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

~~Tentative~~ decision on (1) demurrer: overruled for verification, sustained as to affirmative defenses; (2) motion to strike: denied as moot except tc 43rd affirmative defense, which is granted

Petitioners Franklin Armory, Inc. ("FAI") and California Rifle & Pistol Association, Incorporated ("Association") demur and move to strike portions of the Answer filed by Respondents California Department of Justice ("DOJ") and Robert A. Bonta, in his capacity as Attorney General.

The court has read and considered the moving papers, opposition, 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 Second Amended Complaint ("SAC") filed on February 17, 2021 and 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 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.[1]

2. Course of Proceedings

On February 25, 2021, the court sustained with leave to amend Respondents' demurrer to the First Amended Complaint ("FAC"). Subsequently, on June 3, 2021, the court overruled Respondents' demurrer to the SAC's first, second, and eight causes of action.

Respondents were directed to file an answer within 20 days. On June 23, 2021, Respondents filed an Answer to the first, second, and eight causes of action of the SAC. The

[1] The third through seventh causes of action seek damages and have been stayed.

Answer contains 53 affirmative defenses.

B. Applicable Law

1. Demurrers

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 defendant's answer must plead ultimate facts rather than evidentiary detail in the same manner as required for the plaintiff's complaint. *See* FPI Development. Inc. v. Nakashima, (1991) 213 Cal.App.3d 367, 384. The answer may plead inconsistent defenses. Weil & Brown, California Practice Guide: Civil Procedure Before Trial, (Rutter Group 2002), 6:645, 6-96. However, the various affirmative defenses must be separately stated and must refer to the causes of action to which they relate "in a manner by which they may be intelligently distinguished." CCP §431.30(g).

Where an answer is defective, a plaintiff 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. A plaintiff may demur to an answer on any of the following three grounds: (a) the answer fails to state facts sufficient to constitute a defense; (b) the answer is uncertain; and (c) where the answer pleads a contract, it cannot be ascertained whether the contract is oral or written. CCP §430.20. The demurrer may be taken to the entire answer or to one or more of the defenses in the answer. CCP §430.50(b). Unless made within 10 days after service of the answer, the demurrer is waived. CCP §430.40(b).

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 §430.41(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 §430.41(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 §430.41(a)(3).

2. Motions to Strike

Any party, within the time allowed to respond to a pleading, may serve and file a notice of motion to strike the whole or any part thereof. CCP §435(b)(1). The notice of motion to strike shall be given within the time allowed to plead, and if a demurrer is interposed, concurrently therewith, and shall be noticed for hearing and heard at the same time as the demurrer. CRC

3.1322(b). The notice of motion to strike a portion of a pleading shall quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count or defense. CRC 3.1322(a).

The grounds for a motion to strike shall appear on the face of the challenged pleading or form any matter of which the court is required to take judicial notice. CCP §437(a). Matter to be judicially noticed shall be specified in the notice of motion. CCP §437(b). The court then may strike out any irrelevant, false, or improper matter inserted in any pleading and strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. CCP §436. When the defect which justifies striking a complaint is capable of cure, the court should allow leave to amend. Perlman v. Municipal Court, (1979) 99 Cal. App. 3d 568, 575.

C. Analysis

Petitioners move to strike the Answer because it is not verified as required by CCP section 1089. Petitioners also demur to Affirmative Defenses 3–42 and 44-53 because they do not state facts sufficient to constitute a defense and are uncertain.[2]

Petitioners have complied with the meet and confer requirements of CCP section 430.41(a). Barvin Decl., ¶¶ 4-12.

1. Unverified Answer

Petitioners argue that the State's unverified Answer should be stricken because it was not verified as required by CCP section 1089, which permits a respondent to make a return by "demurrer, verified answer or both." Any responsive pleading in a mandamus proceeding that is not a demurrer must be verified or else may be stricken. Universal City Studios, Inc. v. Superior Court , (2003) 110 Cal.App.4th 1273, 1287 (unverified return to appellate court's order to show cause was stricken for purposes of mandamus merits but not for motion to seal).

Petitioners rely on People v. Superior Court, ("Alvarado"), (1989) 207 Cal.App.3d 464, 470, as holding that verification in mandate proceedings is required without exception by CCP sections 1086 and 1089.

In Alvarado, the prosecution sought mandamus in the appellate court to compel the superior court to accept an amendment of a criminal complaint. Id. at 467. Alvarado contended that the People's mandamus petition was not verified as required by CCP section 1086. Id. at 469.

The Alvarado court noted that the appellate court in Verzi v. Superior Court, ("Verzi") (1986) 183 Cal.App.3d 382, 385, relied on CCP section 446 to conclude that public agencies and their officers are exempt from verifying a return to an appellate alternate writ. Id. Conversely, the court in Municipal Court v. Superior Court, ("Sinclair"), (1988) 199 Cal.App.3d 19, 25, n.1 concluded that CCP section 446 did not control. Sinclair noted that, while CCP section 446, contained in Part 2 of the CCP, provides that "pleadings" of pubic entities need not be verified, CCP section 1109, contained in Part 3 of the CCP, states that the provisions of Part 2 apply to mandamus proceedings "[e]xcept as otherwise provided in this title" (Title 1 concerning writs of review, mandate, and prohibition). CCP sections 1086 and 1089 are contained in Title 1 of Part 3

[2] Petitioners should have filed the demurrer and motion to strike separately. Respondents do not object to their joint presentation.

and require verification of mandamus without exception. Id. at 470. In contrast, CCP section 446 relieves public officers of verification for pleadings that join issues, meaning complaints and answers. Id. Where the paper is to be used as evidence – as is often true for a mandamus petition – it must be verified. Id. (citing Witkin). The Alvarado court concluded that this crucial difference made Sinclair more persuasive authority than Alvarado and that the People's mandamus petition must be verified. Id.

