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

13
14 **FRANKLIN ARMORY, INC. AND
CALIFORNIA RIFLE & PISTOL
15 ASSOCIATION, INCORPORATED,**

16
17 Plaintiffs,

18 v.

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

22 Defendants.

Case No. 20STCP01747

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION BY DEFENDANTS FOR
SUMMARY JUDGMENT; OR IN THE
ALTERNATIVE, FOR SUMMARY
ADJUDICATION OF ISSUES**

**Date: July 10, 2024
Time: 8:30 a.m.
Dept.: 32**

Honorable Daniel S. Murphy

RES ID: 554862513719

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I

INTRODUCTION

This action is premised on the allegation raised in an October 24, 2019, letter sent by plaintiff's counsel to former Attorney General Becerra, asserting that a defect in the Department of Justice (Department) online system for processing transfers of firearms rendered dealers unable to transfer its new Title 1 firearm to its customers. (Second Amended Complaint (SAC), ¶ 69, Ex. C.) Plaintiff alleges that this letter triggered a mandatory duty under various Penal Code statutes on the part of defendants to modify the online system to correct the alleged defect and that the failure to do so in a timely manner deprived plaintiff of profits from lost sales of the Title 1. (SAC, ¶¶ 58-59, 105, 145, 157.)

Jay Jacobson, the President and owner of Franklin Armory, testified that the Title 1 was designed with a 16 inch barrel and a padded buffer tube instead of a stock. Without a stock, it would not be intended to be fired from the shoulder and thus not a rifle under the statutory definition of "rifle." (Jacobson Dep. p. 9:23-10:4, 21:12-15, 103:4-24, Ex. A to Lake Dec.) "Rifle" means a weapon "intended to be fired from the shoulder." (Pen. Code, § 17090.) The Title 1 was a long gun. "Long gun" means any firearm that is not a handgun or a machinegun. (SAC, ¶¶ 23-24, Pen. Code, § 16865.)

Blake Graham, a Special Agent Supervisor in the Bureau of Firearms (Bureau)¹ with expertise in firearms identification, testified that the Title 1 was an AR-15 style firearm with a rifle barrel length without a traditional stock and thus did not fall under the traditional "rifle" category. (Graham Dep. pp. 8:24-9:10, 11:10-18, 13:3-7, 22:18-23:25, 34:15-35:4, 38:12-40:16, 78:13-20, Ex. B to Lake Dec.)

With the Title 1 not technically a "rifle" under the statutory definition, it would not be considered an assault weapon as defined by the version of Penal Code Section 30515 in effect up until August 6, 2020, because that definition applied only to "rifles." (Pen. Code, § 30515(a)(1)-(3).) On August 6, 2020, the legislature passed SB 118 which included amending the Penal Code

¹ The Bureau is part of Department's Division of Law Enforcement (DLE). (Mendoza Dec., ¶ 1.)

1 Section 30515 definition of an assault weapon to add a “centerfire firearm that is not a rifle,
2 pistol, or shotgun” that includes components in three categories. (Pen. Code, § 30515 (a)(9)-
3 (11).) With this change in definition, the Title 1 was rendered a banned assault weapon on
4 August 6, 2020. (SAC, ¶ 112.)²

5 The online system for the submission of information concerning the sale and transfer of
6 firearms is known as the Dealer Record of Sale Entry System (DES) (Cal. Code Regs., tit. 11, §
7 4200; citing Pen. Code, § 28205.) Penal Code section 28205 states in pertinent part that, “. . .
8 except as permitted by the department, electronic transfer shall be the exclusive means by which
9 information is transmitted to the department.” (Pen. Code, § 28205, subd. (c).) The DES is a
10 web-based application used by California firearms dealers to submit firearm background checks
11 to the Department to determine if an individual is eligible to purchase, loan, or transfer a
12 handgun, long gun, and ammunition. (Mendoza Dec., ¶ 3.) A primary purpose of a background
13 check is “to notify the dealer if a prospective firearm purchaser is prohibited from possessing a
14 gun under federal law or under certain provisions of California law relating to prior convictions
15 and mental illness.” (*Bauer v. Becerra* (9th Cir. 2017) 858 F.3d 1216, 1219.)

16 The alleged defect in the DES was that the gun type drop-down menu for long guns that a
17 dealer would select from while processing a transfer included only options for rifle, shotgun, or
18 rifle/shotgun combination. Since the Title 1 was not technically a “rifle” under the statutory
19 definition, plaintiff alleges that a dealer could not process a Title 1 for transfer unless the DES
20 was modified to add an “other” option to this drop-down menu. (SAC, ¶¶ 58, 69, Ex C.) The
21 SAC does not identify any statute or other authority that requires that a firearm being processed
22 for transfer in the DES fit the statutory definition of “rifle” in order to be processed as such. As
23 discussed further below, Mr. Jacobson admits that he understood that for years prior to the

24
25 ² The SAC contains allegations that infer wrongdoing by defendants in supporting the passage of
26 SB 118. (SAC, ¶¶ 109-112.) However, to the extent plaintiff premises any cause of action on a
27 Department employee, including former Attorney General Becerra, advocating for firearms
28 legislation, including SB 118, said cause of action is barred under the *Noerr-Pennington* doctrine.
The *Noerr-Pennington* immunity applies to “virtually any tort, including unfair competition and
interference with contract.” (*Premier Medical Management Systems, Inc. v. California Ins.
Guarantee Assn.* (2006) 136 Cal.App.4th 464, 478; *Sosa v. DIRECTV* (9th Cir. 2006) 437 F.3d
923, 942; *Manistee Town Ctr. v. City of Glendale* (9th Cir. 2000) 227 F.3d 1090, 1092.)

