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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

FRANKLIN ARMORY, INC., and
CALIFORNIA RIFLE & PISTOL
ASSOCIATION, INCORPORATED,

Petitioners-Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF JUSTICE,
ROBERT A. BONTA, in his official capacity
as Attorney General for the State of California,
and DOES 1-10,

Respondents-Defendants.

Case No.: 20STCP01747

[Assigned for all purposes to the Honorable
James C. Chalfant; Department 85]

**DECLARATION OF ANNA M. BARVIR IN
SUPPORT OF PLAINTIFFS AND
PETITIONERS’ DEMURRER TO AND
MOTION TO STRIKE RESPONDENTS’
ANSWER TO THE FIRST, SECOND, AND
EIGHTH CAUSES OF ACTION TO THE
SECOND AMENDED COMPLAINT**

[Filed concurrently with Notice of Demurrer and
Demurrer to and Motion to Strike Respondents’
Answer to the First, Second, and Eighth Causes
of Action to the Second Amended Complaint;
Memorandum of Points and Authorities; and
[Proposed] Order]

Hearing Date: October 14, 2021
Hearing Time: 9:30 a.m.
Department: 85

Action Filed: May 27, 2020

1 statutory 30-day extension.

2 6. On July 8, 2021, Mr. Lake responded via email and explained why he believed the
3 State’s answer need not be verified. But he did not address other issue that I raised in my initial
4 email—that is, that the answer was too generally pled. He did not then agree to a telephonic meet
5 and confer. Nor did he provide any availability to participate in one. **Ex. A.**

6 7. On July 14, 2021, I sent another email that both countered Mr. Lake’s arguments
7 about the verification issue and expanded on Petitioners’ concerns about the generalized nature of
8 the State’s ostensible affirmative defenses. I asked that the State reconsider its decision not to
9 amend and again requested a telephonic meet-and-confer so the parties could discuss the issues
10 further. **Ex. A.**

11 8. On July 19, 2021, Mr. Lake responded, again via email. This time, instead of
12 agreeing to participate in a telephonic meet and confer, he asked me for more details regarding
13 “which specific affirmative defense [Petitioners] take issue with and the specific deficiency of that
14 defense.” **Ex. A.**

15 9. On July 21, 2021, I responded to Mr. Lake via email to confirm that Petitioners
16 intended to demur to all of the State’s affirmative defenses, except Nos. 1 and 2, because they lack
17 sufficient facts to support the defenses pled. I also informed him that Petitioners would move to
18 strike all affirmative defenses that were not cognizable affirmative defenses or were irrelevant to
19 the unstayed causes of action. Because of the breadth of Petitioners’ anticipated challenge to the
20 State’s Answer, I could not reasonably explain each and every deficiency of each and every
21 improper defense. But I did provide several examples of each type of deficiency in good faith. I
22 then once again asked the State to reconsider amending its answer and asked once again that
23 opposing counsel agree to participate in telephone call to discuss Petitioners’ anticipated motion. I
24 also informed Mr. Lake that if the State would agree to neither by July 23, 2021, Petitioners would
25 have to consider their efforts to meet and confer closed and file their motion. **Ex. A.**

26 10. On July 23, 2021, Mr. Lake emailed me to say he needed until Monday, July 26,
27 2021, to consider the points raised in my July 21 email. I obliged in hopes of resolving these issues
28 without needing to bring a demurrer and motion to strike. **Ex. A.**

EXHIBIT A

From: Anna M. Barvir
Sent: Friday, July 23, 2021 3:20 PM
To: Kenneth Lake <Kenneth.Lake@doj.ca.gov>
Subject: Re: Franklin Armory, et al. v. California Department of Justice, et al. [MA-Interwoven.FID84998]

Thank you for your response. I look forward to hearing from you on Monday.

Enjoy your weekend,

Anna

On Jul 23, 2021 2:59 PM, Kenneth Lake <Kenneth.Lake@doj.ca.gov> wrote:

I won't be able to get a response to you on this until Monday as I need time to review the affirmative defense issues you raise. Thanks.

From: Anna M. Barvir <ABarvir@michellawyers.com>
Sent: Wednesday, July 21, 2021 4:13 PM
To: Kenneth Lake
Cc: Alexis Diamond; Ben Barnouw
Subject: RE: Franklin Armory, et al. v. California Department of Justice, et al. [MA-Interwoven.FID84998]

Good afternoon, Kenneth,

Thank you for your response. I would like to clarify first that I was identifying the fact that Plaintiffs took issue with the general nature of the State's affirmative defenses in my initial meet and confer email when I stated that "[w]e are considering filing a demurrer and/or motion to strike due to the general nature of the answer, as well as the State's failure to verify the response to the writ of mandate" and requested a call to further discuss the matter. My apologies if there was any miscommunication on that front.