Petitioners acknowledge that Hall v. Superior Court, (2005) 133 Cal.App.4th 908, suggests otherwise. In Hall, the court observed in a footnote that government defendants need not verify their answers in writ proceedings where it is used merely to join the issues raised by the petition, citing Verzi, *supra,* 183 Cal.App.3d at 385, Lertora v. Riley, (1936) 6 Cal.2d 171, 176, and Crowl v. Commission on Professional Competence, (1990) 225 Cal.App.3d 334, 342. 133 Cal.App.4th at 914, n. 9. Petitioners criticize all three of these cases as relying on CCP section 446 without considering CCP section 1089's language that a verified answer is required. Mot. at 8-9.

Petitioners contend that Hall therefore is "based on a precedential house of cards" which caused the First Appellate District recently to acknowledge that the question is not settled. in Alfaro v. Superior Court, ("Alfaro") (2020) 58 Cal.App.5th 371, 382, n. 8. The Alfaro court did not decide the issue and instead treated the unverified return as a demurrer which admits the facts pleaded in the writ petition. Id. *See also* Ashmus v. Superior Court, ("Ashmus") (2019) 42 Cal.App.5th 1120, 1124, n. 4 (return to appellate OSC was unverified legal brief which, to avoid the catastrophic consequence of striking, the court considered as a demurrer which admits the facts pleaded in the writ petition).

The State responds that Hall is the most recent pronouncement that verification by a public entity or official is not required, doing so in 2005. Trask v. Superior Court, ("Trask") (1994) 22 Cal.App.4th 346, 350, n. 3, also did so, stating that an agency may file an unverified answer and then rebut the petitioner's allegations with evidence at hearing. Finally, Epstein v. Superior Court, ("Epstein") (2011) 193 Cal.App.4th 1405, held that, while ordinarily an answer to a mandamus petition, like the petition itself, must be verified under CCP section 1089, no verification is required where the answering defendant is a public agency or officer, citing CCP section 446 and 1109. Id. at 1409.[3] Opp. at 2.

The State distinguishes Alvarado as a case requiring that a mandamus petition (not an answer) which is to be used as evidence must be verified, it relied on dictum from another case, Municipal court v. Superior Court, (1988) 199 Cal.App.3d 19, and misstated the Witkin authority on which it relied. Opp. at 3-4. Petitioners reply to these arguments in detail. Reply at 5-7.

The parties' dispute is much ado about nothing. The battle in the appellate cases cited by Petitioners primarily concerns whether an unverified return can be used as evidence. As Epstein explained, a mandamus return in the appellate court is the evidence on which the respondent relies and which the petitioner must controvert in reply. There is no evidentiary hearing, only an oral argument. 193 Cal.App.4th at 1409, n. 1. This was the situation in both Ashmus and Alfaro. Mandamus in a trial court involves the presentation of evidence at a trial wholly separate and apart from the petition and answer. Thus, whether the answer is verified at the trial level is not significant.

[3] The Epstein court distinguished the use of an answer as evidence in the appellate court from the evidence at trial required by Trask in a trial court. 193 Cal.App.4th at 1409, n. 1.

As the parties demonstrate, the court can choose which appellate authority to follow. While Petitioners contend that their legal analysis is best, the court will rely on practicality. There is no reason to compel a public agency to find the appropriate official to verify an answer that the agency is not going to rely upon as evidence at trial. This is the reasoning behind CCP section 446 and is the rationale supporting Trask and Epstein. The State need not file a verified answer.

2. Affirmative Defenses

a. Demurrer

As stated *ante,* a defendant's answer must plead ultimate facts rather than evidentiary detail in the same manner as required for the plaintiff's complaint. *See* FPI Development, Inc. v. Nakashima, *supra,* 213 Cal.App.3d at 384.

Petitioners demur to all of the Answer's 53 affirmative defenses except 1, 2, and 43, on the grounds that they fail to plead sufficient facts and offer only legal conclusions. Mot. at 11-12.

The State weakly responds that an affirmative defense need only provide general notice and must be liberally construed. It also requires examination of the compliant because its adequacy is with reference to the complaint's allegations. Many of the affirmative defenses, read together with the SAC's allegations, refer to well-known legal doctrines that do not need reference to a case or statute. Opp. at 4-5.

Petitioners correctly reply that principles of liberal construction, notice pleading, and well-known legal doctrines do not save the State's boilerplate defenses. The defenses must plead ultimate facts in the same manner as Petitioners' claims in the SAC. As Petitioners argue, the "State's failure to give even the most basic factual...support for most of its defenses makes it nearly impossible for Petitioners to guess" what the grounds are. Reply at 10.

b. Motion to Strike

Petitioners move to strike each of the defenses to which they demur, as well as the 43rd affirmative defense to which they did not demur. The basis of the motion to strike is that the defenses are irrelevant or improper. Mot. at 13-19.

The motion to strike is moot as to those affirmative defenses to which the demurrer has been sustained. This leaves only the Forty Third Affirmative Defense, which alleges that the Respondents have not deprived any person of any right, privilege or immunity guaranteed by the California Constitution. Petitioners explain that this defense is irrelevant because they have never claimed any violation of the California Constitution. Mot. at 15.

D. Conclusion

The demurrer for failure to verify the Answer is overruled. The demurrer to the affirmative defenses is sustained. The motion to strike is moot as to all but the 43rd affirmative defense, to which it is granted. The State has 15 days leave to amend its Answer's affirmative defenses.