1 introduction of the Title 1, stockless firearms were processed in the DES as rifles or shotguns
2 respectively even though they did not meet the statutory definition. (e.g. dealers would process a
3 stockless rifle as a rifle in the DES.) The version of the DES “Gun Type” drop-down menu that
4 had three options (rifle, rifle/shotgun combination, or shotgun) had been in place had been in
5 place since at least 2015. (Mendoza Dec., ¶ 6.)

6 There are three remaining causes of action: tortious interference with contractual relations
7 (3rd), tortious interference with prospective economic advantage (4th) and negligent interference
8 with prospective economic advantage. (5th) As a result of the court granting defendants’ motion
9 for judgment on the pleadings as to the sixth, seventh and ninth causes of action on September 6,
10 2023, Attorney General Bonta is no longer a defendant and plaintiff California Rifle and Pistol
11 Association is no longer a plaintiff in this action. (9/6/23 hearing transcript, Ex. E to Lake Dec.,
12 p. 27:19-30:1.) Thus, the three remaining claims are asserted by the remaining plaintiff, Franklin
13 Armory, against the remaining defendants, the State of California acting by and through the
14 Department and former Attorney General Becerra.³

15 As discussed further below, defendants are entitled to summary judgment on numerous
16 grounds. First, there is no direct liability against the Department for the three interference claims
17 and uncontrovertible evidence shows that multiple elements of each claim cannot be established
18 against any Department employee including former Attorney General Becerra. Second, the Penal
19 Code statutes cited by plaintiff fail to establish a mandatory duty on the Department, or its
20 employees, to have modified the DES to add an “other” option to the drop-down menu prior to
21 August 6, 2020, but rather conferred discretionary authority as to the operation of the DES.
22 Finally, the discretionary immunity under Government Code section 820.2 bars the remaining
23 claims.

24 II

25 FACTS

26 Prior to plaintiff’s counsel sending the letter alleging a defect in the DES in October,
27 2019, Franklin Armory filed another action regarding the Title 1 in Sacramento Superior Court.

28 ³ Plaintiff is not claiming any damages relative to the Title 1 rimfire caliber model. (Jacobson
Dep. p. 135:10-136:1.)

1 (*Franklin Armory v. State of California et al.*, Sacramento Superior Case No. 2018-00246584-
2 CU-MC (Sacramento Action).) Mr. Jacobson authorized the filing of the Sacramento action
3 suing former Attorney General Becerra because he was the man in charge as head of the
4 Department which is the same reason he is suing him in this action. (Jacobson Dep. pp. 85:25-
5 86:19, 87:8-88:7.) In the Sacramento action, Franklin Armory requested a declaration of rights
6 that the Title 1 was not an assault weapon because it was not a “rifle.” However, the stated
7 reason that the Title 1 could not be transferred was uncertainty over whether it was an illegal
8 assault weapon which created a fear of prosecution for selling a Title 1 if it were deemed to be an
9 assault weapon. (Sacramento Action, FAC, Ex. G to Lake Dec., ¶¶ 66, 73-74, 77-78, 85, 95, 97-
10 98; Jacobson Dep. p. 94:5-95:7.) After the court sustained a demurrer with leave to amend on
11 September 23, 2019, plaintiff dismissed the action on October 3, 2019. (Sacramento Action,
12 Order 9/23/19-Ex. H and Dismissal-Ex. I to Lake Dec.)

13 Mr. Jacobson admits that there was no mention of any issue with the DES in the
14 Sacramento action and that he was unaware of any issue with the DES during that time.
15 (Jacobson Dep. p. 96:10-19.) During the time the Sacramento action was pending, no one ever
16 expressed concern that the Title 1 could not be processed in the DES because it was not a “rifle.”
17 (Jacobson Dep. p. 97:6-19.)

18 Furthermore, Mr. Jacobson understood that for years since the DES was put in use,
19 stockless firearms such as lower receivers, barreled receivers and pistol grip shotguns were
20 processed in the DES as rifles or shotguns respectively even though they did not meet the
21 statutory definition. (Jacobson Dep. p. 57:6-58:10, 56:8-25.) For example, he was aware of what
22 he called the “historic tradition” of processing Mossberg Cruisers, a stockless shotgun, in the
23 DES as shotguns for a number of years. (Jacobson Dep. p. 40:16-25, 50:19-51:1.)

24 Mr. Graham referenced examples of stockless firearms that were not rifles or shotguns
25 under the statutory definition that had been processed in the DES prior to the adding of the
26 “other” option in 2021, including lower receivers which were processed in the DES as rifles.
27 Browning pistol grip shotguns, which are stockless, were processed in the DES as shotguns.
28

1 (Graham Dep. pp. 19:10-20:19, 74:20-77:2, 104:15-25.) Mr. Jacobson testified that Mr. Graham
2 told him that this practice was the status quo. (Jacobson Dep. p. 60:21-61:8.)

3 The regular process for a California resident to purchase a Franklin Armory firearm would
4 first require the person to purchase the firearm paying the full price. (Jacobson Dep. p. 154:24-
5 155:15.) Franklin Armory would then obtain an online verification number from the Department
6 which would be provided to the California licensed dealer when shipping the firearm to them.
7 (Jacobson Dep. p. 155:16-156:7; SAC, ¶¶ 1, 3, 35; Pen. Code, §§ 28050, subd. (b), 27555, subd.
8 (a)(1).)

