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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CIVIL COMPLEX CENTER

Hon. William D. Claster, Coordination Trial Judge

Coordination Proceeding Special Title (Rule 3.550) GHOST GUNNER FIREARMS CASES Included actions: Cardenas v. Ghost Gunner, Inc. dba GhoseGunner.net, et al. McFadyen, et al. v. Ghost Gunner, Inc. dba GhostGunner.net, et al.	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 5167 **SECOND REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS' DEMURRER TO PLAINTIFFS' COMPLAINTS** Hearing Date: May 6, 2022 Hearing Time: 9:00 a.m. Department: CX104 Reservation No.: 73662202

SECOND REQUEST FOR JUDICIAL NOTICE

Please take notice that, under California Evidence Code Rules 452 and 453, and California Rules of Court, rules 3.1113(l) and 3.1306(c), Defendants through their counsel of record respectfully request that this Court take judicial notice of the following additional document in connection with Defendants' Demurrer to Plaintiffs' complaints in the coordinated Ghost Gunner Firearms Cases, a document which did not exist at the time their demurrer was filed:

1. Ruling on Demurrer in *Yisroel Goldstein, et al. v. John T. Earnest, et al.,* San Diego County Superior Court Case No. 37-2020-00016638-CU-PO-CTL. (March 11, 2022). A true and correct copy is attached as **Exhibit D**. Includes the Attorney General's notice of ruling as well as the tentative ruling which the court adopted as its final ruling.[1]

The Court must take the requested judicial notice if the moving party "(a) [g]ives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and [,] (b) [f]urnishes the court with sufficient information to enable it to take judicial notice of the matter." (Evid. Code, § 453.)

Here, **Exhibit D** is a true and correct copy of a court's ruling in a case currently before the Superior Court of the County of San Diego. As such, it qualifies for judicial notice as a record of a court of this state. (Evid. Code, § 452, subd. (d).) Additionally, in ruling on a demurrer, the court may take judicial notice of the official acts or records of any court in California. (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 314.)

Despite the general rule against presenting new evidence on reply, "whether to accept new evidence with the reply papers is vested in the trial court's sound discretion". (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 241.) "[T]he inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case…and if permitted, the other party should be given the opportunity to respond." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th

[1] Specifically, Defendants seek judicial notice of just page 1 of the actual ruling. The Attorney General's notice of ruling is merely included to confirm that the court adopted the tentative as its final ruling.

1522, 1537-1538, citing *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn. 8.) Defendants believe the scenario presented here, with a highly relevant ruling in a case with similar facts to this one issued *after* Defendants' demurrer was filed, is precisely such an "exceptional case" that allows new evidence on reply. The ruling in *Yisroel Goldstein, et al. v. John T. Earnest, et al* was issued on March 11, 2022, and Defendants had already filed their demurrer on January 24, 2022. Defendants do not oppose Plaintiffs having the chance to respond as to this additional request for judicial notice, although there isn't any doubt that the records of another court of this state are subject to judicial notice.

Dated: April 4, 2022

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EXHIBIT D

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Attorneys for Defendant State of California, by and through California Department of Justice

No Fee Pursuant to Government Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

YISROEL GOLDSTEIN, et al., Plaintiff, **v.** **JOHN T. EARNEST, et al.,** Defendant.	Case No. 37-2020-00016638-CU-PO-CTL **NOTICE OF RULING ON DEMURRER OF CALIFORNIA DEPARTMENT OF JUSTICE TO PLAINTIFFS SECOND AMENDED COMPLAINT; NOTICE OF ENTRY OF MINUTE ORDER SUSTAINING DEMURRER OF CALIFORNIA DEPARTMENT OF JUSTICE TO PLAINTIFFS SECOND AMENDED COMPLAINT WITHOUT LEAVE TO AMEND** Dept: C-66 Judge: The Honorable Kenneth J. Medel Action Filed: May 26, 2020

TO ALL PARTIES AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE that on March 11, 2022, at 9:30 a.m. in Department 66 of the above entitled Court, the Honorable Kenneth J. Medel presiding, the Demurrer of the State of California, by and through the California Department of Justice to Plaintiffs' Second Amended Complaint (hereinafter, the "Motion") came on regularly for hearing. Deputy Attorney General Tim J. Vanden Heuvel and Supervising Deputy Attorney General David Adida appeared for defendant State of California, by

and through the California Department of Justice. Maurice A. Bumbu, Artiano Shinoff, appeared for plaintiffs along with co-counsel. On March 10, 2022, the Court issued a tentative ruling granting the Motion, attached hereto as Exhibit "A." At the March 11, 2022 hearing on the Motion, the Court sustained the demurrer of the State of California, by and through the California Department of Justice to Plaintiffs' Second Amended Complaint without leave to amend, adopting the tentative ruling as the final ruling of the Court.

