

**FILED**  
Superior Court of California  
County of Los Angeles  
**JUN 03 2021**  
Sherri R. Carter, Clerk  
By: J. De Luna, Deputy

Franklin Armory, Inc. v. California Department of Justice, et al., 20STCP01747

~~Tentative~~ decision on demurrer:

Respondents California Department of Justice (“DOJ”) and Xavier Becerra, in his capacity as Attorney General, demur to portions of the Second Amended Complaint (“SAC”) filed by Petitioners Franklin Armory, Inc., (“FAI”) and the California Rifle & Pistol Association, Inc. (“Association”).

The court has read and considered the moving papers, opposition,<sup>1</sup> and reply, and renders the following tentative decision.

**A. Statement of the Case**  
**1. Petition**

Petitioners commenced this action on May 27, 2020. The operative pleading is the SAC filed on February 17, 2021, alleging causes of action for: (1) declaratory relief; (2) traditional mandamus; (3) tortious interference with contractual relations; (4) tortious interference with prospective economic advantage; (5) negligent interference with a prospective economic advantage; (6) deprivation of liberty without procedural due process of law; (7) deprivation of substantive due process of law; and (8) violation of public policy. The verified SAC alleges in pertinent part as follows.

As of January 1, 2003, licensed firearm dealers in California are required to submit all background checks to DOJ electronically via the Dealer Record of Sale Entry System (“DES”). The DES is a web-based application designed, developed, and maintained by DOJ and used by firearm dealers to report the required information.

The DES can facilitate the transfer of certain types of firearms: “handguns” (“pistols” or “revolvers”), “rifles,” and “shotguns.” This information is entered into the DES during the application process by the user selecting the appropriate type/subtype of firearm within a predetermined drop-down list. Many firearms do not qualify as handguns, pistols, revolvers, rifles, or shotguns, or even “frames” or “receivers” for said firearms. The DES drop-down list for firearm type/subtype has no provision for “other” firearms such as “undefined firearm subtypes.”

Because dealers cannot accurately submit the required information through the DES for “long guns” that are undefined firearm subtypes, they are prohibited from processing and accepting applications from purchasers of said firearms. Respondents have designed the DES with this technological barrier that functions to prohibit the transfer through a licensed firearms dealer of all firearms that are long guns but not rifles, shotguns, or rifle/shotgun combinations.

Respondents have long known about the DES’ deficiencies and have refused requests to correct it. Since 2012, FAI has communicated with Respondents about the design and features of its Title 1 firearms that do not fall under the existing DES categories and informed Respondent

<sup>1</sup> The parties failed to lodge courtesy copies of their demurrer and opposition brief in violation of the Presiding Judge’s General Order Re: Mandatory Electronic Filing. Their counsel is admonished to provide courtesy copies in all future filings.

00  
00  
00  
00  
00  
00  
00  
00  
00  
00

DOJ of the DES's defects as early as October 24, 2019.

Despite the fact that it has proven it can quickly make the requested change, DOJ has refused to modify the DES. It previously addressed a similar deficiency regarding the drop-down list for transferee's nation of origin—a deficiency FAI reported at the same time it raised the issue of undefined firearm subtypes—within weeks. Respondents have neither corrected the DES, nor has it implemented alternative procedures to facilitate the lawful transfer of “firearms with an undefined subtype,” including but not limited to the FAI Title I series of firearms, buntline revolvers, butterfly grip firearms, and barreled action firearms.

Respondents' motivation in delaying was to buy time to work with the Legislature to develop legislation designating FAI Title 1 style firearms as “assault weapons” and restricting their sale. The scheme proved successful because on August 6, 2020 the Legislature passed Senate Bill 118 (“SB 118”), which expanded the statutory definition of “assault weapon” to include any “semiautomatic centerfire firearm that is not a rifle, pistol, or shotgun, that does not have a fixed magazine, but that has any of a list of enumerated characteristics, like a forward pistol grip or thumbhole stock. The effect of SB 118 was to restrict FAI's transfer of centerfire versions of FAI Title 1 firearms to customers despite existing orders that long predated SB 118. Even after the adoption of SB 118, not all FAI's Title 1 firearms have been reclassified as assault weapons.

