine the principle.

The issue has arisen and been decided in the federal courts, where it is so settled that horn book law, Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 2948.4, pp. 207-210, states:

> A federal statute prohibiting the threatened acts that are the subject matter of the litigation has been considered a strong factor in favor of granting a preliminary injunction. Of course, only a violation that can be anticipated or is likely to occur properly may be enjoined. It has even been held that when the acts sought to be enjoined have been declared unlawful or clearly are against the public interest, plaintiff need show neither irreparable injury nor a balance of hardship in his favor, nor a likelihood of success on the merits. (Footnotes omitted).

Among the cases cited are United States v. Ingersol-Rand Co., 218 F.Supp. 530, 544 (D.C.Pa. 1963), *aff'd* 320 F.2d 509 (1963) (preliminary injunction granted in action under the Clayton Act [monopolies], where the Court said the Congressional pronouncement of harm from

monopolistic effects "embodies the irreparable injury of violation of its provisions. No further showing need be made . . . ."). So too here, in 49 U.S.C. § 32701 Congress made express findings for the law:

> **(a) Findings.** Congress finds that—
> (1) buyers of motor vehicles rely heavily on the odometer reading as an index of the condition and value of a vehicle;
> (2) buyers are entitled to rely on the odometer reading as an accurate indication of the mileage of the vehicle;
> (3) an accurate indication of the mileage assists a buyer in deciding on the safety and reliability of the vehicle; and
> (4) motor vehicles move in, or affect, interstate and foreign commerce.
>
> **(b) Purposes.** The purposes of this chapter are—
> (1) to prohibit tampering with motor vehicle odometers; and
> (2) to provide safeguards to protect purchasers in the sale of motor vehicles with altered or reset odometers.

This embodies the irreparable injury which results from violation of the Federal Odometer Act; no further showing need be made.[5] Consumers rely and are entitled to rely on the odometer reading as an index of the condition and value of a vehicle, and an accurate indication of the mileage assists a buyer in deciding on the safety and reliability of the vehicle. This is a strong and express indication of the public interest. Violations of the Act *ipso facto* contravene the public interest, constitute irreparable injury, and must be enjoined. Courts being asked to grant preliminary injunctions seem especially mindful of a defendant's violation of a statute and whether granting the injunction would further the public interest in administration of the statute:

> Good administration of the statute is in the public interest and that will be promoted by taking timely steps when necessary to prevent violations either when they are about to occur or prevent their continuance after they have begun. The trial court is not bound by the strict requirements of traditional equity as developed in private litigation but in deciding whether or not to grant an injunction in this type of case should also consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted.

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[5] Additional proof of irreparable harm is contained in the Comments for the Regulations in the Federal Register, attached as Exhibit # 1, showing the average fraudulent price increase and estimated illegal profits from the acts at which the statute is aimed.

Federal Maritime Commission v. Australia/U.S. Atl. & Gulf Conference, 337 F.Supp. 1032, 1038 (S.D.N.Y. 1972), quoting Walling v. Brooklyn Braid Co., 152 F.2d 938, 940-941 (2nd Cir. 1945). Here, Congress has specifically provided in the Federal Odometer Act, 49 U.S.C. § 32705(b) that a "motor vehicle the ownership of which is transferred may not be licensed for use in a State unless..." the requirements contained in 49 U.S.C. § 32701 *et seq.* are followed. Defendant, DMV, is licensing vehicles in violation of federal laws. If defendants are not ordered to comply forthwith, the Congressional purposes (protect purchasers in the sale of motor vehicles) underlying enactment will be thwarted.

Other state courts too recognize the principle that irreparable harm need not be shown to enjoin violations of statutes:

> . . . Indiana decisions hold that when the acts sought to be enjoined have been declared unlawful or clearly against the public interest, i.e. contrary to statute, a plaintiff need show neither irreparable harm nor a balance of hardship in his favor.

Cobblestone II Homeowners Ass'n Inc. v. Baird, 545 N.E.2d 1126, 1129 (Ind.Ct.App. 1989).

Accordingly, plaintiffs need not show irreparable harm.[6]

2. Plaintiffs Have Shown Irreparable Harm.

In Opposition, defendants simply make a conclusory argument that plaintiffs have failed to show that any harm will come to them, and that mere speculation that plaintiffs may encounter the same or similar situations upon further dealings with DMV is insufficient. The individual named plaintiffs showed in painstaking detail what has happened to them and the resulting harm. They have alleged that the acts which harmed them are done routinely, intentionally, and as a part of defendants' policy, practice and procedure. Importantly, this has not been denied. Plaintiffs have alleged that one of the acts which harm them results directly

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[6] We surmise that if the shoe were on the other foot, i.e. if the DMV through the Attorney General's office were seeking to enjoin violations of statutes, they would take a different position.

from use of an illegal DMV form supplied to and routinely used by Nevada used car dealers. Plaintiffs, on behalf of themselves and all similarly situated used car buyers in Nevada, allege they intend to purchase used cars in Nevada.

Congress has found that buyers of motor vehicles rely heavily on the odometer reading as an index of the condition and value of a vehicle; buyers are entitled to rely on the odometer reading as an accurate indication of the mileage of the vehicle; and an accurate indication of the mileage assists a buyer in deciding on the safety and reliability of the vehicle. When defendants' illegal acts in licensing vehicles in violation of the requirements of the Federal Odometer Act in fact do result in a failure to protect buyers of used vehicles as exemplified by the named plaintiffs' experiences, irreparable injury is shown.