9 The purchaser then would go into the dealer and provide background information for the
10 background check that would then be transmitted to the Department. (Jacobson Dep. p. 156:8-
11 18.) A dealer transmitting to the Department agrees that “all of the information I submit to the
12 Department through the DES shall be true, accurate, and complete to the best of my knowledge.”
13 (Cal. Code Reg., tit. 11, § 4210, subd. (a)(6).) The Department then reviews the information
14 provided and advises the dealer if there exists grounds for denying the transfer of the firearm to
15 the purchaser. (Pen. Code, §§ 28215, 28210, 28220.) If these requirements have been satisfied
16 and the Department has not indicated grounds for denying the transfer, the dealer may deliver the
17 firearm to the purchaser. (Pen. Code, §§ 26815, 27540, 28255.)

18 The SAC indicates that “a person found ineligible to receive a firearm may appeal the
19 decision” citing 28 C.F.R. section 25.10 which authorizes an individual to bring an action against
20 the state or political subdivision responsible for denying the transfer for an order directing that the
21 firearm transfer be approved. (28 C.F.R. § 25.10, subd. (f).) (SAC, ¶ 49.) If the dealer cannot
22 legally deliver the firearm to the purchaser, the dealer typically returns the firearm to the seller.
23 (Pen. Code, § 28050, subd. (d).) The purchaser would get a refund minus a restocking fee.
24 (Jacobson Dep. p. 161:11-15.)

25 Plaintiff does not allege that anyone ever actually purchased a Title 1 firearm and
26 attempted to process a transfer of the Title 1 in the DES through a licensed firearms dealer.
27 Rather, plaintiff alleges that individuals “placed deposits” for the Title 1 firearm. (SAC, ¶ 113.)
28

1 After introducing the Title 1 in October, 2019, Franklin Armory put it out that it was
2 taking \$5.00 deposits online for the Title 1. The \$5.00 deposit was refundable and there was no
3 requirement for any person placing a deposit to complete a purchase. (Jacobson Dep. p. 116:1-
4 117:17.) When a person was going through the online deposit process, the purchase price of the
5 Title 1 firearm did not appear on the screen or in an invoice or sales order. (Jacobson Dep. p.
6 122:6-123:12.) The price of the Title 1 was \$944.99. (Jacobson Dep. p. 124:11-20.) Mr.
7 Jacobson solicited submission of the deposits for the Title 1 without the intent of actually
8 shipping them at that point in time. (Jacobson Dep. p. 147:17-23.) Deposits were placed from
9 October 16, 2019, to approximately August 6, 2020. (Jacobson Dep. p. 130:12-131:1.)

10 When asked why he did not go through the regular sales process for a Title 1 by having a
11 dealer submit a Title 1 for transfer, Mr. Jacobson testified “that’s not an avenue that I’m allowed
12 to take from a standpoint of the dealers themselves have to make that decision.” (Jacobson Dep.
13 p. 174:15-175:12.)

14 **Modification of the DES**

15 The issue regarding the Title 1 was first brought to the attention of Bureau Director
16 Allison Mendoza in the latter part of 2019. (Mendoza Dec., ¶¶ 6-7.) Prior to becoming Director
17 in March, 2023, Director Mendoza served as Assistant Bureau Chief from 2015 until March,
18 2023. (At some point, the title of this position changed to Assistant Bureau Director.) As the
19 Assistant Bureau Chief/Director, she was responsible for managing all activities under the
20 Bureau’s Regulatory Branch including management and oversight of the DES. (Mendoza Dec.,
21 ¶¶ 1-3.)

22 Director Mendoza states that, at any given time, there are numerous pending requests for
23 enhancements to be made to the DES. Such requests can arise from, among other things, new or
24 amended statutes, new or amended regulations, court decisions, and technological advancements,
25 to name a few. In her role as Assistant Bureau Chief/Director, she was involved in the decision
26 making process relating to DES enhancement requests. The decision-making process as to
27 whether to move forward with a DES enhancement often involve the Bureau, the Application
28 Development Bureau (ADB), the Department’s attorneys, and occasionally higher levels within

1 the Department, such as the DLE, California Justice Information Services Division (CJIS), and
2 the Directorate Division. This process as to a proposed enhancement can include deciding
3 whether to move forward with the enhancement as well as the parameters of the enhancement and
4 timeline for completion and deployment. This process requires the relevant parties within the
5 Department to engage in a balancing of multiple factors and a weighing of competing priorities
6 among the multiple proposed enhancement requests pending at any given time including
7 enhancements mandated by statutes, regulations, or court orders, allocation of available resources
8 for a particular enhancement (such as the required number of personnel it will take to complete
9 the project), the available budget for such an enhancement, and the time it will take to complete
10 said enhancement. Director Mendoza notes that considerations of public safety are very
11 important and any proposed enhancement must be evaluated in terms of the certainty that it will
12 not compromise the Department's ability and responsibility to ensure public safety. (Mendoza
13 Dec., ¶¶ 4-5.)

14 In the latter part of 2019, the Bureau initiated a review to evaluate the resources required
15 for a potential DES enhancement to add an "other" option in the "Gun Type" drop-down menu in
16 the "Dealer Long Gun Sale" transaction type. This review required the leadership of the Bureau,
17 in collaboration with ADB and the Department's attorneys, to engage in a balancing of multiple
18 factors and a weighing of competing priorities among the multiple proposed DES enhancement
19 requests pending at that time. The Department also evaluated and weighed the allocation of
20 available resources to such an enhancement, such as the number of personnel required, budgeting
21 of the enhancement, and the time it would take to complete said enhancement. The onset of the
22 COVID-19 pandemic in March 2020 presented additional difficulties in being able to staff such a
23 DES enhancement. (Mendoza Dec., ¶ 8.)

24 ADB undertook a review of what would be required to add the "other" option to the "Gun
25 Type" drop-down menu. At some point, ADB reported back that it would take many months to
26 implement this enhancement, and would require well over a dozen personnel, many of whom
27 would have to be diverted from other projects. Implementing this DES enhancement would
28

1 have required changes to many other applications and databases in addition to the DES.
2 (Mendoza Dec., ¶ 9.)