The first cause of action seeks a judicial declaration about the legality of Respondents' conduct regarding the DES and undefined firearm subtypes and an injunction to prevent Respondents from enforcing administrative and/or technological barriers that prevent the sale of lawful “firearms with an undefined subtype,” including but not limited to rimfire variants of the FAI Title 1 series of firearms, buntline revolvers, butterfly grip firearms, and barreled action firearms., and from enforcing the Roberti-Roos Assault Weapons Act in a manner that prohibits those who could have lawfully acquired and registered their FAI Title 1 style firearm but for Respondents' technological barriers.

The second cause of action is for a writ of mandate directing Respondents to design, maintain, and enforce updates to the DES such that it does not proscribe the lawful sale, transfer, and loan of a class of lawful firearms, including FAI's Title 1 firearms. It also asks the court to direct Respondents to design, implement, maintain, and enforce updates to their assault weapons registration process to permit the registration of variants of the FAI Title 1 style firearms by those whose orders were placed on or before August 6, 2020, or such time as deemed appropriate by the court.

The eighth cause of action is for declaratory and injunctive relief for Respondents' violation of the Administrative Procedure Act (“APA”). Petitioners seek a declaration that Respondents' de facto ban on the transfer of undefined firearm subtypes, including but not limited to the FAI Title 1 series of firearms, buntline revolvers, butterfly grip firearms and barreled action firearms, constitutes an underground regulation in violation of the APA and an injunction preventing enforcement of the underground regulation.<sup>2</sup>

## **2. Course of Proceedings**

On February 25, 2021, the court sustained with leave to amend Respondents' demurrer to the First Amended Complaint (“FAC”).

---

<sup>2</sup> The third through seventh causes of action seek damages and have been stayed.

### **B. Applicable Law**

Demurrers are permitted in administrative mandate proceedings. CCP §§1108, 1109. A demurrer tests the legal sufficiency of the pleading alone and will be sustained where the pleading is defective on its face.

Where pleadings are defective, a party may raise the defect by way of a demurrer or motion to strike or by motion for judgment on the pleadings. CCP §430.30(a); Coyne v. Krempels, (1950) 36 Cal.2d 257. The party against whom a complaint or cross-complaint has been filed may object by demurrer or answer to the pleading. CCP §430.10. A demurrer is timely filed within the 30-day period after service of the complaint. CCP § 430.40; Skrbina v. Fleming Companies, (1996) 45 Cal.App.4th 1353, 1364.

A demurrer may be asserted on any one or more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading; (b) The person who filed the pleading does not have legal capacity to sue; (c) There is another action pending between the same parties on the same cause of action; (d) There is a defect or misjoinder of parties; (e) The pleading does not state facts sufficient to constitute a cause of action; (f) The pleading is uncertain (“uncertain” includes ambiguous and unintelligible); (g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct; (h) No certificate was filed as required by CCP §411.35 or (i) by §411.36. CCP §430.10. Accordingly, a demurrer tests the sufficiency of a pleading, and the grounds for a demurrer must appear on the face of the pleading or from judicially noticeable matters. CCP §430.30(a); Blank v. Kirwan, (1985) 39 Cal.3d 311, 318. The face of the pleading includes attachments and incorporations by reference (Frantz v. Blackwell, (1987) 189 Cal.App.3d 91, 94); it does not include inadmissible hearsay. Day v. Sharp, (1975) 50 Cal.App.3d 904, 914.