C. PRACTICALITY AND REASONABLENESS

Defendants beginning at p. 5 of the Opposition argue that plaintiffs' demands are neither practical or reasonable. First, defendants argue that DMV Form RD-136 cannot be entirely eliminated as it has other uses. But the problem is that there is no *lawful* use for a form power of attorney which allows the recipient to sign in the name, place and stead of the signator "any Certificate of Ownership issued by the [DMV] covering the motor vehicle described above, in whatever manner necessary to transfer any registration of said motor vehicle." This is what Form RD-136 allows and it simply cannot be done under federal law. For a conforming title, federal odometer disclosures must be made on the title and signed by the transferor and transferee. Exceptions exist when the title is not present (as when held by a lien holder), but still the disclosures must then be made on a *secure* power of attorney, be signed by both transferor and transferee, and contain all the information required by federal law.[7]

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[7] It is use of the word "any" in Form RD-136 which makes use *per se* illegal under federal law. Defendants could perhaps rewrite Form RD-136 to allow the recipient to sign

nonconforming titles (i.e. those which do not contain and therefore do not require federal odometer disclosures on them), but use of Form RD-136 as written is simply illegal.

The "other uses" for Form RD-136 cited by defendants do not save it. Defendants state: "This form is used in sales between private parties." (Opposition at p. 5). This does not save the form. Under federal law, odometer disclosures on conforming titles must be made by any transferor, not just dealers.[8] Next, defendants state: "The form is also used by automobile dealers in situations involving outstanding vehicle titles." (Opposition at p. 5). Plaintiffs are unsure what defendants are suggesting. If defendants are suggesting that dealers use Form RD-136 when the title is not present (as when held by a lien holder), that is our whole point: such violates federal odometer law! [For plain English emphasis, see 54 Fed.Reg. 35,879 (August 30, 1989), partial reprint from National Consumer Law Center, Automobile Fraud (1998), attached as Exhibit # 1, at page numbered 252, also noting the benefit that requiring all the federal disclosures on the power of attorney "enables purchasers to examine previously issued power of attorney for mileage disclosure alterations, erasures, or other marks, and to learn the name of the prior owner without the additional cost of a title search."]. Finally, defendants state: "The RD-136 form enables the dealer to obtain a duplicate title." The form on its face does not do so. The form permits the recipient to sign "any Certificate of Ownership." As already shown, this cannot be done as to a conforming Certificate of Ownership under federal law. And defendants have an entirely separate form and instructions for obtaining a duplicate title. (See pp. 2-14, 2-15 and 2-16, attached, of the DMV Registration and Title Guide, attached as Exhibit # 3).

As such, as to Form RD-136, plaintiffs' demand to immediately enjoin use of this illegal form is reasonable, practical, and is the law.

Defendants next argue that faxing a letter to all Nevada used car dealers is not practical. This has been addressed *supra.* at page four.

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[8] "Transferor" is defined at 49 C.F.R. § 580.3 as "any person who transfers his ownership of a motor vehicle by sale, gift, or any means other than by the creation of a security interest, and any person who, as agent, signs an odometer disclosure statement for the transferor."

Defendants next argue the threatening letter will not serve the public interest. Plaintiffs are not opposed to rewording the letter to make it less commanding[9] and more informational. The whole point is to inform dealers that title documents will not be processed unless there is compliance with federal law, as federal law requires of defendants. This *furthers* the public interest because it will enable the dealers to learn the new and lawful procedures and carry them out at the dealership without having all the paperwork returned to them to begin the process anew.

D. NO BOND SHOULD BE REQUIRED

Defendants state that issuance of the preliminary injunction will result in great expense for DMV if it is found to have been wrongfully enjoined. It is true the registration and title clerks will have to be trained not to do what they are doing and how to do their job correctly. This task is not too complicated and should be able to be accomplished in a one hour training session. The Parra and Cordova cases provide prime examples for training.

There really is no dispute about the merits. Defendants are not following federal law and so they will not be found to have been wrongfully enjoined. The only real dispute is over the timing of compliance: now pursuant to an injunction or whenever DMV gets around to it later if an injunction is denied.

The matter of the amount of a security bond required as a condition for injunctive relief clearly rests within the sound discretion of the court. Notwithstanding the literal language

[9] For example, we can eliminate the language ordering dealers to "cease and desist" from use of Form RD-136. Dealers can simply be told DMV acceptance has been enjoined and therefore dealers should stop using it.

of NRCP 65(c), which is identical to Fed.R.Civ.P. 65(c):

> [C]ourts have discretion to excuse the bond requirement under appropriate circumstances, such as where requiring security would deny access to judicial review, e.g., People of California v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325-36 (9th Cir. 1985), or where a suit is brought on behalf of a group of mostly indigent persons, Walker v. Pierce, 665 F. Supp. 831, 843-844 (9th Cir. 1987); Orantez-Hernandez v. Smith, 541 F. Supp. 351, 385 (C.D. Cal. 1982).

Pinoleville Indian Community v. Mendocino County, 684 F. Supp. 1042, 1047 (N.D. Cal. 1988).

Plaintiffs submit that in an action such as this, brought by plaintiffs of limited resources who are eligible for legal services, motivated by concerns in the public interest, that only a $1.00 bond should be required.

DATED this _____ day of March, 2000.

CLARK COUNTY LEGAL SERVICES PROGRAM, INC.

By: _____
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CERTIFICATE OF MAILING

I hereby certify that on the ___ day of March, 2000, I mailed a copy of the foregoing **PLAINTIFFS' REPLY TO OPPOSITION TO APPLICATION FOR PRELIMINARY**

INJUNCTION, in a sealed envelope, to the following counsel of record and that postage was fully prepaid thereon:

Susanne M. Sliwa
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Employee of Clark County Legal Services