

**JAN 27 2022**

Sherri R. Carter, Executive Officer/Clerk of Court  
By: J. De Luna, Deputy

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

Tentative decision on motion to dismiss  
granted

Respondents California Department of Justice (“DOJ”) and Robert A. Bonta, in his capacity as Attorney General moves to dismiss the first, second, and eight cause of action in the Second Amended Complaint of Petitioners Franklin Armory, Inc. (“FAI”) and California Rifle & Pistol Association, Incorporated (“Association”) as moot.

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

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<sup>1</sup> Respondents failed to lodge a courtesy copy of Respondents’ reply brief in violation of the Presiding Judge’s First Amended General Order Re: Mandatory Electronic Filing. Respondents’ counsel is admonished to provide courtesy copies in all future cases.

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DOJ 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. Yet, DOJ has refused to modify the DES. Respondents have neither corrected the DES nor 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"). Subsequently, on June 3, 2021, the court overruled Respondents' demurrer to the SAC's first, second, and eight causes of action. The court has stayed the SAC's remaining claims. Respondents were directed to file an answer to the first, second, and

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

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eight causes of action within 20 days.

On June 23, 2021, Respondents filed an Answer to the SAC's first, second, and eighth causes of action. The Answer contains 53 affirmative defenses. On October 26, 2021, the court sustained Petitioners' demurrer to the affirmative defenses. The court denied motion to strike was moot as to all but the 43rd affirmative defense, which was granted. The court directed Respondents to amend the Answer's affirmative defenses in 15 days.<sup>3</sup>

On November 23, 2021, the parties stipulated to, and the court granted, a 90-day continuance of the discovery deadline until March 1, 2022.

### **B. Applicable Law**

While there is no statutory basis for a motion to dismiss, such motions serve the same function as a general demurrer and may be filed at any time where the question is whether a complaint states a cause of action. Barragan v. Banco BCH, (1986) 188 Cal.App.3d 283, 299.

Additionally, CCP section 1094 authorizes a respondent to bring a noticed motion for a judgment denying a writ petition. Specifically, section 1094 provides that if a "petition for a writ of mandate ... presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ." "[T]he motion for judgment provided by CCP section 1094 is the proper, and exclusive, procedural means for seeking a streamlined review of an agency's decision." Dunn v. County of Santa Barbara, (2006) 135 Cal.App.4th 1281, 1293.

### **C. Statement of Facts**

#### **1. Respondents' Evidence**<sup>4</sup>

The DES is a public-facing web application which firearms dealers use to transmit information to the DOJ's Bureau of Firearms ("BOF") to perform background checks on firearms transactions. Leyva Decl., ¶3; Massaro-Florez Decl., ¶3.

The background check is known as the Basic Firearms Eligibility Check. Massaro-Florez Decl., ¶3. Dealers enter information into the DES through a Dealer Record of Sale ("DROS") form, which asks for information about the prospective purchaser or transferee, the firearm, and the firearms dealer. Massaro-Florez Decl., ¶3. The information is routed to the DES database and is then pulled from that database into an internal database system known as the Consolidated Firearms Information System ("CFIS"). Massaro-Florez Decl., ¶3. CFIS coordinates the electronic portion of the Basic Firearms Eligibility Check by sending inquiries to other electronic databases and compiling the responses through the DROS application. Massaro-Florez Decl., ¶3.

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<sup>3</sup> In the parties' joint stipulation filed on November 23, 2021, parties indicated that Respondents filed their Amended Answer to the SAC on November 16, 2021. There is no Amended Answer on file.

<sup>4</sup> Respondents requests judicial notice of the following documents: (1) the court's January 28, 2021 Decision on Demurrer (Ex. 1); (2) Petitioners' Memorandum of Points and Authorities in Opposition to Respondents' Demurrer filed May 20, 2021 (Ex. 2); and (3) Joint Stipulation and Order Continuing Trial Setting Conference and Discovery Cut-Off filed November 23, 2021 (Ex. 3). There is no need to judicially notice these documents; a judge can always review documents in the court file.

The DROS application utilizes a middleware program known as the Consolidated Firearms Interface Gateway (“CFIG”). Massaro-Florez Decl., ¶3.