3 For these reasons, ADB additionally explored the possibility of doing a DES enhancement
4 that was reduced in-scope, temporary, and applicable to only the Title 1 firearm. Under this
5 proposal, a permanent enhancement would be implemented at a later date. ADB estimated such
6 an enhancement would take a few months. ADB also advised that this proposal would present
7 operational difficulties in properly recording the sales and transfers of the Title 1 firearm in the
8 DES until a permanent enhancement was implemented. Such operational difficulties would have
9 raised significant public safety concerns. These factors, including the public safety concerns,
10 were discussed within the Department, which ultimately decided to not immediately proceed with
11 the temporary DES enhancement. (Mendoza Dec., ¶ 10.)

12 After SB 118 was signed into law on August 6, 2020, which rendered the Title 1 firearm a
13 prohibited assault weapon, the Department decided, after weighing competing priorities among
14 the multiple proposed DES enhancements pending at that time in the middle of the COVID-19
15 pandemic, to implement at a later date the DES enhancement to add an “other” option in the “Gun
16 Type” drop-down menu. This enhancement was completed on October 1, 2021. (Mendoza Dec.,
17 ¶ 11.)

18 Cheryle Massaro-Florez, an Information Technology Supervisor II who works in the
19 Bureaus’ firearms software developments unit, oversaw the enhancement project to add the
20 “other” option in the DES. (Massaro-Florez Dep.1(12/28/21), p. 18:12-21,19:2-12, 30:19-
21 31:10.) The work on this enhancement project took from July 1, 2021, to October 1, 2021.
22 (Massaro-Florez Dep.1 p. 68:25-69:10.) Her entire staff of at least 12 people worked on this
23 project along with staff from the firearms application support unit and the Bureau. (Massaro-
24 Florez Dep.1 p.36:18-37:25.) The project was done in four phases including analysis, build,
25 ~~system integration and testing.~~ (Massaro-Florez Dep.1 p. 94:6-24.) ~~Ms. Massaro-Florez testified~~
26 that this project was complicated because it required not only modifications in the DES but
27 several other applications and databases. (Massaro-Florez Dep.1 p. 57:14-60:11, 61:13-62:5,
28 91:3-92:21.) Christina Rosa-Robinson, an Information Technology Specialist I who works with

1 the Bureau supporting its firearms applications and was involved in all stages of the enhancement
2 project, referred to this enhancement as a big undertaking. (Rosa-Robinson Dep. pp. 11:14-12:5,
3 13:9-14, 18:10-19:5, 25:23-26:9, 52:13-23, Ex. E to Lake Dec.)

4 III

5 ARGUMENT

6 A. SUMMARY JUDGMENT SHOULD BE GRANTED

7 "The motion for summary judgment shall be granted if all the papers submitted show that
8 there is no triable issue as to any material fact and that the moving party is entitled to judgment as
9 a matter of law." (Civ. Proc. § 437c (c)). "Our Supreme Court has made clear that the purpose of
10 the 1992 and 1993 amendments to the summary judgment statute was to liberalize the granting of
11 summary judgment motions." (*Hodges v. Cedars-Sinai Medical Center* (2023) 91 Cal.App.5th
12 894, 903 (citation omitted).) Summary judgment is no longer called a "disfavored" remedy and is
13 now seen as "a particularly suitable means to test the sufficiency of the plaintiff's or defendant's
14 case." (*Id.* (citation omitted).) Summary judgment motions serve the purpose to "expedite
15 litigation and eliminate needless trials." (*Continental Casualty Co. v. Superior Court* (2001) 92
16 Cal.App.4th 430, 438.)

17 Thus, summary judgment law no longer requires "a defendant moving for summary
18 judgment to conclusively negate an element of the plaintiff's cause of action. In this particular
19 too, it now accords with federal law. All that the defendant need do is to 'show that one or more
20 elements of the cause of action . . . cannot be established' by the plaintiff." (*Aguilar v. Atlantic*
21 *Richfield Co.* (2001) 25 Cal.4th 826, 854 (citations omitted)).

22 Each party's burden of proof on a defendant's motion for summary judgment is set forth at
23 Code of Civil Procedure 437c, subdivision (p)(2), which states:

24 "A defendant or cross-defendant has met his or her burden of showing that a cause of
25 action has no merit if that party has shown that one or more elements of the cause
26 of action, even if not separately pleaded, cannot be established, or that there is a
27 complete defense to that cause of action. Once the defendant or cross-defendant
28 has met that burden, the burden shifts to the plaintiff or cross-complainant to show
that a triable issue of one or more material facts exists as to that cause of action or
a defense thereto. The plaintiff or cross-complainant may not rely upon the mere
allegations or denials of its pleadings to show that a triable issue of material fact

1 exists but, instead, shall set forth the specific facts showing that a triable issue of
2 material fact exists as to that cause of action or a defense thereto.”

3 (Civ. Proc. § 437c (p)(2).)

4 In order for an issue to be material, it must “relate to a claim or defense in issue which
5 could make a difference in the outcome.” (*Mallett v. Superior Court* (1992) 6 Cal.App.4th 1853,
6 1863-1864.) “Only material factual disputes bear any relevance: No amount of factual conflict
7 upon other aspects of the case will preclude summary judgment.” (*Christina C. v. County of*
8 *Orange* (2013) 220 Cal.App.4th 1371, 1379.)

