

1 ROB BONTA
Attorney General of California
2 DONNA M. DEAN
Supervising Deputy Attorneys General
3 KENNETH G. LAKE (STATE BAR 144313)
ANDREW F. ADAMS (STATE BAR 275109)
4 Deputy Attorneys General
300 South Spring Street
5 Los Angeles, CA 90013
Telephone: (213) 269-6525
6 Facsimile: (916) 731-2120
E-mail: Kenneth.Lake@doj.ca.gov
7 *Attorneys for Defendants State of California,*
acting by and through the California Department
8 *of Justice, Former Attorney General Xavier*
Becerra in his personal capacity only and Attorney
9 *General Rob Bonta in his official capacity only*

10
11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF LOS ANGELES
14

15 **FRANKLIN ARMORY, INC. AND**
16 **CALIFORNIA RIFLE & PISTOL**
ASSOCIATION, INCORPORATED,

17
18 Plaintiffs,

19 v.

20 **CALIFORNIA DEPARTMENT OF**
21 **JUSTICE, XAVIER BECERRA, IN HIS**
OFFICIAL CAPACITY AS ATTORNEY
22 **GENERAL FOR THE STATE OF**
CALIFORNIA, AND DOES 1-10,

23 Defendants.
24

Case No. 20STCP01747

**REPLY TO OPPOSITION TO MOTION
BY DEFENDANTS FOR JUDGMENT ON
THE PLEADINGS**

Date: September 6, 2023

Time: 8:30 a.m.

Dept.: 32

Honorable Daniel S. Murphy

RES ID: 742759559028

25 **Introduction**

26 The opposition incorrectly asserts that this is the fourth motion attacking the claims at issue
27 in this motion and that “these arguments come far too late” in an apparent attempt to dissuade the
28 court from considering the merits of this motion. (Opp., pp. 7:23-8:4.) First, it is clear that this is

1 the first motion addressing the remaining claims which were previously stayed. Second, a review
2 of the merits of this motion, as demonstrated in the moving papers and discussed further below,
3 shows that the second amended complaint (SAC) fails to state a cause of action as to each of the
4 remaining claims. Therefore, the motion for judgment on the pleadings should be granted in its
5 entirety.

6 **Standing**

7 Plaintiffs assert that standing to bring a monetary damages action can be established by
8 merely sending a letter with a government claim to a governmental official advising of a potential
9 problem which may arise in the course of applying for transfer of a firearm. (Opp., p. 18:14-24.)
10 According to plaintiffs' logic, if the official doesn't do what they propose, then they have
11 established standing to bring a monetary damages action without ever going through the
12 application process. Plaintiffs have not and cannot allege any authority which establishes a duty
13 on the part of the DOJ or former Attorney General Becerra to respond to Franklin's letter. Nor is
14 there any authority establishing a duty to respond to the letter by suggesting alternatives as
15 plaintiffs assert. Franklin Armory made a similar assertion regarding the Title 1 centerfire
16 firearm in the Sacramento action asserting that DOJ had a duty to respond to Franklin Armory's
17 letter asking DOJ to advise if the Title 1 centerfire was an illegal assault weapon. The court
18 rejected this argument. (Sacramento Action, FAC, ¶¶ 66, 73-74, 77-78, 85, 95, 97-98, Order
19 9/23/19, pp. 2-3, Exhs. C, D Req. for Jud. Notice.)

20 The theory of acquiring standing by sending a letter is clearly contrary to case law
21 authority because a party "lacks standing to challenge a rule or policy to which he has not
22 submitted himself by actually applying for the desired benefit." (*Madsen v. Boise State*
23 *University* (9th Cir. 1992) 976 F.2d 1219, 1220.) The opposition concedes that plaintiffs may
24 lack standing by not having applied "for the desired benefit" but assert the futility exception.
25 (Opp., p. 18:4-19:18.)