Background checks focus not only on the prospective purchaser but also on the firearm. Massaro-Florez Decl., ¶4. For example, the DROS application queries a DOJ database known as the Automated Firearms System to check if the firearm was reported as lost or stolen. Massaro-Florez Decl., ¶4. As another example, the DROS application queries the CFIS database to determine if the applicant is applying to purchase more than one handgun or semiautomatic centerfire rifle in any 30-day period. Massaro-Florez Decl., ¶4. As a third example, where the applicant is younger than 21 years old, the DROS application checks to see that the firearms dealer has submitted information supporting an exemption to the age requirement. Massaro-Florez Decl., ¶4.

Once the Basic Firearms Eligibility Check is completed and the firearm transaction is approved, information is routed from the DES database to several applications and databases maintained by the DOJ that track firearms and firearm transactions, including the Automated Firearms System (“AFS”) and the Armed and Prohibited Persons System (“APPS”). Massaro-Florez Decl., ¶5. The AFS is a repository of firearm information which can be queried by law enforcement to determine who might own a given firearm or what firearms a given person might have. Massaro-Florez Decl., ¶5. APPS is a database that cross-references persons with firearms records in the AFS, typically a DROS record, with those who have a criminal conviction or other circumstance that prohibit them from possessing firearms. Massaro-Florez Decl., ¶5

The Firearms Software Development Unit undertook a project to modify the DES application and various DOJ applications and databases. Massaro-Florez Decl., ¶2. The purpose of the project was to include an “Other” option in the “Gun Type” field of the DES application. Massaro-Florez Decl., ¶6. Prior to the project, when a DES user selected “Long Gun Transactions” and selected “No” for “Receiver Only,” the user had to select one of three options in the “gun type” field: Rifle, Shotgun, and Rifle/Shotgun. Leyva Decl., ¶4; Massaro-Florez Decl., ¶6.

As a result of the project, when a DES user selects Long Gun Transactions and selects No for Receiver Only, then the user must select one of four options available in the Gun Type field: Rifle, Shotgun, Rifle/Shotgun Combination, and Other. Leyva Decl., ¶4; Massaro-Florez Decl., ¶6. The modifications were deployed on October 1, 2021. Leyva Decl., ¶4; Massaro-Florez Decl., ¶¶ 2, 6.

**a. Modifications to DES and Other Processes**

Since data flows from the DES database to other databases, the project involved modifications to the coding of DES and several other applications and databases. Massaro-Florez Decl., ¶7.

To add the Other option in the DES Gun Type menu, DES was enhanced to add the Other category for four transaction types – sale, buy, consignment, and pawn. Massaro-Florez Decl., ¶8.

In addition, coding was needed to instruct the system to trigger the Basic Firearms Eligibility Check process for a DROS of a long gun with the Gun Type of Other. Massaro-Florez Decl., ¶8. Coding was also needed to modify the DES process run which checks information submitted in the firearm transaction application, such as the length of the firearm, to confirm it is consistent with the category selected for the firearm. Massaro-Florez Decl., ¶8.

CFIG, the middleware program used to import and manage data in the AFS, had to be

modified to be capable of identifying a firearm as having a Gun Type of Other, and it also had to be modified to allow searches for records of firearms with a Gun Type of Other. Massaro-Florez Decl., ¶9.

CFIG also runs the process that checks if the firearm was reported stolen or lost. Massaro-Florez Decl., ¶10. This process needed to be modified to check for firearms with a gun type of "Other." Massaro-Florez Decl., ¶10.

CFIG also runs the process which checks the CFIS database to determine if the applicant is applying to purchase more than one handgun or semiautomatic centerfire rifle in any 30-day period. Massaro-Florez Decl., ¶11. This required enhancement to account for those cases where either the subject of the application at issue or a prior application was a firearm with a Gun Type of Other. Massaro-Florez Decl., ¶11.

CFIG also runs the process which checks the CFIS database to determine whether, for an applicant who is younger than 21-years old, the firearms dealer has submitted information supporting an exemption to the age requirement. Massaro-Florez Decl., ¶12. This process had to be enhanced to account for a case where the application was for a firearm with a Gun Type of Other. Massaro-Florez Decl., ¶12.

