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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

FRANKLIN ARMORY, INC. AND CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, Petitioners-Plaintiffs, **v.** **CALIFORNIA DEPARTMENT OF JUSTICE, XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA, AND DOES 1-10,** Respondents-Defendants.	Case No. 20STCP01747 **OPPOSITION TO DEMURRER AND MOTION TO STRIKE ANSWER TO THE FIRST, SECOND, AND EIGHTH CAUSES OF ACTION TO THE SECOND AMENDED COMPLAINT** **Date: October 14, 2021** **Time: 9:30 a.m.** **Dept: 85** **Honorable James C. Chalfant**

I

Verification of a Public Entity or Official's Answer to a Writ of Mandate Petition is Not Required

The most recent pronouncement from the Second District Court of Appeal addressing a claim that a public entity or official's answer to a writ of mandate petition must be verified held

that verification by a government entity or official is not required:

> 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 ["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 [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 [Code of Civil Procedure section 446 exempts public agencies and their officers from the verification requirement].

(*Hall v. Superior Court* (2005) 133 Cal.App.4th 908, 914, fn. 9[1].)

The Second District Court of Appeal also held, in *Trask v. Superior Court* (1994) 22 Cal.App.4th 346, that a public agency, unlike a private citizen, need not verify its answer to a verified petition. (*Id.* at p. 350, fn. 3; citing Code Civ. Proc., §§ 446, 1109.)

The Sixth District Court of Appeal in *Epstein v. Superior Court,* (2011) 193 Cal.App.4th 1405, went further holding:

> Ordinarily an answer to a petition for an extraordinary writ, like the petition itself, must be verified. (Code Civ. Proc., § 1089; Cal. Rules of Court, rule 8.487(b)(1).) However, no verification is required where an answering defendant is the state, any public agency, or any officer of the state in his or her official capacity, is defendant. (Code Civ. Proc., § 446; § 1109 [most civil pleading rules applicable to writ proceedings].) The return was filed on behalf of the Governor, another state officer, and a state department. Each of the answering defendants was thus entitled to file an unverified answer. And despite the absence of verification, that pleading is sufficient to establish the truth of its uncontroverted allegations under the rule cited above. [2]

(*Id.*, at p. 1409.)

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[1] Petitioners incorrectly infer that because the recitation to *Hall* is from a footnote, its holding is somehow less authoritative. "A footnote is as important a part of an opinion as the matter contained in the body of the opinion and has like binding force and effect." (*People v. Jackson* (1979) 95 Cal.App.3d 397, 402.)

[2] The *Epstein* court disagreed with *Trask* to the extent it could be construed as holding that a public agency's unverified answer could not constitute evidence but rather require a rebuttal of the petitioner's allegations presented by way of declaration or at a hearing. (*Id.* at p. 1409, fn. 1.)

These cases considered the provisions of Code of Civil Procedure section 446 and section 1089 and concluded that, pursuant to section 446, a public agency or official need not verify an answer to a verified petition. Nevertheless, Petitioners assert, without recitation to any authority, that the provisions of section 1089 should apply over section 446. However, the *Crowl* court specifically rejected this argument:

> "Citing Code of Civil Procedure section 1089, which provides generally that the return to a petition for writ of mandate must be made by demurrer, verified answer, or both, [Petitioner] contends the [Public entity's] failure to verify its answer to his petition requires us to accept all the allegations of the petition as true. However, in a writ proceeding, as in a civil action, the answer filed by a [ ] public entity need not be verified."

(*Crowl*, *supra,* 225 Cal.App.3d at p. 342.)

People v. Superior Court (Alvarado), (1989) 207 Cal.App.3d 464, is inapposite and does nothing to contradict these authorities. First, the *People v. Superior Court (Alvarado)* court held only that a petition for writ of mandate to be used as evidence of the facts stated therein generally requires verification. It did not address whether a verification is required of an answer not used as evidence.[3] (*Id.* at pp. 469-470.) The *Hall* court distinguished *People v. Superior Court (Alvarado)* for that reason. (*Hall, supra,* 133 Cal.App.4th at p. 914, fn 9.)

Second, the *People v. Superior Court (Alvarado)* court incorrectly relied on *Municipal Court v. Superior Court*, (1988) 199 Cal.App.3d 19, for the prospect that a verification by a government entity or official is required. The *Municipal Court* court's discussion in this regard is dicta as that case did not involve an unverified petition or answer.[4] (*Id.* at p. 25, fn 1.)