The sole issue on demurrer for failure to state a cause of action is whether the facts pleaded, if true, would entitle the plaintiff to relief. Garcetti v. Superior Court, (1996) 49 Cal.App.4th 1533, 1547; Limandri v. Judkins, (1997) 52 Cal.App.4th 326, 339. The question of plaintiff’s ability to prove the allegations of the complaint or the possible difficulty in making such proof does not concern the reviewing court. Quelimane Co. v. Stewart Title Guaranty Co., (1998) 19 Cal.4th 26, 47. The ultimate facts alleged in the complaint must be deemed true, as well as all facts that may be implied or inferred from those expressly alleged. Marshall v. Gibson, Dunn & Crutcher, (1995) 37 Cal.App.4th 1397, 1403. Nevertheless, this rule does not apply to allegations expressing mere conclusions of law, or allegations contradicted by the exhibits to the complaint or by matters of which judicial notice may be taken. Vance v. Villa Park Mobilehome Estates, (1995) 36 Cal.App.4th 698, 709.

For all demurrers filed after January 1, 2016, the demurring party must meet and confer in person or by telephone with the party who filed the pleading for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. CCP §430.31(a). As part of the meet and confer process, the demurring party must identify all of the specific causes of action that it believes are subject to demurrer and provide legal support for the claimed deficiencies. CCP §430.31(a)(1). The party who filed the pleading must in turn provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency. Id. The demurring party is responsible for filing and serving a declaration that the

meet and confer requirement has been met. CCP §430.31(a)(3).

### **C. Governing Law**

Under the Penal Code, there are three basic types of firearms: (1) handguns, also referred to as pistols and revolvers; (b) rifles; and (c) shotguns.

A handgun generally has a barrel length less than 16 inches and can be concealed on a person, and is synonymous with the terms pistol, revolver, and firearm capable of being concealed upon the person. Penal Code §§ 16530(a), 16640(a).

A rifle is a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger. Penal Code §17090.

A shotgun is a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger. Penal Code §17190. The term “long gun” generally refers to rifles and shotguns. *See, e.g.*, Penal Code, §16865.

In California, individuals generally must purchase firearms through a licensed dealer. Penal Code §26500(a). Individuals must also have a licensed dealer process transfers of firearms, including private sales, gifts, and loans. Penal Code §§ 27545, 28050.

When an individual goes to a gun dealer to initiate a purchase or other transaction involving a firearm, the dealer is required to obtain information and create a record of the transaction. Penal Code §28100(a). This record is referred to as a Dealer Record of Sale (“DROS”). Various information about the firearm must be included on the DROS, including the make of firearm, manufacturer’s name if stamped on the firearm, model name or number if stamped on the firearm, caliber, and type of firearm. Penal Code §28160(a). The DROS must also include information regarding the purchaser, including their name, date of birth, local and permanent addresses, place of birth, occupation, gender, physical description, all legal names and aliases ever used, and a “yes or no” answer whether they are in any of the categories of persons prohibited from purchasing a firearm. *Ibid.*

The dealer must transmit the DROS to DOJ and is required to wait at least ten days before completing the purchase and delivering the firearm to the purchaser, assuming the result of a background check has been received by then. Penal Code §§ 26815(a), (b), 27540(a).

The DROS must be submitted to DOJ electronically, except as DOJ otherwise permits. Penal Code §28205(c). DOJ shall prescribe the form of the register and the record of electronic transfer pursuant to Penal Code section 28105. Penal Code §28155. The DES is the method established by DOJ for the submission of purchaser information required by Penal Code section 28160(a). The DES is a web-based application designed, developed, and maintained by DOJ and used by firearm dealers to report the required information.

Any semi-automatic centerfire firearm that is not a rifle, pistol, or shotgun that has one or more specified characteristics is classified as an assault weapon. Penal Code §30515(a)(9)-(11). Individuals are restricted from possessing any firearm classified as an assault weapon unless they possessed the firearm prior to its classification as an assault weapon or are exempt as a member of law enforcement, military forces, or other specified entities. Penal Code §§ 30605, 30620, 30625,

**D. Analysis**

Respondents demur to the SAC's first, second, and eighth causes of action on the grounds that (1) Petitioners lack standing, (2) these claims fail to allege sufficient facts to support a cause of action and (3) these claims fail to establish a mandatory, ministerial duty.