To better direct our meet and confer efforts, I can state that Plaintiffs likely intend to demurrer to all of the state's affirmative defenses except Affirmative Defenses 1 and 2, as almost none of them raise any facts that would support the defenses raised. Rather, most (if not all) appear to be boilerplate defenses without any facts showing that the defenses have

any relation to this case. By way of limited example only, Plaintiffs note the following insufficiently pleaded defenses:

- Affirmative Defense No. 3: The entirety of AD No. 3 states “[t]he second amended complaint and each and every cause of action stated therein are barred by the applicable statute of limitations.” The defense does not identify which, if any, statute of limitations the State is relying on or any fact alleging that Plaintiffs missed it.
- Affirmative Defense No. 10: The entirety of AD No. 10 states “[t]he second amended complaint, and each cause of action alleged therein, are barred by the doctrine of laches.” The answer alleges no fact that the Plaintiffs unreasonably delayed or that the State suffered any prejudice from any such delay.
- Affirmative Defense No. 11: The entirety of AD No. 11 states “[t]he second amended complaint is barred by the doctrine of unclean hands, as well as other applicable equitable defenses.” The answer nowhere alleges any fact that Plaintiffs acted unlawfully or otherwise improperly. And it doesn’t identify which, if any, other “applicable equitable defenses” it is referencing here.
- Affirmative Defense No. 39: Marginally better than AD No. 3, AD No. 39 identifies potentially applicable statutes of limitations (i.e., CPC section 342 and Gov’t Code sections 945.4. and 945.6), but it alleges no facts alleging when these SOLs began to run or that Plaintiffs, or either of them, brought this suit after they had run.

Other defenses also appear, on their face, to bear no relevance to the unstayed claims the Answer purports to respond to. But perhaps their relevance could be made more clear if the State could identify which claims its defenses apply to or if it has supporting facts that it would agree to amend to add. Otherwise, we would ask the Court to strike these defenses to ensure the pleadings are straightforward and relevant in order to prevent hardship for the parties during the next phases of this litigation. Examples of potentially irrelevant defenses include:

- Affirmative Defense No. 38: Plaintiffs do not allege the State is “liable for any injury or damages . . . for failure to inspect or for a negligent inspection of property owned or controlled by a third party.” Even if they did, the three unstayed claims are for equitable, not monetary, relief.
- Affirmative Defense No. 43: Plaintiffs do not allege that the State has “deprived any person of any right, privilege or immunity guaranteed by the California Constitution.”
- Affirmative Defense No. 48: Plaintiffs do not allege the State is liable “for any injury or damages . . . caused by a misrepresentation by any public employee, whether such misrepresentation was negligent or intentional or not.” Again, even if they had, the three unstayed claims are for equitable, not monetary, relief.
- Affirmative Defense No. 49: Plaintiffs do not allege that the State has “liability for injury or damages . . . caused by the instituting or prosecuting of any judicial or administrative proceeding.” Again, even if they had, the three unstayed claims are for equitable, not monetary, relief.

Finally, some of the State’s defenses would not constitute affirmative defenses even if

sufficient facts were plead. Instead, they appear to be denying that specific elements of Plaintiffs' claims are met. For instance, Affirmative Defense No. 14 states that "Defendants have not deprived Plaintiffs of any right guaranteed by law." Similarly, Affirmative Defense No. 16 states that "Plaintiffs are not entitled to mandamus relief because there is no clear, present, and ministerial duty on the part of Defendants, Plaintiffs do not have a clear, present, and beneficial right to the performance of that duty, defendants have discretion that cannot be directed by the courts, and an adequate remedy exists at law for Plaintiffs." We do not believe these are cognizable affirmative defenses, but rather arguments that Plaintiffs have not established or cannot establish the elements of their claim(s), making it part of the State's defense that the complaint fails to state a claim. But I am certainly open to discussing the issue with you if you believe we are misunderstanding the State's pleading.

At this point, through these back and forth emails, I believe Plaintiffs have more than sufficiently summarized the grounds for their anticipated motion. And I would again suggest that we have a call if the State has further concerns. I am facing a lot of deadlines in the coming days and weeks, so I must get this motion on file soon if one becomes necessary. Please let me know if the State intends to amend or if you would rather schedule a call with me by COB on Friday, July 23. Otherwise, we will consider these attempts to meet and confer closed and file our motion next week.

Thank you in advance for your cooperation in resolving these matters.

Regards,
Anna

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| Anna M. Barvir Partner | Direct: (562) 216-4453 Main: (562) 216-4444 Fax: (562) 216-4445 Email: ABarvir@michellawyers.com Web: www.michellawyers.com 180 E. Ocean Blvd. Suite 200 Long Beach, CA 90802 |
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in error, you are on notice of its status. Please notify us immediately by reply e-mail and then delete this message from your system. Please do not copy it or use it for any purposes, or disclose its contents to any other person. To do so could violate state and Federal privacy laws. Thank you for your cooperation. Please contact Michel & Associates, PC at (562) 216-4444 if you need assistance.