Third, the *People v. Superior Court (Alvarado)* court misstates that the Witkin authority it relied on applies to a public entity or officers. The Witkin authority cited does not address this issue nor does the case on which the Witkin authority is based. The *People v. Superior*

[3] Respondents' answer is not submitted as evidence. It is anticipated that there will be briefing and evidence presented in support of and opposition to the petition at the hearing on this matter to be set by the court at the TSC on November 30, 2021.

[4] The court should similarly ignore as dicta Petitioners' recitation and discussion of *Alfaro v. Superior Court of Marin County,* (2020) 58 Cal.App.5th 371, 382, fn.8 and *Ashmus v. Superior Court,* (2019) 42 Cal.App.5th 1120, 1124, fn. 4.

Court (Alvarado) opinion did not include this citation.[5] (*People v. Superior Court (Alvarado)*, *supra,* 207 Cal.App.3d at p. 470.) The case cited by Witkin is *Star Motor Imports v. Superior Court* (1979) 88 Cal.App.3d 201. However, *Star Motor Imports* did not address the rule that a public agency or official need not verify its answer to a verified petition. (*Id.* at pp. 203-204 [rejecting a verification on information and belief by counsel for a *private* party petitioner].) Thus, to the extent that *People v. Superior Court (Alvarado)* can be construed as inconsistent with or contrary to *Hall, Trask, Epstein* and *Crowl*, it should be disregarded.

II

Respondents Have Sufficiently Pled Each Affirmative Defense to Put Petitioners on Notice of the Defense Alleged

"Whatever defenses and objections are raised by defendant in the answer are deemed controverted by plaintiff (CCP § 431.20(b)), though plaintiff may demur to the answer (but this is rarely done)." (*Weil & Brown,* Cal. Practice Guide: Civ. Pro. Before Trial (The Rutter Group 2021) § 6:476.) An affirmative defense only need comply with general notice pleading requirements and must be liberally construed. (*Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1483, fn. 3.)

There are important differences between a demurrer to a complaint and a demurrer to an answer. (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 733.) "The determination of the sufficiency of the answer requires an examination of the complaint because its adequacy is with reference to the complaint it purports to answer." (*Id.*) In other words, the sufficiency of allegations in an affirmative defense should be read together with the allegations in the complaint.

"Another rule, particularly applicable to the case of a demurrer to the answer, is that each

[5] The actual quote states: "A verification on information and belief is insufficient. C.C.P. 446, permitting that verification palpably refers to pleadings that join issues, such as the common complaint and answer of a lawsuit. Where the paper is to be used as evidence of the facts stated—as is often the case in a petition for mandamus (see C.C.P. 1086)—the verification must be positive, i.e., it must state that the matters set forth are true of the petitioner's own knowledge." (8 Witkin, Cal. Procedure (5th ed. 2020) Extraordinary Writs, § 172; citing *Star Motor Imports v. Superior Court* (1979) 88 C.A.3d 201, 204, 205.)

so-called defense must be considered separately without regard to any other defense. Accordingly, a separately stated defense or counterclaim which is sufficient in form and substance when viewed in isolation does not become insufficient when, upon looking at the answer as a whole, that defense or counterclaim appears inconsistent with or repugnant to other parts of the answer. Therefore, if one of the defenses or counterclaims is free from the objections urged by demurrer, then a demurrer to the entire answer must be overruled." (*Id.* at pp. 733-734.)

"The primary function of a pleading is to give the other party notice so that it may prepare its case and a defect in a pleading that otherwise properly notifies a party cannot be said to affect substantial rights." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 240.) No error or defect in a pleading is to be regarded unless it affects substantial rights. (*Id.* [Affirmative defense in answer was sufficient to put plaintiff on notice of the defense].) Citation to a statute in an affirmative defense is sufficient to put a plaintiff on notice of a defense. (*Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1805-1806 [disapproved on other grounds in *Quigley v Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 815, fn. 8].)

Here, liberally construing the affirmative defenses, read together with the allegations of the Second Amended Complaint, Respondents have sufficiently pled each affirmative defense to put Petitioners on notice of the defense alleged. First, based on *Hata*, the affirmative defenses that reference a statute as a basis for the defense provide sufficient notice of the defense alleged.

Second, many of the affirmative defenses include specific reference to well-known legal doctrines that do not need reference to a statute or case citation to provide notice of the defense. See e.g. affirmative defenses 12 (estoppel), 40 (failure to exhaust administrative remedies) and 52 (absolute and qualified immunity).