Respondents have complied with the meet and confer requirements of CCP section 430.31(a). Lake Decl., ¶2.

**1. Standing**

Respondents argue that Petitioners do not have standing to pursue mandamus because they fail to allege specific facts as to a particular mode of a firearm that they are unable to process through DES. Dem. at 12.

Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff. Mendoza v. JPMorgan Chase Bank, N.A., (“Mendoza”) (2016) 6 Cal.App.5th 802, 810. As a general rule, a party must be “beneficially interested” to seek a writ of mandate. Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control Dist., (2015) 235 Cal.App.4th 957, 962 (citing CCP §1086). Likewise, to seek declaratory relief, a party must be an “interested person.” CCP §1060. An “interested person” means the same thing as a “beneficially interested” person in mandamus cases. Asimow, et al., Administrative Law (2018), Ch. 14, §14:6. “Beneficially interested” has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. SJJC Aviation Services, LLC v. City of San Jose, (“SJJC”) (2017) 12 Cal.App.5th 1043, 1053. The beneficial interest must be direct and substantial. Ibid. A petition has no beneficial interest if she will gain no direct benefit from the writ's issuance and suffer no direct detriment if it is denied. Ibid.

Respondents admit that the SEC refers to a specific model of Title 1 rimfire that is a .17 WSM rimfire caliber. However, Respondents note that the court sustained the demurrer to the FAC partially because Petitioners failed to allege specific models of firearms and the SAC only alleges three general categories of firearms (buntline revolvers, butterfly grip firearms and barreled action firearms) rather than any specific model. Dem. at 12. Respondents argue that the allegation concerning the Title 1 rimfire model, but they fail to allege any specific component of the Title 1 rimfire model that establishes why it is not a handgun, rifle or shotgun. Dem. at 12; Reply at 3-4. There are no allegations establishing that this model cannot be processed through the DES, making Petitioners' claim conjectural. Dem. at 12; Reply at 3-4.

It is true that the court directed Petitioners to allege specific models. Petitioners argue that the SAC does so by referring to Browning 1919 A4 firearms, including the Browning .30 Cal.M-1919 A4, Browning .50 Cal. M2 semiautomatic rifles configured with a pistol or butterfly grip, and U.S. Ordinance Semi-60 configured with a butterfly grip. SAC ¶¶ 30-31. Respondents do not reply to this argument and the court is not qualified to ascertain whether these are models or types.

In any event, Respondents' admission that the SEC refers to a specific model of Title 1 rimfire that is a .17 WSM rimfire caliber is sufficient. Petitioners are correct that there is a minimal

69  
68  
67  
66  
65  
64  
63  
62  
61  
60  
59  
58  
57  
56  
55  
54  
53  
52  
51  
50  
49  
48  
47  
46  
45  
44  
43  
42  
41  
40  
39  
38  
37  
36  
35  
34  
33  
32  
31  
30  
29  
28  
27  
26  
25  
24  
23  
22  
21  
20  
19  
18  
17  
16  
15  
14  
13  
12  
11  
10  
9  
8  
7  
6  
5  
4  
3  
2  
1

pleading requirement and, if the pleadings contain sufficient particularity and precision to acquaint the defendants with the nature, source, and extent of the cause of action, a demurrer should be overruled. County of Santa Clara v. Superior Court, (2009) 171 Cal.App.4th 119, 126. A complaint need only provide fair notice of the pleaded claim (Lee v. Hanley, (2015) 61 Cal.4th 1225, 1238-39) and Petitioners have done so for the Title 1 rimfire.<sup>3</sup>