TO ALL PARTIES AND THEIR COUNSEL OF RECORD: PLEASE TAKE ADDITIONAL NOTICE that on March 11, 2022, the Court entered a Minute Order sustaining the demurrer of the State of California, by and through the California Department of Justice to Plaintiffs' Second Amended Complaint without leave to amend, adopting the tentative ruling as the final ruling of the Court. A correct and true copy of the Court's Minute Order is attached as Exhibit "B."

Dated: March 14, 2022

Respectfully submitted,

ROB BONTA
Attorney General of California
DAVID ADIDA
Supervising Deputy Attorney General

TIM J. VANDEN HEUVEL
Deputy Attorney General
Attorneys for Defendant State of California, by and through the California Department of Justice

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EXHIBIT "A"

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - March 10, 2022

EVENT DATE: 03/11/2022 EVENT TIME: 09:30:00 AM DEPT.: C-66

JUDICIAL OFFICER:Kenneth J Medel

CASE NO.: 37-2020-00016638-CU-PO-CTL

CASE TITLE: GOLDSTEIN VS EARNEST [EFILE]

CASE CATEGORY: Civil - Unlimited CASE TYPE: PI/PD/WD - Other

EVENT TYPE: Demurrer / Motion to Strike
CAUSAL DOCUMENT/DATE FILED: Demurrer, 08/18/2021

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(1) Smith & Wesson's Demurrer to the Second Cause of Action for Violation of the UCL is SUSTAINED without leave to amend. This demurrer is only to the Second Cause of Action for Violation of the UCL in the Second Amended Complaint. In ruling on the Demurrer to the First Amended Complaint, the Court SUSTAINED the demurrer to the UCL cause of action based on the lack of standing. The Court ruled that the First Amended Complaint did not allege standing, but granted leave to amend.
Under the UCL, standing extends to "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition" (§ 17204) Under cases such as Kwikset Corp. v. Superior Court, 51 Cal. App. 4th 310, 322 (2011), to allege standing, a party must ... (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e. economic injury, and (2) show that the economic injury was the result of, i.e., caused by the unfair business practice ... that is the gravamen of the claim."
The Second Amended Complaint alleges "economic injury" in the form of medical expenses, lost monetary earnings, and lost future earning capacity as a result of S&W's conduct.
Cases indicate that a prospective UCL plaintiff, who is not a competitor of the defendant, must have "lost money or property" as the result of direct or indirect "business dealings" with the defendant. See, e.g., Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 788; Shersher v. Sup. Ct. (2007) 154 Cal.App.4th 1491, 1496-1500. While direct business dealings with a UCL defendant are not required, a defendant must at least be indirectly involved in the chain of business transactions with a UCL plaintiff to confer standing in non-competitor cases – for example, a plaintiff who purchases the defendant's product from a third-party seller. (Id.) This is all consistent with the overriding purpose of the UCL to protect businesses from unfair marketplace competition by their competitors. Plaintiffs do not claim they had direct or indirect business dealings with Smith & Wesson. They were not consumers of Smith & Wesson's products, and were not competitors of Smith & Wesson. There is no authority whereby payment of medical bills and/or loss of income arising out of a personal injury resulting from a third party's product misuse is sufficient to meet the UCL's "injury in fact" standing requirements.
(2) The Department of Justice's Demurrer is SUSTAINED without leave to amend. Plaintiffs have named the California Department of Justice (DOJ), claiming it should have stopped Earnest from obtaining the rifle.
Ordinarily, a person must be at least 21 years old to buy a firearm. The shooter, John Earnest, was 19 years old when he bought the rifle in April of 2019. Earnest used an exception that allowed a person his age to buy a rifle if they had "a valid, unexpired hunting license issued by the Department of Fish and Wildlife." (Pen. Code, §27510, subd. (b)(1) (Lexis 2019).) Plaintiffs contend that Earnest's license was not valid for the purchase until July 1, 2019, the beginning of the next hunting season.
Plaintiffs assert one cause of action against the DOJ, for negligence/negligent infliction of emotional distress. Their claim is premised on two legal contentions: first, that Earnest's purchase of the rifle was

illegal because his hunting license did not comply with Penal Code section 27510(b)(1); and, second, that the DOJ had a duty under section 28220 to investigate whether the hunting license complied with section 27510(b)(1). (SAC ¶¶270, 271.)