9 **B. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT AS TO ALL**
10 **THREE OF THE INTERFERENCE WITH CONTRACT AND PROSPECTIVE**
11 **ECONOMIC ADVANTAGE CLAIMS**

12 Government Code section 815 declares that, “except as otherwise provided by statute,
13 public entities are not liable for a tortious injury, whether such injury arises out of an act or
14 omission of the public entity or a public employee or any other person.” (Gov. Code §815, subd.
15 (a)). The California Supreme Court has repeatedly and clearly held that, “under the Government
16 Claims Act (Govt. Code, §810 et seq.), there is no common law tort liability for public entities in
17 California; instead, such liability must be based on statute.” (*Guzman v. County of Monterey*
18 (2009) 46 Cal.4th 887, 897.)

19 The intent of the Government Claims Act is “not to expand the rights of plaintiffs against
20 government entities. Rather, the intent of the act is to confine potential governmental liability to
21 rigidly delineated circumstances.” (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th
22 983, 991.) “Thus, in the absence of some constitutional requirement, public entities may be liable
23 only if a statute declares them to be liable.” (*County of Los Angeles v. Superior Court (Terrell R.)*
24 (2002) 192 Cal.App.4th 627, 637.) The applicable enactment must be alleged in specific terms.
25 (*Id.* at p. 638.) Every fact material to the existence of its statutory liability “must be pleaded with
26 particularity.” (*City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129, 138.)

27 Under Government Code section 815.2, public entities may be liable for acts of their
28 employees but are not liable if the employee’s act or omission would not give rise to a cause of
action against that employee or if the employee is immune from liability. (*Walker v. County of*

1 *Los Angeles* (1987) 192 Cal.App.3d 1393, 1397.) “A public employee is not liable for an injury
2 caused by the act or omission of another person.” (Gov. Code, § 820.8.) Liability under section
3 815.2 depends on whether a public employee breached a duty owed to plaintiff. (*Hoff v.*
4 *Vacaville Unified* (1998) 19 Cal.4th 925, 933.) “The non-action of one who has no legal duty to
5 act is nothing.” (*People v. Heitzman* (1994) 9 Cal.4th 189, 198.) “Absence of duty bars recovery
6 for intentional torts as well as for negligence.” (*Gregory v. Cott* (2014) 59 Cal.4th 996, 1011-
7 1012.) “As a rule, one has no duty to come to the aid of another. A person who has not created a
8 peril is not liable in tort merely for failure to take affirmative action to assist or protect another
9 unless there is some relationship between them which gives rise to a duty to act.” (*Zelig v.*
10 *County of Los Angeles* (2002) 27 Cal.4th 1112, 1128-1129.) “A ‘special relationship’ exists if and
11 only if an injured person demonstrates the public officer assumed a duty toward him greater than
12 the duty owed to another member of the public.” (*Walker, supra*, 192 Cal.App.3d at p. 1398.)

13 A duty to act on the part of a public employee “should be sufficiently alleged so as to
14 make that duty clear and unequivocal. This is a simple, ordinary rule of fairness.” (*Susman v.*
15 *City of Los Angeles* (1969) 269 Cal.App.2d 803, 809.) Furthermore, “since all California
16 governmental tort liability flows from the California Government Claims Act, the plaintiff must
17 plead facts sufficient to show his or her cause of action lies outside the breadth of any applicable
18 statutory immunity.” (*City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129, 148.)

19 Here, since there is no common law tort liability for public entities, the SAC fails to state
20 a cause of action against the Department because interference with contract and prospective
21 economic advantage claims are common law torts. (*Della Penna v. Toyota Motor Sales* (1995)
22 11 Cal.4th 376, 381[“interference torts” which includes interference with contract and
23 interference with prospective economic relations are based on common law].)⁴

24 While no cause of action can be stated directly against the Department, the allegations
25 indicate that plaintiff is attempting to predicate liability based on the failure of Department
26 employees, including former Attorney General Becerra, to modify the DES to add an “other”

27 _____
28 ⁴ A summary judgment motion “necessarily includes a test of the sufficiency of the complaint.”
(*Centinela Hospital v. City of Inglewood* (1991) 225 Cal.App.3d 1586, 1595.)

1 option after the Title 1 was introduced in October, 2019, and before the Title 1 was banned by the
2 passage of SB 118. However, as discussed below, defendants have shown that elements of the
3 interference claims cannot be established. In addition, the applicable Penal Code statutes did not
4 impose a mandatory duty to modify the DES but rather conferred discretionary authority for
5 Department employees, including former Attorney General Becerra, to determine if and/or when
6 the DES should have been modified to add an “other” option. Furthermore, the discretionary
7 immunity under Government Code section 820.2 bars the interference claims.

8 **1. Summary Judgment Should be Granted as to the Third Cause of Action for**
9 **Interference with Contractual Relations**

10 “Tortious interference with contractual relations requires “(1) the existence of a valid
11 contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3)
12 the defendant's intentional acts designed to induce a breach or disruption of the contractual
13 relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting
14 damage.” (*Ixchel Pharma, LLC v. Biogen, Inc.* (2020) 9 Cal.5th 1130, 1141.)

15 A tortious disruption of an *existing* contract is required. (*Della Penna v. Toyota Motor*
16 *Sales, U.S.A.* (1995) 11 Cal.4th 376, 392 (emphasis in original).) The existence of a contract
17 requires parties capable of contracting; their consent; a lawful object; and a sufficient cause or
18 consideration. (*Fleming v. Oliphant Financial, LLC* (2023) 88 Cal.App.5th 13, 21.) In
19 determining whether a contract was formed, California law “places emphasis on the party's intent
20 to be bound to the contract.” (*Id.* at p. 22.) The parties must “have a present intention to be
21 bound by their agreement” (1 Williston on Contracts (4th ed.) § 3:7; see also § 3.2-parties
22 must “manifest objectively an intent to be bound by the agreement.”)