From: Kenneth Lake <Kenneth.Lake@doj.ca.gov>
Sent: Monday, July 19, 2021 5:51 PM
To: Anna M. Barvir <ABarvir@michellawyers.com>
Cc: Ben Barnouw <Ben.Barnouw@doj.ca.gov>; Alexis Diamond <Alexis.Diamond@doj.ca.gov>
Subject: Re: Franklin Armory, et al. v. California Department of Justice, et al. [MA-Interwoven.FID84998]

In your July 14 email you indicate you are taking issue with the affirmative defenses in our answer. However, you do not identify any particular affirmative defense or what is wrong with it. You did not mention affirmative defenses in your initial meet and confer email of 7/5. Could you let me know which specific affirmative defense you take issue with and the specific deficiency of that defense. Thank you.

Kenneth G. Lake
Deputy Attorney General
State of California Department of Justice
(213)269-6525
Kenneth.Lake@doj.ca.gov

From: Anna M. Barvir <ABarvir@michellawyers.com>
Sent: Wednesday, July 14, 2021 12:36 PM
To: Kenneth Lake
Cc: Ben Barnouw; Alexis Diamond
Subject: RE: Franklin Armory, et al. v. California Department of Justice, et al. [MA-Interwoven.FID84998]

Thank you so much for your response, Counsel.

We respectfully disagree that the law on verification by public entities of answers to writs Is as clear cut as the case law you cited below. Indeed, within the last year, the First District Court of Appeal recognized the unsettled nature of the issue and only avoided deciding it because it exercised its discretion to treat the public entity's unverified return as a demurrer. (*Alfaro v. Superior Court* (2020) 58 Cal.App.5th 371, 382, fn. 8.) Obviously, that is not possible here, as the State has already filed two demurrers and was ordered to file its answer. It is our position that the plain text of CCP 1089 requires verification even from public entities. This is why *Municipal Court v. Superior Court (Sinclair)* (1988) 199 Cal.App.3d 19, 25, fn. 1, which (like *Alvarado*) remains good law, states that "Sections 1086 and 1089 . . . require verification in mandate proceedings without exception, and therefore prevail over the provisions of section 446 . . ." *Hall v. Superior Court* and the cases it cites hardly address the alternative authorities of section 1089 and *Sinclair*.

Additionally, as I indicated in my first meet-and-confer request, we are also considering filing a demurrer on the grounds that the State's answer is not well-plead. Specifically, plaintiffs believe the State's answer is insufficient because the affirmative defenses do little more than spout "terse legal conclusions," failing to provide supporting facts "as carefully and with as much detail" as is required in a complaint. (See *FPI Devel., Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384; *Quantification Settlement Cases* (2011) 201 Cal.App.4th 758, 812-813; *Alan v. Buena Park Sch. Dist.*, No. G049491, 2015 WL 10856334, at *7 (Cal. Ct. App. Oct. 13, 2015).)

For these reasons, and in the interest of saving both parties' time and resources, plaintiffs ask the State to reconsider its decision not to amend to verify its recently filed answer and to flesh out its affirmative defenses. If the State remains unconvinced, we request the opportunity to discuss plaintiffs' demurrer and/or motion to strike with you over the phone this week to comply with pre-filing meet-and-confer requirements. Please let me know your availability.

On a different note, I ask that the State kindly respond to my email of June 29, 2021, regarding rescheduling plaintiffs' previously noticed PMK depositions. If I missed your reply, please do let me know and re-send. It may have been caught in my firm's email filtering software.

Regards,

Anna

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| Anna M. Barvir Partner | Direct: (562) 216-4453 Main: (562) 216-4444 Fax: (562) 216-4445 Email: ABarvir@michellawyers.com Web: www.michellawyers.com |
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From: Kenneth Lake <Kenneth.Lake@doj.ca.gov>
Sent: Thursday, July 08, 2021 6:42 AM
To: Anna M. Barvir <ABarvir@michellawyers.com>
Cc: Ben Barnouw <Ben.Barnouw@doj.ca.gov>; Alexis Diamond <Alexis.Diamond@doj.ca.gov>
Subject: Re: Franklin Armory, et al. v. California Department of Justice, et al.

The most recent pronouncement from the Second District Court of Appeal addressing a claim that a public entity/official's answer to a writ of mandate petition must be verified held that verification was not required, cited numerous cases supporting this conclusion and distinguished the case you rely on, *People v. Superior Court (Alvarado)* (1989) 207 Cal.App.3d 464.