DOJ demurs, primarily arguing that DOJ has no duty to investigate whether a hunting license is valid for a firearm transaction.

Under the Government Claims Act (Gov.Code, § 810 et seq.), there is no common law tort liability for public entities in California; instead, such liability must be based on statute. (Guzman v. County of Monterey (2009) 46 Cal.4th 887, 897; see Gov. Code, §815, subd. (a), ["Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person"].) Thus, "direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714. Otherwise, the general rule of immunity for public entities would be largely eroded by the routine application of general tort principles." (Eastburn v. Regional Fire Protection Authority (2003) 31 Cal.4th 1175, 1184.) Plaintiffs rely upon two statutes, Government Code sections 815.6 and 815.2.

Mandatory Duty

Section 815.6 provides that "[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." Plaintiffs claim the DOJ breached mandatory duties imposed by section 28220 and section 27510. (SAC ¶¶269-271.)

Penal Code Section 28220 states: "Upon submission of firearm purchaser information, the Department of Justice shall examine its records, as well as those records that it is authorized to request from the State Department of State Hospitals pursuant to Section 8104 of the Welfare and Institutions Code, in order to determine if the purchaser is a person described in subdivision (a) of Section 27535, or is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm." (Penal Code, § 28220(a))

DOJ argues that Section 28220 does not impose a mandatory duty on the DOJ relating to purchases of rifles and other non-handguns. DOJ relies on Penal Code section 28245, which provides: "Whenever the Department of Justice acts pursuant to this article as it pertains to firearms other than handguns, the department's acts or omissions shall be deemed to be discretionary within the meaning of the Government Claims Act...."

The transaction in this case involved a rifle, not a handgun. (SAC ¶¶2-3.) As a result, DOJ argues section 28220 did not impose any mandatory duty on the DOJ with respect to the transaction.

Plaintiff responds that under the plain language of Section 28220, the CA DOJ's acts or omissions shall only be deemed discretionary if the CA DOJ acts. Plaintiffs allege that the DOJ did not act pursuant to Section 28220 to determine if Earnest was prohibited from purchasing the Rifle. As stated above, Section 28245 renders both acts and omissions "discretionary."

Plaintiff appears to argue there is significance between the first phrase of Section 28245, "when the DOJ acts pursuant to this Article" that is separate from the second part phrase which defines any acts "or omissions" to be discretionary. Even assuming there is an "act" required for the discretionary immunity to apply, the pleading makes it clear that the DOJ is named in this case because it reviewed at some level firearm purchaser information submitted by the seller. DOJ was "acting" ("or not acting") pursuant to its role as required under Penal Code Section 28220 statutory scheme.

The Second Amended Complaint outlines this statutory scheme in the Eleventh Cause of Action against DOJ at p.49, part of paragraph 270:

California law requires a prospective purchaser of a firearm to submit an application to purchase that firearm (known as a DEPARTMENT OF JUSTICE "Dealer Record of Sale" or "DROS" form) through a licensed dealer. The licensed dealer then submits the DROS form electronically to Defendant DEPARTMENT OF JUSTICE, which must determine whether the individual is prohibited from "possessing, receiving, owning, or purchasing a firearm." Cal. Pen. Code § 28220;

The Shooter completed a hunter education course and obtained a hunting license from the DEPARTMENT OF FISH AND WILDLIFE on April 13, 2019. The same day, the Shooter drove to the Defendant SAN DIEGO GUNS gun store. On information and belief, the Shooter presented the hunting license to Defendant SAN DIEGO GUNS, applied to purchase a firearm, and paid for the Rifle;