APPS also required modification to enhance the matching logic used to associate and disassociate firearms from individuals to account for those cases where the firearm is identified as having a Gun Type of Other. Massaro-Florez Decl., ¶13.

Since firearms could be categorized as Other in AFS, an electronic form that citizens can use to retrieve firearms held by a law enforcement agency needed to be modified to account for the possibility that the firearm was identified as an Other. Massaro-Florez Decl., ¶14. This electronic form is known as the Law Enforcement Gun Release and can be accessed through a public website known as the California Firearms Application Reporting System. Massaro-Florez Decl., ¶14.

For every individual who has obtained a firearm based on an application submitted through the DES, there is a Person Information record in the Automated Firearms System. Massaro-Florez Decl., ¶15. This Person Information record is created automatically, but an individual can modify some information in their Person Information record through the California Firearms Application Reporting System website by submitting an electronic form known as a Person Information Update. Massaro-Florez Decl., ¶15. The electronic Person Information Update form requires the individual to identify a firearm that is associated with them. Massaro-Florez Decl., ¶15. Thus, the electronic Person Information Update form required modification to accept a firearm categorized as having a Gun Type of Other. Massaro-Florez Decl., ¶15.

The California Firearms Application Reporting System website runs a process which checks the AFS database to confirm that information associated with a firearm, such as the length of the firearm, is consistent with the category selected for the firearm. Massaro-Florez Decl., ¶16. This process had to be enhanced to account for the case where the application was for a firearm with a Gun Type of Other. Massaro-Florez Decl., ¶16.

The CFG also runs a process which checks the AFS database for firearms that are assault weapons under California law. Massaro-Florez Decl., ¶17. This process had to be enhanced to account for the case where the application was for a firearm with a Gun Type of Other. Massaro-Florez Decl., ¶17.

**b. Bulletins Posted Regarding Modifications**

On September 27, 2021, the DOJ notified firearms dealers in a bulletin titled “Important Notice Regarding “Other” Firearms” (“Bulletin”), of the addition of the Other option in the Gun Type field. Leyva Decl., ¶¶ 5-6; Ex. A. The Bulletin reminded firearms dealers that some firearms that could be considered to fall into the Other category nevertheless fit within the definition of an assault weapon in Penal Code section 30515(a)(9), (10), and (11). Leyva Decl., ¶¶ 5, 7, Ex. A. The relevant Penal Code section and paragraphs were quoted in full. Leyva Decl., ¶¶ 5, 8, Ex. A.

Transactions involving firearms classified as assault weapons under Penal Code section 30515(a) and other sections of the Penal Code cannot legally be processed through the DES. Leyva Decl., ¶¶ 5, 7; Ex. A. Although transactions for such firearms cannot be legally processed through the DES, if an individual possessed the firearm prior to September 1, 2020 and satisfies the eligibility criteria set forth in Penal Code section 30950, he or she could keep the firearm if they registered it with DOJ before January 1, 2022. Leyva Decl., ¶¶ 5, 7; Ex. A.

The Bulletin notified firearms dealers that this registration process would take place between 9:00 a.m. on October 1, 2021, through 11:59 p.m. on December 31, 2021. Leyva Decl., ¶¶ 5, 7, Ex. A. The Bulletin referenced Penal Code section 30900 to inform dealers that there was a separate registration process for Other assault weapons so that they would not mistakenly attempt to register an assault weapon through the DES. Leyva Decl., ¶¶ 5, 7, Ex. A.

Penal Code section 30515(a)(9), (10), and (11) apply to a semiautomatic centerfire firearm that is not a rifle, pistol, or shotgun, that has specified features. Leyva Decl., ¶8. The feature in paragraph (10) is that the firearm has a fixed magazine with the capacity to accept more than 10 rounds. Leyva Decl., ¶8. The feature in paragraph (11) is that the firearm has an overall length of less than 30 inches. Leyva Decl., ¶8. To highlight these two paragraphs, the Bulletin included the following note:

Note: Prior to the sale, loan, or transfer of an ‘Other’ type firearm you must confirm:

1. That it has a fixed magazine that accepts 10 rounds or fewer.
2. That it has an overall length of 30 inches or more. Leyva Decl., ¶8.