"As a threshold matter we reject petitioner's claim respondent court's return should be stricken because it is not verified. Code of Civil Procedure section 1089 provides a party may make a return to a petition for writ of mandate by demurrer, verified answer, or both. California Rules of Court, rule 56(h)(1) similarly provides a party may file a return to a petition for a writ by demurrer, verified answer, or both. However, in a writ proceeding, as in a civil action, an answer filed by a public entity need not be verified when the answer is used merely to join the issues raised in the petition. (Code Civ. Proc., § 446, subd. (a); *Lertora v. Riley* (1936) 6 Cal.2d 171, 176, 57 P.2d 140 ["The answer of an officer of the state of California to a complaint or petition need not be verified."]; *Crowl v. Commission on Professional Competence* (1990) 225 Cal.App.3d 334, 342, 275 Cal.Rptr. 86 [the public entity's answer in the writ proceeding did not need to be verified]; *Verzi v. Superior Court* (1986) 183 Cal.App.3d 382, 385, 228 Cal.Rptr. 299 [Code of Civil Procedure section 446 exempts public agencies and their officers from the verification requirement]; but see, *People v. Superior Court (Alvarado)* (1989) 207 Cal.App.3d 464, 470, 255 Cal.Rptr. 46 [if a pleading is to be used as evidence of facts then it must be verified and be based on the pleader's personal knowledge]."

(*Hall v. Superior Court* (2005) 133 Cal.App.4th 908, 914, fn 9.)

Hall makes clear there is no basis for a demurrer to our answer. If you would like to discuss this further, please let me know. Thank you for your cooperation in this matter.

Kenneth G. Lake
Deputy Attorney General
State of California Department of Justice
(213)269-6525
Kenneth.Lake@doj.ca.gov

From: Anna M. Barvir <ABarvir@michellawyers.com>
Sent: Monday, July 5, 2021 10:42 AM
To: Kenneth Lake
Subject: Franklin Armory, et al. v. California Department of Justice, et al. [MA-Interwoven.FID84998]

Counsel,

I am writing because we are in receipt of your client's Answer to the First, Second, Eighth Causes of Action to the Second Amended Complaint and Petition. We are considering filing a demurrer and/or motion to strike due to the general nature of the answer, as well as the State's failure to verify the response to the writ of mandate. We'd like the opportunity to discuss the matter with you via telephonic meet-and-confer in hopes that motion practice can be avoided. We realize that we are likely outside the time to meet-and-confer before a demurrer or motion to strike an answer would be due, but Jason was on vacation when the Answer was served, and I was out of town all last week for a family reunion and the Fourth of July holiday. So we were just recently able to review the pleading and reach out to you. Even still, please let me know if you would be available to discuss the matter this week.

In preparation for our discussion, I'd like to summarize our position re: verification of the pleading. We recognize that, generally, CCP section 446 exempts government defendants from the requirement that answers to verified complaints must also be verified. But because this is, in part, a writ proceeding, we believe the government must verify its answer: "On the date for return of the alternative writ, or on which the application for the writ is noticed, or, if the Judicial Council shall adopt rules relating to the return and answer, then at the time provided by those rules, the party upon whom the writ or notice has been served may make a return by demurrer, verified answer or both..." (Code Civ. Proc., § 1089.) Caselaw confirms our understanding: "Sections 1086 and 1089, contained in title 1, and supplemented by California Rules of Court, rules 56(a) and 56(c), require verification in mandate proceedings without exception, and therefore prevail over the provisions of section 446 which are contained in part 2." (*People v. Super. Ct. (Alvarado)* (1989) 207 Cal.App.3d 464, 470, citing *Muni. Ct. v. Super. Ct. (Sinclair)* (1988) 199 Cal.App.3d 19, 25, fn. 1.)

Thank you in advance for your cooperation in resolving these issues. I look forward to hearing from you.

Regards,

Anna

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|----------------|--|
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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

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

On August 4, 2021, I served the foregoing document(s) described as

DECLARATION OF ANNA M. BARVIR IN SUPPORT OF PLAINTIFFS AND PETITIONERS' DEMURRER TO AND MOTION TO STRIKE RESPONDENTS' ANSWER TO THE FIRST, SECOND, AND EIGHTH CAUSES OF ACTION TO THE SECOND AMENDED COMPLAINT

on the interested parties in this action by placing
[] the original
[X] a true and correct copy
thereof by the following means, addressed as follows:

Benjamin Barnouw
Deputy Attorney General
Email: Ben.Barnouw@doj.ca.gov
Kenneth G. Lake
Deputy Attorney General
Email: Kenneth.Lake@doj.ca.gov
Alexis Diamond
Deputy Attorney General
Email: Alexis.Diamond@doj.ca.gov
California Department of Justice
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Attorney for Respondents-Defendants

X (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission through One Legal. Said transmission was reported and completed without error.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 4, 2021, at Long Beach, California.



Laura Palmerin