The hunting license the Shooter presented to Defendant SAN DIEGO GUNS was not valid until July 1, 2019; and
On information and belief, the Shooter's hunting license, documents relating to the hunting license, and/or information relating to the hunting license were part of the Defendant DEPARTMENT OF JUSTICE's records at the time the DEPARTMENT OF JUSTICE received the Shooter's prospective firearm purchaser information in April 2019, specifically, when the DEPARTMENT OF JUSTICE received its own "DROS" form from Defendant SAN DIEGO GUNS;
On information and belief, the DROS form submitted by Defendant SAN DIEGO GUNS to Defendant DEPARTMENT OF JUSTICE contained information informing the DEPARTMENT OF JUSTICE that the Shooter sought to obtain the Rifle using a hunting license pursuant to Cal. Pen. Code § 27510, a hunting license which was not valid;
California law also requires a 10-day waiting or "cooling off" period before a firearm can be delivered to a buyer. Cal. Pen. Code §§ 26815, 27540. During this 10-day period, Defendant DEPARTMENT OF JUSTICE conducts a state and national background check on the prospective buyer to determine whether they are prohibited by law from purchasing or possessing a firearm. If Defendant DEPARTMENT OF JUSTICE is unable to determine a prospective buyer's eligibility to purchase or possess a firearm within 10 days, it must notify the licensed dealer to delay the sale. Cal. Pen. Code § 28220 (f)(1)(A). If a person is ineligible to purchase or possess a firearm, Defendant DEPARTMENT OF JUSTICE must notify the licensed dealer and local police chief. Cal. Pen. Code § 28220(c);
On April 26, 2019, following a 10-day waiting period, the Shooter retrieved the Rifle from Defendant SAN DIEGO GUNS.
Paragraph 271 alleges the breach:
PLAINTIFFS are informed and believe and thereon allege that Defendant STATE OF CALIFORNIA, through its DEPARTMENT OF JUSTICE, breached its duty of care to Plaintiffs/victims of the shooting at the Chabad of Poway synagogue by failing to:
Comply with its mandatory, nondelegable directives to "examine its records...in order to determine" whether the Shooter was prohibited from "possessing, receiving, owning, or purchasing a firearm" under Cal. Pen. Code § 28220(a);
Delay or deny the Shooter from obtaining the Rifle despite the fact that it knew or should have known that the hunting license issued by the DEPARTMENT OF FISH AND WILDLIFE was invalid, and would not become valid until July 1, 2019;
Notify Defendant SAN DIEGO GUNS that the Shooter was prohibited from "possessing, receiving, owning, or purchasing a firearm...." Cal. Pen. Code § 28220(c);
Comply with mandatory directives to conduct an adequate background check during the 10-day waiting period to determine that the Shooter was ineligible to possess a firearm;
Follow or implement a new statute, Cal. Pen. Code § 27510 (allowing persons under the age of 21, but at least 18 years of age, to purchase a rifle with a proper and valid hunting license), which came into effect on January 1, 2019, less than four months before the Incident;
Take any steps to retrieve the improperly sold Rifle from Defendant JOHN T. EARNEST; and
Follow and implement the statutory guidelines set forth in Cal. Pen. Code §§ 27510, 28220.
Based on the above, it appears that the DOJ's actions in this case are discretionary as a matter of law and thus, there is no mandatory duty under Govt Code Section 815.6. Absent a mandatory duty, the DOJ's actions are immune from liability under Govt. Code 810.
Similarly, Plaintiffs' Mandatory Duty Claim based on Section 27510 Fails
Penal Code 27510 Subdivision (a) provides that "[a] person licensed under Sections 26700 to 26915, inclusive, shall not sell, supply, deliver, or give possession or control of a firearm to any person who is under 21 years of age." This prohibits acts by "a person licensed under Sections 26700 to 26915," which refers to licensed gun dealers. In addition, the DOJ is immune from liability for "failing to enforce any law." (Gov. Code, §818.2)
Government Code section 815.2
Plaintiffs also rely on Government Code section 815.2, subdivision (a):
A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.
The Second Amended Complaint alleges in conclusory fashion that a DOJ "employee or employees

negligently failed to comply with Pen. Code section 28220" (SAC ¶269) and that the DOJ committed a "breach of duty through its employees responsible for complying with Cal. Pen. Code § 28220, who acted negligently" (SAC ¶272). However, the essence of Plaintiffs' theory against the DOJ is that it failed to investigate Earnest's hunting license and failed to take action to stop Earnest from purchasing the rifle. These theories, if available, are duties on the part of the DOJ and not an individual employee. "A public entity cannot be held vicariously liable for actions of its employees that are actually acts of the entity itself, albeit performed by necessity by employees or agents." (Yee v. Superior Court (2019) 31 Cal.App.5th 26, 40.) Further, public employees also have immunity from liability for their "failure to enforce an enactment." (Gov. Code, §821.)

Based on the above, the Court does not reach the issue of whether the hunting license at issue in this case was valid or satisfied the statutory requirements to allow Mr. Earnest to legally purchase the rifle.

(3) At the status conference on February 22, 2022, the Court set a demurrer by Defendant Chabad of California in the case of Pertz v. San Diego Guns, LLC. This demurrer was originally calendared in another department. The Court has not seen a new notice of the demurrer for this department. Further, the Court has not been able to locate any opposition to the demurrer filed in this particular case. The demurrer will need to be re-calendared and re-noticed.