Unfortunately, this language was imprecise because it inadvertently failed to specify that these limitations only apply to semiautomatic centerfire firearms. Leyva Decl., ¶8. When this omission was brought to the BOF’s attention, it issued a revised Bulletin on September 30, 2021 (“Amended Bulletin”). Leyva Decl., ¶9, Ex. B. The Amended Bulletin was titled “IMPORTANT NOTICE Regarding the Sale of ‘Other’ Firearms”, and specified that it superseded the Bulletin posted on September 27, 2021. Leyva Decl., ¶9; Ex. B. The revised Bulletin corrected the imprecision of the Bulletin by clarifying that an Other firearm could fit the definition of an assault weapon under Penal Code section 30515(a), paragraphs (9), (10), and (11), only if it was centerfire firearm. Leyva Decl., ¶9; Ex. B. Specifically, in place of the imprecise note from the original Bulletin, the revised Bulletin included the following:

“Note: Prior to the sale, loan, or transfer of a centerfire ‘Other’ type firearm, you must confirm the ‘Other’ does not meet the criteria of an ‘Other’ Assault Weapon pursuant to Penal Code 30515.” Leyva Decl., ¶9; Ex. B.

As with the Bulletin, the revised Bulletin quoted Penal Code section 30515(a)(9), (10), and (11). Levya Decl., ¶9; Ex. B. The intent of the revised Bulletin was the same as the Bulletin. Levya Decl., ¶9; Ex. B.

## **2. Petitioners' Evidence**

On September 15, 2021, Deputy Attorney General (“DAG”) Alexis Diamond (“Diamond”) emailed Anna M. Barvir, Esq. (“Barvir”), counsel of record for Petitioners, to inform her that the DOJ had been working on a modification of the DES to add an Other option to the Gun Type menu for long guns. Barvir Decl., ¶¶ 1-2; Ex. 1. The email provided no further details about what the anticipated DES modification would look like or when it would be available for use by DES users. Barvir Decl., ¶2; Ex. 1. Diamond declared that the SAP’s unstayed causes of action were now moot and requested that the parties meet and confer to prepare a stipulation to dismiss these causes of action and proceed to the damages causes of action. Barvir Decl., ¶2; Ex. 1.

On September 21, 2021, parties counsel met via videoconference to discuss the anticipated changes to the DES, their effect on the unstayed claims, and whether voluntary dismissal was then appropriate. Barvir Decl., ¶3. These discussions were limited because Petitioners’ counsel had not received any formal notice about the changes. Barvir Decl., ¶3. Respondents’ counsel refused to tell Petitioners’ counsel any specifics about the anticipated DES modification. Barvir Decl., ¶3. Without the benefit of these details, Petitioners could not agree to voluntarily dismiss their claims. In any event, the claims were not yet moot because the changes had not yet taken effect. Barvir Decl., ¶3. The parties agreed to meet and confer about the possibility of dismissal again once concrete details about the DES modifications and the deployment of the Other option were available. Barvir Decl., ¶3.

On September 27, 2021, the DOJ issued the Bulletin which notified firearms dealers/DES users that, effective October 1, 2021, they would have the option to select Other from the list of automatically populated long gun Gun Types. Barvir Decl., ¶4. The bulletin went on to define what constitutes an Other type firearm and to describe the circumstances under which a DES user could and could not legally use the Other option when transferring Other firearms. Barvir Decl., ¶4.

It was immediately clear to Petitioners’ counsel that the anticipated changes to the DES did not have the effect of mooted the first, second, and eighth causes of action. Barvir Decl., ¶5. The Bulletin did not authorize firearms dealers/DES users to select the “Other” option for many, if not all, of the firearms at issue. Barvir Decl., ¶5. Indeed, the Bulletin expressly proscribed the use of the Other option unless the dealer confirmed that the firearm has both (1) a fixed magazine of ten rounds or fewer and (2) an overall length of 30 inches or more. Barvir Decl., ¶5.

Many Other type firearms—defined in the Bulletin as any “firearm that does not meet the definition of a rifle (Pen. Code § 17090), shotgun (Pen. Code § 17190), or pistol (Pen. Code § 16350)” —are perfectly legal to transfer, own, and possess in California even though they do not have a fixed magazine of ten rounds or fewer or an overall length of 30 inches or more, including many firearms at issue in the unstayed claims. Barvir Decl., ¶5.