Respondents also argue that Petitioners do not have standing because the SAC does not allege that anyone actually attempted to purchase, sell or transfer a Title 1 rimfire model or any firearm in the Buntline revolver, butterfly grip or barreled action categories. Dem. at 13. The SAC identifies Ryan Fellows and Beverly Esendido as seeking to acquire a Title 1 rimfire and buntline revolver, respectively, and Coyote Point Armory, a licensed dealer, as seeking to sell and buntline revolver and other lawful firearms, including a Title 1 rimfire, and that all three have been prevented from doing so by Respondents' actions. SAC ¶¶ 99-101. But the SAC fails to allege that the dealer took any concrete action toward actually selling a firearm or having a purchaser come to its store to initiate processing of a transfer in the DES and there is no allegation that any dealer attempted to process any of these firearms in the DES. Dem. at 13; Reply at 3-4.

The short answer is that Petitioners are not required to allege evidentiary details to achieve standing.<sup>4</sup>

Additionally, Petitioners correctly respond that they and CRPA members and dealers need not perform useless acts as a prerequisite for seeking judicial relief. Van Gammeren v. City of Fresno, (1942) 51 Cal.App.2d 235, 240. The SAC alleges that, because dealers cannot accurately submit the required information through DES for long guns that are undefined firearm subtypes, they cannot process and accept applications for such firearms. SAC ¶59. Petitioners assert that they are not required to allege such specific instances because doing so would be futile due to the nature of the DES and the requirement of 11 CCR section 4210(b)(2)(6), which prohibits the input of inaccurate information into the DES. Opp. at 13. Respondents only weakly respond that there is no futility exception to the requirement of standing. Reply at 4.

The SAC alleges sufficient facts to demonstrate that Petitioners have a beneficial interest in the mandamus and declaratory relief claims to compel DOJ to fix the DES process.<sup>5</sup>

## **2. Mandatory Ministerial Duty**

Respondents contend that the SAC fails to allege sufficient facts establishing a mandatory, ministerial duty to modify the DES. Dem. at 15; Reply at 5.

<sup>3</sup> Petitioners also purport to rely on their discovery responses which identify by make and model dozens of examples of buntlines, butterfly grip firearms and barreled action firearms without stocks that re undefined firearm subtypes that cannot be transferred through DES. Ex. A. Opp. at 12. The discovery responses cannot be considered on demurrer; they only are useful to show that the notice required for pleading can be fleshed out in discovery.

<sup>4</sup> Respondents note that, according to Petitioners' admission (SAC ¶29) the firearm models in question have been manufactured for decades and are known to Respondents, yet the SAC still fails to allege any specific instance where one could not be transferred through the DES. Reply at 2. This is an evidentiary matter for trial.

<sup>5</sup> Because Petitioners have beneficial interest standing, the court need not address public interest standing. The controversy also is ripe.

Generally, mandamus may only be employed to compel the performance of a duty that is purely ministerial in character. Mandate will not issue if the duty is not plain or is mixed with discretionary power or the exercise of judgment. Mooney v. Garcia, (2012) 207 Cal.App.4th 229, 232-33.

Respondents assert that none of the statutes on which Petitioners rely -- Penal Code sections 28155, 28205, 28215 and 28220 -- establish a mandatory, ministerial duty to modify the DES. Dem. at 15; Reply at 5.

In order to construe a statute as imposing a mandatory duty, the mandatory nature of the duty must be phrased in explicit and forceful language. The H.N. & Frances C. Berger Foundation, (2013) 218 Cal.App.4th 37, 48. A ministerial act is an act that a public officer is required to perform in a prescribed manner. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 700. Thus, language in a statute must specify a ministerial duty to act in a particular way. County of San Diego v. State of California, (2008) 164 Cal.App.4th 580, 593.