23 “The fact that the buyer makes a deposit on goods to be manufactured does not establish
24 that the parties made a contract for that purpose.” (2 *Lawrence's Anderson on the Uniform*
25 *Commercial Code* (3d ed.) § 2-204:137-Conduct establishing contract-Conduct held not
26 sufficient to establish existence of contract.)

27 Here, no valid contract existed. Plaintiff admits that the \$5 deposits were refundable and
28 that there was no obligation for any person making a deposit to actually purchase the Title 1.

1 Plaintiff also admits there was no intent to ship any Title 1 firearm at that time and a person
2 would have to complete the full purchase before plaintiff would ship it. Clearly, there was no
3 present intention by the parties to be bound to a purchase of the Title 1. Also, defendants could
4 not have had knowledge of contracts that did not exist.

5 Furthermore, it is undisputed that the setup of the DES to include the gun type drop-down
6 menu with rifle, rifle/shotgun and shotgun occurred before the introduction of the Title 1 in
7 October, 2019. Thus, it is logically impossible for the inclusion of this drop-down menu in the
8 DES to have been an intentional act designed to interfere with sales of a firearm that did not exist
9 yet.

10 In addition, defendants' inaction in not modifying the DES to add an "other" option before
11 the August 6, 2020, ban of the Title 1 cannot properly be construed as an intentional act designed
12 to induce a breach or disruption. Such an assertion is inconsistent with a logical reading of the
13 phrase "intentional act designed to induce." In *Nanko Shipping v. Alcoa Inc.*, (D. D.C. 2015) 107
14 F. Supp. 3rd 174, the court held that no claim for tortious interference with contract or
15 prospective business advantage could be stated when plaintiff's tortious interference claim rested
16 "on alleged inaction." (*Id.* at p. 182-183; reversed on other grounds in *Nanko Shipping, USA v.*
17 *Alcoa, Inc.* (D.C. Cir. 2017) 850 F.3d 461, 467; see also *Knight Enterprises v. RPF Oil Co.* (Mich.
18 Ct. App. 2013) 299 Mich.App. 275, 280 [Commission of an affirmative act required to prevail on
19 a claim for tortious interference under Michigan law].)

20 Even if inaction could be construed as an intentional act designed to induce a breach, there
21 must be a statutory basis establishing a mandatory duty to modify the DES. As discussed further
22 below, the Penal Code statutes relied upon by plaintiff do not establish such a duty.

23 Finally, there is no basis for an actual breach or disruption of any contractual relationship
24 because the deposits were not contracts.

25 **2. Summary Judgment Should be Granted as to the Fourth and Fifth Causes of Action**
26 **for Tortious and Negligent Interference with Prospective Economic Advantage**

27 "Intentional interference with prospective economic advantage has five elements: (1) the
28 existence, between the plaintiff and some third party, of an economic relationship that contains

1 the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the
2 relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual
3 disruption of the relationship; and (5) economic harm proximately caused by the defendant's
4 action.” (*Roy Allan Shurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512.)⁵

5 “A cause of action for tortious interference has been found lacking when either the
6 economic relationship with a third party is too attenuated or the probability of economic benefit
7 too speculative.” (*Id.* at p. 515.) It must be “reasonably *probable* that the lost economic
8 advantage would have been realized but for the defendant's interference.” (*Youst v. Longo* (1987)
9 43 Cal.3d 64, 71 (emphasis in original).)

10 “The tort's requirements presuppose the relationship existed *at the time* of the defendant's
11 allegedly tortious acts lest liability be imposed for actually and intentionally disrupting a
12 relationship which has yet to arise.” (*Roy Allan Shurry Seal, supra*, 2 Cal.5th at p. 518 (emphasis
13 in original).) “The defendant must have engaged in intentionally wrongful acts designed to
14 disrupt the plaintiff's relationship.” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29
15 Cal.4th 1134, 1164.)

16 In addition, a plaintiff must prove “that the defendant not only knowingly interfered with
17 the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other
18 than the fact of interference itself.” (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11
19 Cal.4th 376, 393.) “An act is independently wrongful if it is unlawful, that is, if it is proscribed
20 by some constitutional, statutory, regulatory, common law, or other determinable legal standard.”
21 (*Ixchel Pharma, LLC v. Biogen, Inc.* (2020) 9 Cal.5th 1130, 1142.) “The purpose of the
22 independent wrongfulness requirement in economic interference torts is to balance between
23 providing a remedy for predatory economic behavior and keeping legitimate business competition
24 outside litigative bounds.” (*Id.* at p. 1146.) “Only defendants who have engaged in an unlawful
25 ~~act can be held liable for this tort.” (*Korea Supply, supra*, 29 Cal.4th at p. 1164.)~~

26 ⁵ Negligent interference with prospective economic advantage requires essentially the same
27 elements as intentional interference except that the plaintiff must show that the defendant owed
28 the plaintiff a duty of care. (*Lange v. TIG Ins. Co.* (1998) 68 Cal.App.4th 1179, 1187.)

1 The above discussion demonstrating there is no basis for an interference with contract
2 cause of action applies as well with regard to the interference with prospective economic
3 advantage claims. First, there was no probability of future economic benefit based on the
4 refundable, non-obligatory \$5.00 deposits. In addition, there must have been an intentionally
5 wrongful act designed to disrupt a relationship with a probability of future economic benefit
6 existing at the time of the alleged act. Again, the setup of the DES to include the gun type menu
7 preceded the introduction of the Title 1 in October, 2019. Also, inaction cannot constitute an
8 intentionally wrongful act designed to disrupt.

9 The additional requirement of an independently wrongful act cannot be established
10 because there was no act on the part of defendants that could be construed as “unlawful” under
11 the applicable Penal Code statutes.