The Court sets a STATUS CONFERENCE in this case for MONDAY MARCH 14, 2022 at 9:00 a.m. The Court will request Counsel for Plaintiffs in Goldstein to provide notice. The purpose of the status conference is for the parties to confirm what motions are pending in all cases and for the Court to calendar the motions.

On February 22, 2022, this Court consolidated the following cases, designating the Goldstein case as the lead case:

GOLDSTEIN, et al. v. JOHN T. EARNEST, et al., Case No.: 37-2020-00016638-CU-PO-CTL
PERETZ v.SAN DIEGO GUNS LLC, et al., Case No.: 37-2020-00047963-CU-PO-CTL
ALMOG, et al. v. JOHN T. EARNEST, et al. Case No. 37-2021-00022519-CU-PO-CTL
N.D., et. al. v. CHABAD OF CALIFORNIA et al. Case No. 37-2021-00014378-CU-PO-CTL

All motions must be filed under the Goldstein case caption. All motions from other departments must be re-noticed for this department. In order for the Court to be able to locate the briefing, counsel is to provide to the Court the Case No. and ROA No. for the briefing.

EXHIBIT "B"

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 03/11/2022 TIME: 09:30:00 AM DEPT: C-66

JUDICIAL OFFICER PRESIDING: Kenneth J Medel
CLERK: Bernice Orihuela
REPORTER/ERM: Stephanie Bryant CSR# 13160
BAILIFF/COURT ATTENDANT: J. Regisford

CASE NO: **37-2020-00016638-CU-PO-CTL** CASE INIT.DATE: 05/26/2020
CASE TITLE: **Goldstein vs Earnest [EFILE]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: PI/PD/WD - Other

EVENT TYPE: Civil Case Management Conference

EVENT TYPE: Demurrer / Motion to Strike
MOVING PARTY: State Of California Department Of Justice
CAUSAL DOCUMENT/DATE FILED: Demurrer, 08/18/2021

EVENT TYPE: Demurrer / Motion to Strike
MOVING PARTY: SMITH & WESSON BRANDS, INC.
CAUSAL DOCUMENT/DATE FILED: Demurrer, 09/22/2021

Additional events listed on last page.

APPEARANCES
Michael Kelly, counsel, present for Plaintiff(s) via remote audio conference.
Donna Vobornik, counsel, present for Plaintiff(s) via remote video conference.
Neil Gerald Gilmor, counsel, present for Plaintiff(s) via remote audio conference.
Maurice A Bumbu, counsel, present for Plaintiff(s).
David Adida, counsel, present for Defendant(s) via remote video conference.
Tim J Vanden Heuvel, counsel, present for Defendant(s).
Sean R Ferron, counsel, present for Defendant(s) via remote audio conference.
Mitchell B Malachowski, counsel, present for Defendant(s).
Sarah Risso, counsel, present for Defendant(s) via remote video conference.
Marc P Miles, counsel, present for Defendant(s) via remote audio conference.

Additional appearances listed on last page.

The Court hears argument of counsel.

The Court CONFIRMS AS ORALLY MODIFIED the tentative ruling as follows:

(1) Smith & Wesson's Demurrer to the Second Cause of Action for Violation of the UCL is SUSTAINED without leave to amend. This demurrer is only to the Second Cause of Action for Violation of the UCL in the Second Amended Complaint. In ruling on the Demurrer to the First Amended Complaint, the Court SUSTAINED the demurrer to the UCL cause of action based on the lack of standing. The Court ruled that the First Amended Complaint did not allege standing, but granted leave to amend.

Under the UCL, standing extends to "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition" (§ 17204) Under cases such as Kwikset Corp. v. Superior Court, 51 Cal. App. 4th 310, 322 (2011), to allege standing, a party must ... (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e. economic injury, and (2) show that the economic injury was the result of, i.e., caused by the unfair business practice ... that is the gravamen of the claim."

The Second Amended Complaint alleges "economic injury" in the form of medical expenses, lost monetary earnings, and lost future earning capacity as a result of S&W's conduct.