Petitioners rely on the statutory scheme for firearm transfer. The DOJ shall prescribe the form of the register and the record of electronic transfer pursuant to Penal Code section 28105. Pen. Code §28155. Penal Code section 28205 requires the DOJ to determine the method by which a dealer shall submit firearm purchaser information. On or after January 1, 2003 electronic transfer shall be the exclusive means by which information is transmitted to the department, except as permitted by the DOJ. Penal Code section 28215 describes the process through which dealer and applicant submit an application for approval of a firearm transaction. Penal Code section 28220 sets out procedures to follow upon submission of firearm purchaser information to the DOJ, including examination of records pertaining to a purchaser and submission of information to a dealer relating to whether the purchaser is prohibited from receiving a firearm.

Petitioners argue that these statutes create a clear ministerial duty for Respondents to maintain the DES in a manner that does not block the transfer of legal firearms. Petitioners rely on Penal Code Section 28160, which requires that “for all firearms, the register or record of electronic transfer shall include all of the following information...” Opp. at 15. The Penal Code then lists several items that the record of electronic transfer “shall” include, including the “[t]ype of firearm.” Pen. Code, §28160(a)(14). By refusing to correct the DES to facilitate the transfer of undefined firearm subtypes (Title 1 firearms, buntline revolvers, butterfly grip firearms, and barreled action firearms without stocks), the DOJ violates its duty to create a system that allows firearm retailers to include the statutorily required information for all firearms. Opp. at 15.

Respondents argue that these statutes do not include any mandatory requirement that the DOJ operate the DES in any particular manner. Dem. at 16-17; Reply at 5-6. They instead provide the DOJ with discretion to utilize the DES or another method. Id.

This is true, but Respondents misread Petitioners’ point. Petitioners acknowledge that the DOJ has discretion in the manner in which it implements the electronic transfer system for firearm transfer, and argue that this discretion does not affect the substance of its duty. Opp. at 17. Surely, even the DOJ would admit that it does not have discretion to refuse to implement an electronic transfer system entirely. Penal Code section 28160 requires as much. If the DOJ has a ministerial duty to implement some electronic transfer system, then it is no large jump to conclude that it cannot arbitrarily discriminate in the system it must implement. That is all Petitioners are saying and Penal Code section 28160’s reference to an electronic transfer system for all firearms supports

0000000000

this ministerial duty. In other words, the DOJ has discretion in how it implements the electronic transfer system, but the discretion has limits.

In reply, Respondents argue that the reference to “all firearms” in section 28160 does not imply that there must be DROS information for every firearm. The phrase “all firearms” conveys that the same DROS information is required for both “handguns” and “firearms other than handguns,” which had not been the case prior to January 1, 2014 under Penal Code section 12077, which was repealed as of January 1, 2012. Mandamus does not lie to compel a public agency to exercise discretionary powers in a particular manner or based on a respondent's belief that the respondent should act in a different manner. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693. Reply at 6-7.

To some extent, these statutory interpretation arguments are best left for trial, particularly since Petitioners are correct that Respondents could have made these arguments about the DOJ's discretion in their first demurrer. Opp. at 16. In any event, the language of AIDS Healthcare fully supports Petitioners in that the SAC pleads that the DOJ has failed to act by including the omitted firearms in DES and this failure to act was arbitrary and in derogation of the applicable legal standards. 197 Cal.App.4th at 704. The SAC sufficiently pleads that the DOJ has excluded certain firearms from DES for arbitrary reasons.

### **3. Declaratory and Injunctive Relief**

Respondents contends that the demurrer should be sustained as to the SAC's first and eighth causes of action for declaratory and injunctive relief because they are remedies, not independent causes of action. Dem. at 18-19; Reply at 8-9.

Respondents argue that requests for declaratory and injunctive relief are not independent causes of action but merely types of remedies. Batt v. City and County of San Francisco, (2007) 155 Cal.App.4th 65, 82. Nor is declaratory relief proper where it is duplicative of the primary claim. California Ins. Guarantee Assn. v. Superior Court, (1991) 231 Cal.App.3d 1617, 1623-24 (The object of the declaratory relief statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues). A demurrer is properly sustained as to a claim for declaratory relief which is wholly derivative of the statutory claim. Ball v. FleetBoston Fin. Corp. (2008) 164 Cal.App.4th 794, 800.