When counsel for the parties met and conferred again on September 28, 2021, Petitioners’ counsel notified the DOJ’s counsel that the Bulletin advised firearms dealers that the very “Other” firearms at issue in this lawsuit may not be sold, loaned, or transferred in the DES. Barvir Decl., ¶6. Petitioners’ counsel thus declined to enter a stipulation to voluntarily dismiss the pertinent

claims. Barvir Decl., ¶6.

Two days later, on September 29, 2021, the DOJ issued the Amended Bulletin in an apparent attempt to correct the issues with the Bulletin. Barvir Decl., ¶7.

In late fall 2021, the DOJ issued a third bulletin again entitled “IMPORTANT NOTICE Regarding the Sale of ‘Other’ Firearms” (“Second Amended Bulletin”). Barvir Decl., ¶8; Ex. 2. During her deposition, Leyva confirmed that this document superseded both prior bulletins even though the Second Amended Bulletin says that it only supersedes the Bulletin. Barvir Decl., ¶8; Ex. 2. The Second Amended Bulletin also corrected additional errors not directly relevant here. Barvir Decl., ¶8, Ex. 2.

Petitioners’ counsel did not hear from the DOJ about the DES modifications, the Other option, or the mootness issue until about October 29, 2021, when DAG Kenneth G. Lake (“Lake”), counsel of record for the DOJ, requested a meet-and-confer about DOJ’s anticipated motion to dismiss. Barvir ¶9. The parties’ counsel met on November 3, 2021 to discuss the update to the DES and the DOJ’s potential motion to dismiss. Barvir Decl., ¶10. During that conference, Petitioners’ counsel repeatedly stated that Petitioners would voluntarily dismiss the first, second, and eighth causes of action as moot if the DOJ could provide assurance that it would not reinstate its policy of blocking the transfer of lawful undefined firearm subtypes, whether through additional changes to the DES or by issuing new bulletins proscribing the use of the option for certain firearm transfers. Barvir Decl., ¶10.

To that end, Petitioners’ counsel suggested that the parties could enter a stipulated judgment, a consent decree, or a settlement agreement. Barvir Decl., ¶10. The DOJ rejected the first two options, agreeing only to consider a settlement agreement. Barvir Decl., ¶10. Petitioners’ counsel offered to draft proposed language of a settlement for the DOJ’s consideration. Barvir Decl., ¶10. Petitioners’ counsel also agreed to provide some authorities supporting their position that the unstayed claims, even if moot, may still be decided by the court if the dispute involves issues of public interest likely to recur. Barvir Decl., ¶10.

Petitioners’ counsel drafted a proposed settlement agreement and emailed it on November 9, 2021 to DAGs Diamond, Lake, and Supervising DAG Ben Barnouw (“Barnouw”). Barvir Decl., ¶11, Exs. 3, 4. The email also cited caselaw showing that courts may hear moot cases if they present issues of public interest that likely to recur. Barvir Decl., ¶11; Ex. 3.

On November 16, 2021, after receiving no response from the DOJ to the proposed settlement, Petitioners’ counsel emailed Barnouw to confirm that he received the draft and to discuss whether his clients would be amenable to the terms proposed or something similar. Barvir Decl., ¶12. During a November 18, 2021 telephone conference, the parties discussed the proposed settlement, the DOJ’s anticipated motion to dismiss, and pending discovery matters. Barvir Decl., ¶12. While Barnouw asked for some clarification about the proposed terms, the DOJ never substantively responded to the proposed settlement agreement. Barvir Decl., ¶12. Instead, it proceeded with this motion. Barvir Decl., ¶12.

#### **D. Analysis**

Respondents move to dismiss the SAP’s first, second and eighth causes of action on the ground that the DOJ has modified the DES by adding an Other option under the Gun Type menu, rendering the claims moot.

The first cause of action seeks a judicial declaration about the legality of 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.

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.

The eighth cause of action is for declaratory and injunctive relief for Respondents' violation of the APA through an underground regulation that is a *de facto* ban on the transfer of undefined firearm subtypes.