12 Furthermore, irrespective of plaintiff’s failure to establish elements of the interference
13 claims, these torts have traditionally protected the expectancies involved in “ordinary commercial
14 dealings.” (*Roy Allan Shurry Seal v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 515.)
15 Defendants submit that the *Roy Allan Shurry Seal* holding supports a finding that all of the
16 interference causes of action in this case should be precluded, as a matter of law, under the
17 circumstances presented.

18 *Roy Allan Shurry Seal* involved an interference with prospective economic advantage
19 claim in the context of the bidding process for a public works contract. (*Id.* at p. 509-510.)
20 The *Roy Allan Shurry Seal* court noted that “the public works bidding process differs from the
21 types of commercial transactions that traditionally have formed the basis for tort liability.” (*Id.* at
22 p. 519-520.) The court noted that, “we must consider whether expanding tort liability in the area
23 of public works contracts would ultimately create social benefits exceeding those created by
24 existing remedies for such conduct, and outweighing any costs and burdens it would impose.” (*Id.*
25 at p. 520.) The *Roy Allan Shurry Seal* court noted that “courts must act prudently when fashioning
26 damages remedies in an area of law governed by an extensive statutory scheme.” (*Id.*)

27 The *Roy Allan Shurry Seal* court rejected expanding tort liability to cover wrongful
28 interference torts in the public contracts bid process context because it would provide little

1 additional benefit in light of the extensive statutory scheme. (*Id.* at p. 521.)

2 Here, the firearms industry is “highly regulated.” (*In re Firearm Cases* (2005) 126
3 Cal.App.4th 959, 985-986.) Defendants submit that expanding tort liability to cover wrongful
4 interference torts in the firearms regulation context would provide little additional benefit in light
5 of the extensive statutory scheme. The second reason for the *Roy Allan Shurry Seal* court’s
6 holding was that “the competitive bidding laws were enacted for the benefit of the public, not for
7 the benefit or enrichment of bidders.” (*Roy Allan Shurry Seal, supra*, 2 Cal.5th at p. 521.)
8 Similarly, here, firearms laws were enacted to promote public safety for the benefit of the public,
9 not for the benefit or enrichment of firearms manufacturers.

10 Based on the above discussion, defendants are entitled to summary judgment because they
11 have shown that elements of each of the three interference claims cannot be established.
12 Nevertheless, even if the requirement that a defendant must have engaged in an intentionally
13 wrongful act could be construed as including a failure to act or inaction, there must be a statutory
14 basis establishing a duty to act. The SAC alleges Penal Code sections 28155, 28205, 28215 and
15 28220 as providing a basis for a mandatory duty. (SAC, ¶¶ 105, 145, 157.) However, as
16 discussed below, these statutes fail to impose a mandatory duty upon defendants to have modified
17 the DES to add an “other” option before the Title 1 was banned.

18 **3. The Penal Code Statutes Cited by Plaintiff Fail to Satisfy the Requirements to**
19 **Establish a Mandatory Duty upon the Department, or its employees including**
20 **Former Attorney General Becerra, to Have Modified the DES to Add an “Other”**
21 **Option Before the Title 1 was Banned**

22 A potential statutory basis for liability against a public entity is evaluated under the three
23 elements set forth in Government Code section 815.6 which states:

24 “Where a public entity is under a mandatory duty imposed by an enactment that is
25 designed to protect against the risk of a particular kind of injury, the public entity
26 is liable for an injury of that kind proximately caused by its failure to discharge the
27 duty unless the public entity establishes that it exercised reasonable diligence to
28 discharge the duty.”

(Govt. Code § 815.6.)

“A private cause of action lies against a public entity only if the underlying enactment sets
forth the elements of liability set out in section 815.6.” *Guzman, supra*, 46 Cal.4th at p. 897.)

1 The requirements of section 815.6 must be satisfied in order to create a private right of action for
2 damages. (*Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 632.) Whether
3 an enactment creates a mandatory duty is a question of law. (*Haggis v. City of Los Angeles*
4 (2000) 22 Cal.4th 490, 499.)
5

6 a) **The Penal Code Statutes Cited by Plaintiffs Fail to Satisfy the First Requirement**
7 **to Establish a Mandatory Duty**

8 “First and foremost, application of section 815.6 requires that the enactment at issue be
9 *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it
10 must *require*, rather than merely authorize or permit, that a particular action be taken or not taken.
11 It is not enough, moreover, that the public entity or officer have been under an obligation to
12 perform a function if the function itself involves the exercise of discretion.” (*Haggis v. City of*
13 *Los Angeles* (2000) 22 Cal.4th 490, 498 (emphasis in original).) “If a statute does not require that
14 a ‘particular action’ be taken, section 815.6 does not create the right to sue a public entity.”
15 (*Shamsian, supra*, 136 Cal.App.4th at p. 632.)

16 “Courts have construed this first prong rather strictly, finding a mandatory duty only if the
17 enactment affirmatively imposes the duty and provides implementing guidelines.” (*Guzman,*
18 *supra*, 46 Cal.4th at p. 898.) “The mandatory nature of the duty must be phrased in explicit and
19 forceful language.” (*Id.* at p. 910.) A mandatory duty cannot be implied. (*Id.* at p. 911.)

20 “In addition, it is not enough that the public entity or officer have been under an obligation
21 to perform a function if the function itself involves the exercise of discretion. Therefore, an
22 enactment’s use of mandatory language such as “shall” is not dispositive. An enactment creates a
23 mandatory duty only where the commanded act does not lend itself to a normative or qualitative
24 debate over whether it was adequately fulfilled.” (*County of Los Angeles v. Superior Court*
25 (*Faten*) (2012) 209 Cal.App.4th 543, 546.)