26 However, as discussed in defendants' moving papers, plaintiffs cannot positively state
27 what DOJ would have done if someone had submitted a Title 1 firearm for transfer. First,
28 plaintiffs do not allege that any purchaser went through the steps necessary to submit information

1 to the DOJ to make a determination as to whether a Title 1 firearm could be transferred. (E.g.
2 purchase of a Title 1, obtaining of a verification number and delivery of the firearm to the dealer
3 and the purchaser presenting identification along with the required information at the dealer.) At
4 that point, the dealer and/or purchaser could have requested transfer via some alternative or
5 exception such as submitting the request in writing or selecting “rifle” in the rifle, shotgun,
6 rifle/shotgun combination drop-down menu.

7 DOJ has discretionary authority under Penal Code section 28205, subdivision (c), to allow
8 a transfer in writing. (Penal Code, § 28205, subd. (c) [electronic transfer is the exclusive means
9 of transmittal except as permitted by the department but telephonic transfers not permitted].)
10 There is also no authority precluding DOJ from considering a transfer request selecting “rifle” in
11 the rifle, shotgun, rifle/shotgun combination drop-down menu. The Title 1 firearm is essentially a
12 rifle with a buffer tube instead of a stock and plaintiffs have not and cannot allege any statute
13 requiring that a firearm match the statutory definition of rifle in order to select “rifle” in this drop-
14 down menu. As plaintiffs indicate in the SAC, this drop-down menu is not required by statute.
15 Furthermore, selecting the closest firearm category that applies in this situation would not be
16 unlawful because the dealer transmitting information agrees that it is true, accurate and complete
17 to the best of his or her knowledge. (Cal. Code Reg., tit. 11, § 4210, subd. (a)(6).)

18 Plaintiffs’ allegations note that the online system for transfer of firearms has been in place
19 since at least 2003 and that stockless rifles and shotguns have been manufactured for decades.
20 But there is no allegation that the DOJ rejected a transfer request due to a selection by a dealer or
21 purchaser of rifle, shotgun or rifle/shotgun combination in that drop-down menu due to that
22 firearm not matching the statutory definition. If DOJ rejected such a transfer request, the
23 purchaser would have the right to bring an action to have the transfer request approved.

24 **Judgment on the Pleadings Should be Granted as to the Third, Fourth And Fifth Causes of**
25 **Action for Interference with Contract and Prospective Economic Advantage**

26 Franklin Armory’s opposition effectively concedes that it has not and cannot allege the
27 required element of an intentional act designed to induce a breach of contract or disrupt an
28 existing economic relationship. (*Ixchel Farma, LLC. v. Biogen, Inc.* (2020) 9 Cal 5th 1130, 1141;

1 *Roy Allen Shurry Seal, Inc. v. American Asphalt South Inc.* (2017) 2 Cal 5th 505, 512). Franklin
2 Armory attempts to bypass this clearly stated requirement asserting that an omission may be
3 sufficient based on the concurring and dissenting opinion of Justice Chin in *Korea Supply Co. v.*
4 *Lucky Martin Corp.* (2003) 29 Cal.4th 1134-1175. (Opp., p. 24:28-25:5.) Franklin Armory
5 describes Justice Chin’s opinion as “discussing how a particular act or omission may be the legal
6 cause of an invasion of another’s interest.” (Opp., p. 25:3-5.)

7 First, the element requiring an act of interference was not an issue addressed in *Korea*
8 *Supply*. *Korea Supply* involved a claim for interference with prospective economic advantage
9 against a private corporation and addressed the issue whether a plaintiff must allege that the
10 defendant specifically intended to interfere with the plaintiff’s prospective economic advantage.
11 (*Id.* at p. 1140-1141.)

12 Second, in Justice Chin’s opinion, he was attempting to frame the issue as to whether an
13 act of interference was the “legal cause” of the alleged injury quoting from section 9 of the
14 Restatement of Torts which addresses the meaning of legal cause. (*Id.* at pp. 1174-1175.) The
15 passage relied upon by Franklin Armory is based on Justice Chin’s reference to this section and
16 not to the Restatement section dealing with the required elements of an interference with contract
17 claim. (*Id.* at p. 1175.)