### **1. Mootness**

A case is moot when a court ruling can have no practical impact or provide the parties effectual relief. Downtown Palo Alto Comm. for Fair Assessment v. City Council, (1986) 180 Cal.App.3d 384, 391. A mandamus action is moot where the act sought to be compelled has already been performed. Save Oxnard Shores v. California Coastal Commission, (1986) 179 Cal. App. 3d 140, 149. When a case is moot, dismissal of the action is the proper remedy, rather than engaging in a futile exercise of assessing the case on the merits. Coal. for a Sustainable Future in Yucaipa v. City of Yucaipa, (2011) 198 Cal. App. 4th 939, 945; Wilson v. L.A. County Civ. Serv. Comm'n, (1952) 112 Cal.App.2d 450, 453.

Respondents assert that the first, second, and eighth causes of action are moot because the DES now has an Other option in the Gun Type field. Massaro-Florez Decl., ¶6; Leyva Decl., ¶4. This is precisely the relief sought by Petitioners. See SAC ¶64. The SAC identifies a FAI firearm designated with the model name "Title 1" (a .17 WSM (a rimfire caliber)), and three other categories of firearms (buntline revolvers, butterfly grip firearms, and barreled action firearms) which are alleged not to fit the statutory definition of pistol/handgun, rifle, or shotgun and cannot be sold because of a technological barrier in the DES. SAC ¶¶ 2, 4, 58, 63. The first cause of action seeks declaratory and injunctive relief based on this barrier preventing the sale of certain lawful firearms. SAC ¶¶ 118-19. The second cause of action for mandamus seeks an order commanding Respondents to update the DES so that it does not proscribe the lawful sale, transfer, and loan of these lawful firearms. SAC ¶127. The eighth cause of action contends that DOJ has violated the APA by creating and enforcing an underground regulation prohibiting the sale of these lawful firearms. SAC ¶¶ 186-90. Mot. at 9-11.

Respondents contend that the DOJ has addressed the alleged problem by adopting Petitioners' proposed fix to the DES by creating an Other option for long guns. Mot. at 15; Reply at 3. See SAC ¶64. This fix moots the SAC's claims for declaratory relief, mandamus, and injunctive relief. Mot. at 13-19. Specifically, the mandamus claim is moot because the DOJ has updated the DES so that it does not proscribe the lawful sale, transfer, and loan of an entire class of lawful firearms, and the SAC does not allege that any other aspects of the DES create a barrier to process transactions for the firearms at issue. Mot. at 13-14. The declaratory relief claims are moot both for the same reason and because the DOJ is no longer enforcing the purported underground regulation. Mot. at 17. Injunctive relief – which is not a separate cause of action -- is moot as transactions involving a long gun are now addressed with the inclusion of the Other option. Mot. at 19.

Petitioners do not dispute that the Other option removes the technological barriers alleged.

See Opp. at 10-11. “Although a case may originally present an existing controversy, if before decision it has, through the acts of the parties or other cause, occurring after commencement of the action, lost that essential character, it becomes a moot case or question which will not be considered by the court.” Wilson v. Los Angeles County Civil Service Com., (1952) 112 Cal.App.2d 450, 453.

Despite this law, Petitioners argues that the case remains justiciable because an exception to dismissal for mootness applies. There are three discretionary exceptions to mootness where the case presents (a) an issue of broad public interest that is likely to reoccur, (b) a controversy between the parties that is likely to reoccur, and (c) a material question remaining for the court’s determination. Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga, (“Cucamongans”) (2000) 82 Cal.App.4<sup>th</sup> 479-80. Petitioners argue that this case involves a dispute that is an issue of public interest that is likely to reoccur or at least a controversy between the parties that is likely to reoccur. Mot. at 10-11.

Petitioners argue that the case directly implicates the public’s fundamental interest in protecting and vindicating the Second Amendment right to acquire and possess lawful firearms, and the dispute concerns the interests of thousands of firearm purchasers, dealers, and manufacturers seeking to transfer firearms in California. Courts have long held that litigation enforcing a constitutional right “necessarily affects the public interest”. City of Fresno v. Press Communications, Inc., (1994) 31 Cal.App.4<sup>th</sup> 32, 44. They also have found a broad public interest in cases touching the rights of a large class of persons not a party to the case. See, e.g., Eye Dog Foundation v. State Board of Guide Dogs for the Blind, (1967) 67 Cal.2d 536, 542. Opp. at 11-12.