Respondents are correct about injunctive relief and that a declaratory relief claim may be subsumed in mandamus, but Petitioners are correct that declaratory relief is a cause of action under CCP section 1060. Opp. at 18. Respondents cite to Batt, which lists certain remedies that are not causes of action, including declaratory relief. 155 Cal.App.4th at 82 (citing Witkin). Witkin explains that declaratory relief is an equitable action that results an equitable remedy. 5 California Procedure (Pleading), (5th ed. 2008) §850, pp. 265-66. Thus, declaratory relief is a remedy, but a CCP section 1060 claim is a cause of action that results in that remedy.

The first cause of action is for declaratory relief seeks to compel the DOJ to correct the DES. The second cause of action for mandamus also seeks to direct Respondents to design, maintain, and enforce updates to the DES such that it does not proscribe the lawful sale, transfer, and loan of a class of lawful firearms. Arguably, the proper action between these two is declaratory relief, not mandamus and the court will not sustain the demurrer to the declaratory relief claim as subsumed within mandamus. The eighth cause of action is for declaratory and injunctive relief. While injunctive relief is a remedy, declaratory relief is not, and the demurrer is overruled on that



ground.

#### **4. Administrative Procedure Act**

Respondents also demur to the eighth cause of action on the ground that the configuration of the DES is not a regulation governed by the APA. Dem. at 19. The SAC contends that the Respondents' conduct of operating the DES in a way that prevents the transfers of certain firearms constitutes an unlawful underground regulation in violation of the APA.

The APA establishes the procedures by which state agencies may adopt regulations. Tidewater Marine Western, Inc. v. Bradshaw, (1996) 14 Cal.4th 557, 568. No state agency shall issue, utilize, enforce, or attempt to enforce a regulation without complying with the APA's notice and comment provisions (Govt. Code, §11340.5(a)). Id. at 570. The APA defines "regulation" as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it or to govern its procedure." Govt. Code, §11342.600.

Respondents argue that the configuration of the DES is not a regulation under the APA. It is an electronic web-based system that the DOJ uses to receive and process information submitted regarding firearm transfers. SAC ¶¶ 53-54. The configuration of the DES is not a "rule," "regulation," "order" or "standard," as those terms are used in Government Code section 11342.600. No court has determined that any similar web-based system or program constitutes a regulation subject to the APA. Moreover, the configuration of the DES does not result in any specific interpretation of law or legal determination being imposed with respect to a purchaser or other applicant or to a firearm. Govt. Code section 11340.9(c) specifically excludes forms prescribed by a state agency or any instructions relating to the use of the forms from consideration as regulations. Dem. at 20; Reply at 9-10.

Petitioners do not dispute that the DES configuration itself does not constitute a regulation under the APA. Opp. at 20. Instead, Petitioners argue that the SAC does not allege that the DES configuration itself is the underground regulation, but rather Respondents' policy in blocking the transfer of legal firearms is an internal rule or standard of general application that is an underground regulation. Opp. at 19.

Petitioners are correct. Respondents note (Reply at 9) that the SAC specifically describes the alleged underground regulation as "technological and administrative barriers" to the transfer of "undefined subtype" firearms. SAC ¶186. The only alleged "technological" or "administrative" barriers is the configuration of the DES. The only alleged manifestation or expression of the purported "internal" rule is the configuration of the DES. Reply at 9. True, but the SAC also alleges that it is challenging enforcement of policies and procedures that prohibit the transfer of firearms to lawful purchasers. SAC ¶85. These policies are implemented through the barriers created in the configuration of DES. SAC ¶93.

The demurrer to the eighth cause of action is overruled.

#### **E. Conclusion**

Respondents' demurrer to the SAC is overruled. Respondents have 20 days to answer only.