18 Of course, a concurring or dissenting opinion is not binding precedent but can be cited as
19 persuasive authority. However, this opinion has no application to this case whatsoever. It is clear
20 that Justice Chin’s discussion had nothing to do with the act of interference requirement let alone
21 whether said requirement could be satisfied by an omission. Thus, Franklin Armory’s assertion
22 that the alleged failure to act in not modifying the online system to add an “other” option to the
23 rifle, shotgun, rifle/shotgun combination drop-down menu could satisfy the act of interference
24 requirement is clearly without merit.

25 There is no California case addressing an attempt by a plaintiff to abridge this
26 requirement. However, in *Nanko Shipping v. Alcoa Inc.*, (D. D.C. 2015) 107 F. Supp. 3rd 174,
27 the court held that no claim for tortious interference with contract or prospective business
28

1 advantage could be stated when plaintiff’s tortious interference claim rested “on alleged
2 inaction.” (*Id.* at p. 182-183.)

3 Clearly, the SAC contains no allegations of any act on the part of former Attorney General
4 Becerra. The alleged omission of the DOJ in not modifying the online system in a timely manner
5 is not sufficient to state a cause of action against him personally for interference with contract or
6 prospective economic advantage.

7 In addition, the only allegations of the SAC directed against former Attorney General
8 Becerra are that he is the chief law enforcement officer of California charged with the duty to
9 uniformly and adequately enforce the law and that the DOJ was under his direction and control.
10 (SAC, ¶¶ 7-8, 13-16.) These allegations indicate that Franklin Armory is attempting to hold
11 former Attorney General Becerra personally liable for any acts undertaken by others on behalf of
12 the DOJ. For example, Franklin Armory takes issue with the alleged failure to adequately
13 respond to Franklin Armory’s letter sent in October, 2019, forwarding its government claim to the
14 DOJ and the letter in response. (Opp., p. 18:14-19.)¹ However, the letter in response was written
15 by Patty Li, not former Attorney General Becerra.

16 Under the Government Claims Act, former Attorney General Becerra is not vicariously
17 liable for the conduct of others. Government Code section 820.8 states in pertinent part that, “a
18 public employee is not liable for an injury caused by the act or omission of another person.”
19 (Gov. Code, § 820.8.) The Legislative Committee Comments to section 820.8 make clear that
20 public officers are not vicariously liable for the torts of their subordinates. (*Id.*)

21 It should be noted that a Government Claims Act action seeking monetary damages
22 against a government official personally is different from an action seeking only equitable relief
23 against a government official. In such a case, a plaintiff is not required to allege a named
24 official's personal involvement in the alleged violation but only name an official within the public
25 entity in his or her official capacity who can appropriately respond to the request for equitable

26 _____
27 ¹ The opposition makes numerous references to extrinsic facts and documents not alleged in or
28 attached to the SAC. (See e.g. Opp., pp. 18:18-19, 19:8-10.) As such, these facts and documents
cannot provide a basis for stating a cause of action and should, at best, be construed as a request
for leave to amend the SAC in order to state a cause of action.

1 relief. (See *California DUI Lawyers Assn. v. Department of Motor Vehicles* (2022) 77
2 Cal.App.5th 517, 534-535; *Riley's American Heritage Farms v. Elsasser* (9th Cir. 2022) 32 F.4th
3 707, 732.)