Petitioners note that Respondents have long known about the alleged deficiency and failed to correct it. Opp. at 7. Once Petitioners filed suit, Respondents took the position that it had no legal duty to modify the DES and filed two demurrers arguing as much. Opp. at 7-8, 16. Respondents only began working to fix the DES after the second demurrer was overruled. Opp. at 16. When Petitioners offered to settle by a dismissal if DOJ would commit not to reinstate its policy of blocking the transfer of lawful undefined firearm subtypes, whether through additional changes to the DES or by issuing new bulletins proscribing the use of the option for certain firearm transfers, Respondents refused to agree. Barvir Decl., ¶10. Respondents’ position suggests that it has no regret about the conduct challenged by Petitioners and may simply reinstate the administrative and technological barriers by removing the Other option or issuing a new bulletin blocking the transfer of undefined firearm types through the DES. Opp. at 13.

Petitioners contend that the issues are likely to recur because DOJ could easily reinstate the challenged administrative and technological barriers. Opp. at 12-13. DOJ could modify the DES again and remove the Other option altogether, issue bulletins redefining the Other option or telling firearm dealers they cannot use the Other option. By issuing the Bulletin, the Amended Bulletin, and the Second Amended Bulletin, Respondents show just how easily they could restrict the lawful transfer of undefined firearm subtypes. Opp. at 13-14. Respondents’ refusal to give any reasonable assurance that it has voluntarily ended the allegedly unlawful practice would permit it to reverse course. Petitioners tried to work with Respondents to come to a settlement agreement, but Respondents have refused and filed the instant motion instead. Opp. at 15.

Petitioners conclude that, even if the matter is not of great public importance, it is an issue that is likely to reoccur between the parties, which by itself is a reason to decide a controversy.

Petitioners again rely on Respondents' demurrers, motion to dismiss, and refusal to settle. Opp. at 17.<sup>5</sup>

Although it is not clear that thousands of persons have an interest in transferring the firearms subject to the Other category, the court accepts that the case implicates the public's interest in protecting Second Amendment rights.

However, Respondents are correct (Mot. at 15, 18-19) that there is no reason to believe that the same controversy is likely to reoccur, whether between Respondents and other persons or between Respondents and Petitioners. There is no evidence that the DOJ will modify the DES or issue future bulletins that improperly limit the use of the Other option or that it has a motive to do so. Respondents point out that any modification involves substantial time and effort because of the interlinking of the various involved databases. *See* Massaro-Florez Decl., ¶¶6-17. The purpose of the Bulletin and then the Amended Bulletin's purpose was to remind firearm dealers that some firearms that could otherwise be considered to fall into the Other category would fit within the definition of an assault weapon as set forth in Penal Code section 30414. *Leyva Decl.*, ¶¶ 8-9, Exs. A-B. When DOJ was alerted that the Bulletin was imprecise, it promptly issued the Amended Bulletin that superseded the Bulletin and removed the imprecise language. *Leyva Decl.*, ¶9; Ex. B. These bulletins do not provide any basis to believe that DOJ will issue bulletins in the future that improperly limit use of the Other option.

Respondents also correctly state (Reply at 8) that their litigating position that they have no mandatory duty to modify the DES does not suggest that DOJ will block lawful transfers of firearms. Similarly, Respondents' failure to accept a proposed settlement agreement is not evidence of an intent to reverse the modifications. There is no requirement in law that a party must enter into a settlement and no basis in fact that Respondents' refusal to do so indicates a nefarious motive.

Petitioners do not show that the controversy is likely to reoccur between Respondents and other parties, including Petitioners.

#### **D. Conclusion**

The motion to dismiss is granted for the SAC's first, second, and eighth causes of action. The case is ordered transferred to Department 1 for assignment of the remaining claims to an I/C court.

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<sup>5</sup> The parties debate whether Petitioners' contentions that future bulletins are within the scope of the SAC. Opp. at 17-18; Reply at 9-10. The court agrees with Petitioners that the SAC's prayer for relief for a declaration that enforcement of the DES design is unlawful and an injunction preventing DOJ from enforcing administrative barriers, includes bulletins about the use of the Other option.