Cases indicate that a prospective UCL plaintiff, who is not a competitor of the defendant, must have "lost money or property" as the result of direct or indirect "business dealings" with the defendant. See, e.g., Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 788; Shersher v. Sup. Ct. (2007) 154 Cal.App.4th 1491, 1496-1500. While direct business dealings with a UCL defendant are not required, a defendant must at least be indirectly involved in the chain of business transactions with a UCL plaintiff to confer standing in non-competitor cases – for example, a plaintiff who purchases the defendant's product from a third-party seller. (Id.) This is all consistent with the overriding purpose of the UCL to protect businesses from unfair marketplace competition by their competitors. Plaintiffs do not claim they had direct or indirect business dealings with Smith & Wesson. They were not consumers of Smith & Wesson's products, and were not competitors of Smith & Wesson. There is no authority whereby payment of medical bills and/or loss of income arising out of a personal injury resulting from a third party's product misuse is sufficient to meet the UCL's "injury in fact" standing requirements.

(2) The Department of Justice's Demurrer is SUSTAINED without leave to amend. Plaintiffs have named the California Department of Justice (DOJ), claiming it should have stopped Earnest from obtaining the rifle.
Ordinarily, a person must be at least 21 years old to buy a firearm. The shooter, John Earnest, was 19 years old when he bought the rifle in April of 2019. Earnest used an exception that allowed a person his age to buy a rifle if they had "a valid, unexpired hunting license issued by the Department of Fish and Wildlife." (Pen. Code, §27510, subd. (b)(1) (Lexis 2019).) Plaintiffs contend that Earnest's license was not valid for the purchase until July 1, 2019, the beginning of the next hunting season.

Plaintiffs assert one cause of action against the DOJ, for negligence/negligent infliction of emotional distress. Their claim is premised on two legal contentions: first, that Earnest's purchase of the rifle was illegal because his hunting license did not comply with Penal Code section 27510(b)(1); and, second, that the DOJ had a duty under section 28220 to investigate whether the hunting license complied with section 27510(b)(1). (SAC ¶¶270, 271.)
DOJ demurs, primarily arguing that DOJ has no duty to investigate whether a hunting license is valid for a firearm transaction.

Under the Government Claims Act (Gov.Code, § 810 et seq.), there is no common law tort liability for

public entities in California; instead, such liability must be based on statute. (Guzman v. County of Monterey (2009) 46 Cal.4th 887, 897; see Gov. Code, §815, subd. (a), ["Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person"].) Thus, "direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714. Otherwise, the general rule of immunity for public entities would be largely eroded by the routine application of general tort principles." (Eastburn v. Regional Fire Protection Authority (2003) 31 Cal.4th 1175, 1184.) Plaintiffs rely upon two statutes, Government Code sections 815.6 and 815.2.

Mandatory Duty

Section 815.6 provides that "[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." Plaintiffs claim the DOJ breached mandatory duties imposed by section 28220 and section 27510. (SAC ¶¶269-271.)

Penal Code Section 28220 states: "Upon submission of firearm purchaser information, the Department of Justice shall examine its records, as well as those records that it is authorized to request from the State Department of State Hospitals pursuant to Section 8104 of the Welfare and Institutions Code, in order to determine if the purchaser is a person described in subdivision (a) of Section 27535, or is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm." (Penal Code, § 28220(a))

DOJ argues that Section 28220 does not impose a mandatory duty on the DOJ relating to purchases of rifles and other non-handguns. DOJ relies on Penal Code section 28245, which provides: "Whenever the Department of Justice acts pursuant to this article as it pertains to firearms other than handguns, the department's acts or omissions shall be deemed to be discretionary within the meaning of the Government Claims Act...."
The transaction in this case involved a rifle, not a handgun. (SAC ¶¶2-3.) As a result, DOJ argues section 28220 did not impose any mandatory duty on the DOJ with respect to the transaction.

Plaintiff responds that under the plain language of Section 28220, the CA DOJ's acts or omissions shall only be deemed discretionary if the CA DOJ acts. Plaintiffs allege that the DOJ did not act pursuant to Section 28220 to determine if Earnest was prohibited from purchasing the Rifle. As stated above, Section 28245 renders both acts and omissions "discretionary."

Plaintiff appears to argue there is significance between the first phrase of Section 28245, "when the DOJ acts pursuant to this Article" that is separate from the second part phrase which defines any acts "or omissions" to be discretionary. Even assuming there is an "act" required for the discretionary immunity to apply, the pleading makes it clear that the DOJ is named in this case because it reviewed at some level firearm purchaser information submitted by the seller. DOJ was "acting" ("or not acting") pursuant to its role as required under Penal Code Section 28220 statutory scheme.