Moreover, Petitioners cannot claim to lack notice of defenses previously addressed in the demurrers to the complaints in this action. See e.g. affirmative defenses 4 (standing), 9 (ripeness), 16-18 (no duty) and 32 (no present and actual controversy). Respondents also would logically have notice of the res judicata and collateral estoppel affirmative defenses (6-7) as they must know of related cases they have filed that could have preclusive effect in this action.

The court should reject Petitioners' argument that affirmative defenses that may relate to the stayed damages causes of action are irrelevant at this stage of the action. Paragraph 185 of the Second Amended Complaint, the opening paragraph of the Eighth Cause of Action, realleges and incorporates by reference all of the 184 paragraphs that precede which include all damages causes of action, except the Ninth Cause, and the allegations that apply to all causes of action set forth in paragraphs 1-114 of the SAC. The opening paragraphs of the First and Second Causes of Action (115 and 121) also reallege and incorporate by reference the allegations that apply to all causes of action set forth in paragraphs 1-114. Since Petitioners have realleged and incorporated by reference damages allegations into the First, Second and Eighth Causes of Action, inclusion of affirmative defenses that may relate to the stayed damages causes of action is appropriate.

Furthermore, Petitioners' argument that some affirmative defenses may duplicate others should be rejected. As discussed above, each affirmative defense must be considered separately without regard to any other defense. (*South Shore Land, supra,* 226 Cal.App.2d at pp. 733-734.)

In addition, Petitioners assert, citing California Rule of Court 2.112, that some affirmative defenses are not "separately stated" by combining multiple defenses into one. However, Rule 2.112 requires only that a separately stated defense must include (1) its number, (2) nature, (3) the parties asserting it and (4) the parties to whom it is directed. There is nothing in Rule 2.112 that precludes inclusion of more than one related legal concept in a single affirmative defense and Petitioners do not cite any case supporting their argument. In *Hata*, the court accepted one affirmative defense that included reference to 13 liability and immunity code sections. (*Hata, supra,* 31 Cal.App.4th at pp. 1804-1805.)

Finally, it should be noted that *Quigley* changed the landscape in terms of a public entity or employee asserting affirmative defenses by holding that immunity-related affirmative defenses may be waived if not set forth in an answer. (*Quigley, supra,* 7 Cal.5th at pp. 802-803, 808-816 [rejecting longstanding rule that such affirmative defenses could be raised at any time].) The practical effect of *Quigley* is that public entity and official defendants must include every potential affirmative defense in an answer or risk waiving them. Thus, it is reasonable for Respondents to include every affirmative defense that may apply in this case.

III

Conclusion

For the reasons set forth above, Respondents respectfully request that the court overrule the demurrer and motion to strike in their entirety. If the court is inclined to sustain the demurrer, Respondents request leave to amend as they can certainly amend to add additional factual details, legal discussion of authorities and/or a more particularized reference to allegations in the Second Amended Complaint if the court deems it necessary. "Ordinarily, courts should 'exercise liberality' in permitting amendments at any stage of the proceeding. In particular, liberality should be displayed in allowing amendments to answers, for a defendant denied leave to amend is permanently deprived of a defense." (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1159 (citations omitted).) If the Court finds that a verification to the answer is required, this is also curable by amendment. (*United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 915.)

Dated: September 30, 2021

Respectfully Submitted,

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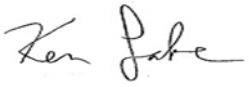

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DECLARATION OF SERVICE BY ELECTRONIC MAIL

RE: ***Franklin Armory, Inc., v. California Department of Justice.***
Case No. 20STCP01747

I declare: I am employed in the City of Los Angeles, County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 300 South Spring Street, Room 1700, Los Angeles, California 90013. On September 30, 2021, I served the documents named below on the parties in this action as follows:

OPPOSITION TO DEMURRER AND MOTION TO STRIKE ANSWER TO THE FIRST, SECOND, AND EIGHTH CAUSES OF ACTION TO THE SECOND AMENDED COMPLAINT

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(BY MAIL) I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Los Angeles, California. I am readily familiar with the practice of the Office of the Attorney General for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

(BY OVERNIGHT DELIVERY) I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery with the GOLDEN STATE OVERNIGHT courier service.

(BY FACSIMILE) I caused to be transmitted the documents(s) described herein via fax number.

X (BY ELECTRONIC MAIL) I caused to be transmitted the documents(s) described herein via electronic mail to the email address(es) listed above.

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

(FEDERAL) I declare under penalty of perjury under the laws of the State of California and the United Stated of America that the above is true and correct.

Executed on September 30, 2021, at Los Angeles, California.

Sandra Dominguez
Declarant

/s/ Sandra Dominguez
Signature