4 **The Penal Code Statutes Cited by Franklin Armory Fail to Satisfy the Requirements to**
5 **Establish a Mandatory Duty**

6 The opposition ignores the specific requirements for an enactment to provide a basis for
7 mandatory duty liability as set forth in the California Supreme Court authority discussed in
8 defendants' moving papers. With regard to the first prong requirement that an enactment must
9 impose a mandatory duty, the court in *Haggis v. City of Los Angeles*, (2000) 22 Cal.4th 490,
10 made clear that an enactment at issue must be *obligatory* in its directions to the public entity and
11 must *require*, rather than merely authorize or permit that a particular action be taken. (*Id.* at p.
12 498 [emphasis in original].) "Courts have construed this first prong rather strictly, finding a
13 mandatory duty only if the enactment affirmatively imposes the duty and provides implementing
14 guidelines." (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 898.)

15 Rather, Franklin Armory cites two cases that did not involve claims for monetary damages
16 under the Government Claims Act and a dangerous condition case from 1920. (*County of Los*
17 *Angeles v. City of Los Angeles* (2013) 214 Cal.App.4th 643, 648 [claim for writ of mandate and
18 declaratory relief to halt construction of a proposed sewer line]; *California Correctional*
19 *Supervisors Organization v. Department of Corrections* (2002) 96 Cal.App.4th 824, 826 [claim
20 for writ of mandate to compel CDCR to discontinue certain staffing practices]; *Ham v. Los*
21 *Angeles County*, (1920) 46 Cal.App. 148, 160, 164-165 [dangerous condition case brought under
22 the Pridham Act of 1911].)

23 Here, the particular action that Franklin Armory alleges was mandated was the
24 modification of the online system to add an "other" option to the rifle, shotgun, rifle/shotgun
25 combination drop-down menu. As discussed in the moving papers, the cited Penal Code sections
26 (sections 28155, 28205, 28215 and 28220) contain clear language conferring discretion on the
27 DOJ and none of these statutes specify that a particular action be taken. Franklin Armory repeats
28 its general allegation that the subject Penal Code statutes do not authorize the DOJ to block legal

1 firearms transactions with its inaction but this is not the correct legal test for establishing a
2 mandatory duty relative to a monetary damages claim.

3 In addition, the legislature’s adoption of Penal Code section 28245 makes clear that no
4 mandatory duty to modify the online system exists as a matter of law because “whenever the
5 Department of Justice acts pursuant to this article as it pertains to firearms other than handguns,
6 the department’s acts or omissions *shall be deemed to be discretionary* within the meaning of the
7 Government Claims Act” (Pen. Code, § 28245 (emphasis added).)

8 Franklin Armory makes the illogical assertion that Penal Code section 28245 applies only
9 to the DOJ and not to former Attorney General Becerra personally. However, all of the Penal
10 Code statutes upon which it relies for establishing a duty on the part of former Attorney General
11 Becerra personally are directed to the DOJ only as well. Thus, if Franklin Armory is relying on
12 these statutes to establish a mandatory duty against former Attorney General Becerra personally,
13 it logically must follow that Penal Code section 28245 applies to him personally as well.

14 With regard to the second prong requirement that the mandatory duty be designed to
15 protect against the particular kind of injury the plaintiff suffered, the opposition does not take
16 issue with the three cases cited by defendants establishing that the legislative purpose of the Penal
17 code statutes relating to transfer of firearms is to protect the public. (*People v. Correa* (2012) 54
18 Cal.4th 331, 342 [purpose of the prohibition on felons possessing firearms is to protect the
19 public]; *Katona v. The County of Los Angeles* (1985) 172 Cal.App.3rd 53, 58 [“the thrust of the
20 deadly weapons control scheme is to prevent harm to third persons”]; *Trinkle v. California State*
21 *Lottery* (1999) 71 Cal.App.4th 1198, 1203 [false advertising statutes at issue designed to protect
22 the public not safeguard profits of gaming operators].)

23 Rather, Franklin Armory asserts that defendants did not cite any legislative findings to
24 support the conclusion that the firearms regulations statutes were designed to protect the public.
25 Franklin Armory goes on to argue, without citation to any authority, that it is just as arguable that
26 the goal of the legislature was to facilitate lawful commerce between law abiding people and
27 gunmakers. This assertion does nothing to contradict the clear case law authority of *Katona*,
28 *People v. Correa* and *Trinkle*.