The Second Amended Complaint outlines this statutory scheme in the Eleventh Cause of Action against DOJ at p.49, part of paragraph 270:

California law requires a prospective purchaser of a firearm to submit an application to purchase that

firearm (known as a DEPARTMENT OF JUSTICE "Dealer Record of Sale" or "DROS" form) through a licensed dealer. The licensed dealer then submits the DROS form electronically to Defendant DEPARTMENT OF JUSTICE, which must determine whether the individual is prohibited from "possessing, receiving, owning, or purchasing a firearm." Cal. Pen. Code § 28220;

The Shooter completed a hunter education course and obtained a hunting license from the DEPARTMENT OF FISH AND WILDLIFE on April 13, 2019. The same day, the Shooter drove to the Defendant SAN DIEGO GUNS gun store. On information and belief, the Shooter presented the hunting license to Defendant SAN DIEGO GUNS, applied to purchase a firearm, and paid for the Rifle;

The hunting license the Shooter presented to Defendant SAN DIEGO GUNS was not valid until July 1, 2019; and
On information and belief, the Shooter's hunting license, documents relating to the hunting license, and/or information relating to the hunting license were part of the Defendant DEPARTMENT OF JUSTICE's records at the time the DEPARTMENT OF JUSTICE received the Shooter's prospective firearm purchaser information in April 2019, specifically, when the DEPARTMENT OF JUSTICE received its own "DROS" form from Defendant SAN DIEGO GUNS;

On information and belief, the DROS form submitted by Defendant SAN DIEGO GUNS to Defendant DEPARTMENT OF JUSTICE contained information informing the DEPARTMENT OF JUSTICE that the Shooter sought to obtain the Rifle using a hunting license pursuant to Cal. Pen. Code § 27510, a hunting license which was not valid;

California law also requires a 10-day waiting or "cooling off" period before a firearm can be delivered to a buyer. Cal. Pen. Code §§ 26815, 27540. During this 10-day period, Defendant DEPARTMENT OF JUSTICE conducts a state and national background check on the prospective buyer to determine whether they are prohibited by law from purchasing or possessing a firearm. If Defendant DEPARTMENT OF JUSTICE is unable to determine a prospective buyer's eligibility to purchase or possess a firearm within 10 days, it must notify the licensed dealer to delay the sale. Cal. Pen. Code § 28220 (f)(1)(A). If a person is ineligible to purchase or possess a firearm, Defendant DEPARTMENT OF JUSTICE must notify the licensed dealer and local police chief. Cal. Pen. Code § 28220(c);

On April 26, 2019, following a 10-day waiting period, the Shooter retrieved the Rifle from Defendant SAN DIEGO GUNS.

Paragraph 271 alleges the breach:

PLAINTIFFS are informed and believe and thereon allege that Defendant STATE OF CALIFORNIA, through its DEPARTMENT OF JUSTICE, breached its duty of care to Plaintiffs/victims of the shooting at the Chabad of Poway synagogue by failing to:

Comply with its mandatory, nondelegable directives to "examine its records...in order to determine" whether the Shooter was prohibited from "possessing, receiving, owning, or purchasing a firearm" under Cal. Pen. Code § 28220(a);

Delay or deny the Shooter from obtaining the Rifle despite the fact that it knew or should have known that the hunting license issued by the DEPARTMENT OF FISH AND WILDLIFE was invalid, and would not become valid until July 1, 2019;

Notify Defendant SAN DIEGO GUNS that the Shooter was prohibited from "possessing, receiving, owning, or purchasing a firearm...." Cal. Pen. Code § 28220(c);

Comply with mandatory directives to conduct an adequate background check during the 10-day waiting period to determine that the Shooter was ineligible to possess a firearm;

Follow or implement a new statute, Cal. Pen. Code § 27510 (allowing persons under the age of 21, but at least 18 years of age, to purchase a rifle with a proper and valid hunting license), which came into effect on January 1, 2019, less than four months before the Incident;

Take any steps to retrieve the improperly sold Rifle from Defendant JOHN T. EARNEST; and
Follow and implement the statutory guidelines set forth in Cal. Pen. Code §§ 27510, 28220.

Based on the above, it appears that the DOJ's actions in this case are discretionary as a matter of law and thus, there is no mandatory duty under Govt Code Section 815.6. Absent a mandatory duty, the DOJ's actions are immune from liability under Govt. Code 810.

Similarly, Plaintiffs' Mandatory Duty Claim based on Section 27510 Fails
Penal Code 27510 Subdivision (a) provides that "[a] person licensed under Sections 26700 to 26915, inclusive, shall not sell, supply, deliver, or give possession or control of a firearm to any person who is under 21 years of age." This prohibits acts by "a person licensed under Sections 26700 to 26915," which refers to licensed gun dealers. In addition, the DOJ is immune from liability for "failing to enforce any law." (Gov. Code, §818.2)
Government Code section 815.2

Plaintiffs also rely on Government Code section 815.2, subdivision (a):

A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

The Second Amended Complaint alleges in conclusory fashion that a DOJ "employee or employees negligently failed to comply with Pen. Code section 28220" (SAC ¶269) and that the DOJ committed a "breach of duty through its employees responsible for complying with Cal. Pen. Code § 28220, who acted negligently" (SAC ¶272). However, the essence of Plaintiffs' theory against the DOJ is that it failed to investigate Earnest's hunting license and failed to take action to stop Earnest from purchasing the rifle. These theories, if available, are duties on the part of the DOJ and not an individual employee. "A public entity cannot be held vicariously liable for actions of its employees that are actually acts of the entity itself, albeit performed by necessity by employees or agents." (Yee v. Superior Court (2019) 31 Cal.App.5th 26, 40.) Further, public employees also have immunity from liability for their "failure to enforce an enactment." (Gov. Code, §821.)

Based on the above, the Court does not reach the issue of whether the hunting license at issue in this case was valid or satisfied the statutory requirements to allow Mr. Earnest to legally purchase the rifle.

(3) At the status conference on February 22, 2022, the Court set a demurrer by Defendant Chabad of California in the case of Pertz v. San Diego Guns, LLC. This demurrer was originally calendared in another department. The Court has not seen a new notice of the demurrer for this department. Further, the Court has not been able to locate any opposition to the demurrer filed in this particular case. The

demurrer will need to be re-calendared and re-noticed.

The Court sets a STATUS CONFERENCE in this case for TUESDAY MARCH 22, 2022 at 9:00 a.m. The Court will request Counsel for Plaintiffs in Goldstein to provide notice. The purpose of the status conference is for the parties to confirm what motions are pending in all cases and for the Court to calendar the motions.

On February 22, 2022, this Court consolidated the following cases, designating the Goldstein case as the lead case:

GOLDSTEIN, et al. v. JOHN T. EARNEST, et al., Case No.: 37-2020-00016638-CU-PO-CTL

PERETZ v.SAN DIEGO GUNS LLC, et al., Case No.: 37-2020-00047963-CU-PO-CTL

ALMOG, et al. v. JOHN T. EARNEST, et al. Case No. 37-2021-00022519-CU-PO-CTL

N.D., et. al. v. CHABAD OF CALIFORNIA et al. Case No. 37-2021-00014378-CU-PO-CTL

All motions must be filed under the Goldstein case caption. All motions from other departments must be re-noticed for this department. In order for the Court to be able to locate the briefing, counsel is to provide to the Court the Case No. and ROA No. for the briefing.

The Status Conference (Civil) is scheduled for 03/22/2022 at 09:00AM before Judge Kenneth J Medel.

IT IS SO ORDERED.

Kenneth J. Medel

Judge Kenneth J Medel

ADDITIONAL EVENTS:

EVENT TYPE: Demurrer / Motion to Strike

EVENT TYPE: Demurrer / Motion to Strike

ADDITIONAL APPEARANCES:

Robert M Juskie, counsel, present for Defendant(s).
Douglas Honig, counsel, present for Defendant(s) via remote video conference.
James Vogts, counsel, present for Defendant(s) via remote video conference.

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Yisroel Goldstein v. John T. Earnest, et al.**
No.: **37-2020-00016638-CU-PO-CTL**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **March 14, 2022**, I served the attached

NOTICE OF RULING ON DEMURRER OF CALIFORNIA DEPARTMENT OF JUSTICE TO PLAINTIFFS SECOND AMENDED COMPLAINT; NOTICE OF ENTRY OF MINUTE ORDER SUSTAINING DEMURRER OF CALIFORNIA DEPARTMENT OF JUSTICE TO PLAINTIFFS SECOND AMENDED COMPLAINT WITHOUT LEAVE TO AMEND

by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on **March 14, 2022**, at San Diego, California.

A. J. Lopez
Declarant


Signature

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF ORANGE

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 April 4, 2022, I served the foregoing document(s) described as:

SECOND REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS' DEMURRER TO PLAINTIFFS' COMPLAINTS

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:

Please see Attached Service List.

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 April 4, 2022, at Long Beach, California.

s/ Laura Palmerin
Laura Palmerin

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