1 **The Discretionary Immunity Under Government Code Section 820.2 Also Precludes**
2 **Liability Against Defendants**

3 The above discussion regarding the discretionary authority of the DOJ as to the operation
4 of the online system makes clear that any act or omission of former Attorney General Becerra
5 would fall under the discretionary immunity. Franklin Armory has not alleged any act by him
6 relative to this action and thus have not alleged his involvement in any decision as to the nature of
7 the modification to the online system including the timing, complexity or funding for
8 implementation of the modification. Even if such allegations had been made, these types of
9 decisions are immunized under Government Code section 820.2. (See e.g. *Taylor v. Buff* (1985)
10 172 Cal.App.3d 384, 390 [decision whether or not to allocate funds for an improved security
11 system in a jail was discretionary].)

12 In addition, if a purchaser of a Title 1 firearm had submitted a transfer request to the DOJ
13 and the DOJ rejected said request, liability would be precluded pursuant to the licensing
14 immunity under Government Code sections 821.2 and 818.4.

15 **Judgment on the Pleadings Should be Granted Without Leave to Amend as to the Section**
16 **1983 Causes of Action for Violation of Procedural (Sixth) and Substantive (Seventh) Due**
17 **Process**

18 The opposition provides further support for the preclusion of declaratory relief relative to
19 SB 118 for individuals who placed deposits for a Title 1 centerfire firearm without applying for
20 transfer or possessing said firearm prior to the effective date of SB 118. The opposition does not
21 address Judge Chalfant’s correct ruling that an order permitting completion of the
22 transfer of an assault weapon to an individual who made a deposit before August 6, 2020, would
23 violate SB 118 because said individual did not have possession before September 1, 2020.

24 Instead, plaintiffs refer to a stipulated injunction and consent decree in a case involving
25 delays in a DOJ online program for registering “bullet button” firearms. (*Sharp v. Becerra et al.*,
26 U.S.D.C. Eastern District Case No. 2:18-cv-02317-MCE-AC, Stipulated Injunction and Consent
27 Decree, p. 2:9-14, Ex. A to Req. for Jud. Notice filed by plaintiffs in this action on June 29,
28 2021.) However, the stipulation in that case applied only to individuals who lawfully possessed a
firearm at issue in that case before the applicable statutory deadline under Penal Code section

1 30900, subdivision (b)(1). (Ex. A to plaintiffs’ Req. for Jud. Notice, pp. 2:23-3:5.) Thus, an
2 individual who did not possess a “bullet button” firearm before the deadline could not acquire one
3 after the deadline. Therefore, the *Sharp* stipulation provides further support in this case for the
4 clear conclusion that if an individual did not possess a Title 1 centerfire firearm before the
5 September 1, 2020, deadline, it would be illegal to acquire one after said deadline. Thus,
6 declaratory relief ordering transfer of a Title 1 centerfire firearm at this juncture is not available,
7 as a matter of law.

8 In addition, plaintiffs make the conclusory assertion that there is ongoing harm, but the
9 alleged wrongdoing in this case (i.e. not adding an “other” option to the rifle, shotgun,
10 rifle/shotgun combination dropdown menu in a timely manner) was addressed as of October 1,
11 2021. However, the passage of Penal Code section 30685 made it illegal to come into possession
12 of a Title 1 centerfire firearm after September 1, 2020, and no one had applied for transfer of a
13 Title 1 centerfire firearm before that time. Thus, plaintiffs are essentially alleging a past wrong of
14 not adding the “other” option in time for an individual to apply to legally possess a Title 1
15 centerfire firearm before the September 1, 2020, cutoff. In other words, it is Penal Code section
16 30685 and not the online registration system that prevents transfer of a Title 1 centerfire firearm
17 at this juncture.

18 As to the failure of the SAC to otherwise state a claim for violation of procedural due
19 process because state mandamus is a satisfactory post-deprivation remedy, plaintiffs cite *Sorrels*
20 *v. McKee*, (9th Cir. 2002) 290 F.3d 965, which did not address state mandamus or the adequacy
21 thereof for procedural due process purposes. *Sorrels* involved an inmate who was not given
22 notice of rejection of delivery of a legal journal pursuant to internal prison policy. The court
23 found this failure insufficient to state a due process violation under § 1983. (*Id.* at p. 972-973.)

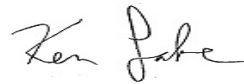
24 As to the failure of the SAC to otherwise state a claim for violation of substantive due
25 process, the opposition does not question the authorities cited in defendants’ moving papers
26 stating that the liberty of contract is not an interest protected by substantive due process. Nor do
27 plaintiffs cite any authority finding that the ability to contract freely to buy and sell firearms is a
28 fundamental interest protected by substantive due process under the Fourteenth Amendment.

1 Plaintiffs cite two Second Amendment violation cases that did not involve a substantive due
2 process claim. (*Boland v. Bonta* (C.D. Cal. 2023) --- F.Supp.3d ---, 2023 WL 2588565; *Ezell v.*
3 *City of Chicago* (7th Cir. 2011) 651 F.3d 684.) These cases are inapposite as the seventh alleged
4 cause of action is not a Second Amendment violation claim.

5 In addition, the opposition acknowledges that the SAC does not allege that the conduct at
6 issue shocks the conscience. However, plaintiffs assert that alleging deliberately indifferent
7 conduct satisfies this requirement citing cases decided in the context of alleged injuries that
8 occurred to persons in custody including *Castro v. County of Los Angeles* (9th Cir. 2016) 833
9 F.3d 1060, 1067-1068. *Sharp v. Becerra*, (E.D. Cal. 2019) 393 F.Supp.3d 991, also cited by
10 plaintiffs, relies on *Castro* in noting “that averments of deliberate indifference are necessary to
11 advance a substantive due process claim.” (*Id.* at p. 997.) Irrespective of whether conscience
12 shocking or deliberately indifferent conduct must be alleged in the context of this case, the SAC
13 also does not allege that the conduct at issue was deliberately indifferent. For this additional
14 reason, the SAC fails to state a cause of action for a violation of substantive due process.

15 Dated: August 29, 2023

Respectfully submitted,
ROB BONTA
Attorney General of California
DONNA M. DEAN
Supervising Deputy Attorney General

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KENNETH G. LAKE
Deputy Attorney General
21 *Attorneys for Defendants State of*
22 *California, acting by and through the*
23 *California Department of Justice, Former*
24 *Attorney General Xavier Becerra in his*
25 *personal capacity only and Attorney*
26 *General Rob Bonta in his official capacity*
27 *only*

1 **DECLARATION OF SERVICE BY ELECTRONIC MAIL**

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

4 I declare: I am employed in the City of Los Angeles, County of Los Angeles, State
5 of California. I am over the age of 18 years and not a party to the within action. My business
6 address is 300 South Spring Street, Room 1700, Los Angeles, California 90013. On August 29,
7 2023, I served the documents named below on the parties in this action as follows:

8 **REPLY TO OPPOSITION TO MOTION BY DEFENDANTS FOR JUDGMENT ON**
9 **THE PLEADINGS**

10 C.D. Michel
11 Anna M. Barvir
12 Jason A. Davis
13 MICHEL & ASSOCIATES, P.C.
14 180 E. Ocean Blvd., Suite 200
15 Long Beach, CA 90802
16 Email: abarvir@michellawyers.com
17 CMichel@michellawyers.com
18 Jason@calgunlawyers.com
19 lpalmerin@michellawyers.com
20 *Attorneys for Plaintiffs-Petitioners*

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

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

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

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

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

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

35 Executed on August 29, 2023, at Los Angeles, California.

36 Sandra Dominguez
37 Declarant

38 /s/ Sandra Dominguez
Signature