26 Here, the Penal Code section dealing with the DES is section 28205, which states in
27 pertinent part, *except as permitted by the department*, electronic transfer shall be the exclusive
28

1 means by which information is transmitted to the department.” (Pen. Code, § 28205, subd.
2 (c)(emphasis added).)⁶

3 In interpreting statutory provisions, a court’s “fundamental task is to determine the
4 Legislature’s intent and give effect to the law’s purpose.” (*Lopez v. Sony Electronics, Inc.* (2018)
5 5 Cal.5th 627, 633-634.) In this regard, the *Lopez* court stated:

6 “We begin by examining the statute’s words because they generally provide the
7 most reliable indicator of legislative intent. If the statutory language is clear and
8 unambiguous our inquiry ends. In that case, the plain meaning of the statute is
controlling, and resort to extrinsic sources to determine the Legislature’s intent is
unnecessary.”

9 (*Id.* at p. 634.)

10 Here, the plain meaning of the language in section 28205 clearly does not establish a
11 mandatory duty to have modified the DES to add an “other” option before August 6, 2020. First,
12 as required by *Haggis* and *Shamsian*, it does not require that a particular action be taken as to how
13 to setup the DES. For example, it does not specify a particular action with regard to entry of
14 information as to gun type, nor does it address provision of additional information such as rifle,
15 rifle/shotgun or shotgun or whether inclusion of such information would need to match the
16 statutory definition of each category. The plain meaning of the language “except as permitted by
17 the department” is that the Department has discretion to permit transmission by non-electronic
18 means (with the exception of a telephonic transfer) although it has not done so. In this regard, use
19 of the word “shall” is not dispositive when read together with the “except as permitted by the
20 department” language. Nevertheless, it is undisputed that the Department has required use of the
21 DES for processing firearms transfers.

22 Second, as required by *Guzman*, section 28205 does not provide “implementing
23 guidelines” or phrase the nature of a duty in “explicit and forceful language.” As the above
24 discussion illustrates, a logical reading of this general language is that implementation of setting
25 up the DES is left to the discretion of the department. ~~The only way to glean a duty to modify the~~

26 ⁶ The complete text of subdivision (c) states: “On or after January 1, 2003, except as permitted
27 by the department, electronic transfer shall be the exclusive means by which information is
28 transmitted to the department. Telephonic transfer shall not be permitted for information
regarding sales of any firearms.” (Pen. Code, § 28205, subd. (c))

1 DES to add an “other” option would be to imply one. However, *Guzman* makes clear that a
2 mandatory duty cannot be implied. Furthermore, to the extent there was a duty to setup and
3 operate the DES, it is undisputed that defendants did so.

4 In addition, the allegations of the SAC show that plaintiff agrees that section 28205,
5 subdivision (c), confers discretionary authority upon defendants. Plaintiff alleges that the
6 inability to process a Title 1 in the DES “could also be alleviated if the Department authorizes any
7 of a multitude of alternative means pursuant to the authority granted it by Penal Code section
8 28205, subdivision (c) . . .” (SAC ¶ 66.) In addition, plaintiff indicates that defendants would
9 have authority to do away with the rifle, rifle/shotgun, shotgun drop-down menu altogether
10 stating: “Significantly, while the “type” of firearm (e.g., “long gun” or “handgun”)⁷ is required,
11 the “subtype” [i.e. rifle, rifle/shotgun, shotgun] of a firearm is not mandated by Penal Code
12 section 28160, subdivision (a), or any other provision within Penal Code sections 28200 through
13 28255.” (SAC, ¶ 45.) Plaintiff’s allegation that defendants should have exercised their discretion
14 to provide an alternative or modify the DES sooner illustrates that section 28205 does lend itself
15 to a normative or qualitative debate over the setup and operation of the DES which precludes a
16 finding of a mandatory duty.

17 More significantly, Penal Code section 28245 explicitly states that defendants’ acts or
18 omissions pursuant to section 28205 as it pertains to long guns shall be deemed to be
19 discretionary under the Government Claims Act. Penal Code section 28245 states:

20 “Whenever the department of Justice acts pursuant to this article as it pertains to
21 firearms other than handguns, the department’s acts or omissions shall be deemed
22 to be discretionary within the meaning of the Government Claims Act pursuant to
23 Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.”

23 (Pen. Code, §28245.)

24 First, both sections 28205 and 28245 are part of the same article. (Article 3. Submission
25 of Fees and Firearm Purchaser Information to the Department of Justice.) Second, the plain
26 meaning of the language “as it pertains to firearms other than handguns” is that section 28245

27 ⁷ See also Rostron, *Style, Substance, and the Right to Keep and Bear Assault Weapons* (2018) 40
28 Campbell L. Rev. 301, 304 [discussing types of firearms as handguns and long guns.]

1 applies to long guns. Third, section 28245 applies to acts or omissions making clear that it
2 applies to the alleged failure to modify the DES. Fourth, the specific reference to the
3 Government Claims Act makes clear that it applies to the monetary damages claims herein as
4 opposed to claims outside the Government Claims Act such as for mandamus or declaratory relief.
5 Thus, section 28245 conclusively removes any doubt that acts or omissions pursuant to section
6 28205 were discretionary and did not establish a duty to modify the DES.

7 Plaintiff also asserts Penal Code section 28155 as a basis for establishing a mandatory
8 duty. Section 28155 simply states: “The Department of Justice shall prescribe the form of the
9 register and the record of electronic transfer pursuant to Section 28105.” The plain meaning of
10 the language in Section 28155 clearly does not establish a mandatory duty to have modified the
11 DES to add an “other” option before August 6, 2020.

12 First as required by *Haggis* and *Shamsian*, it does not require or specify that a particular
13 action be taken with regard to what the form should contain. Second, as required by *Guzman*, the
14 general, one sentence language of Section 28155 does not provide “implementing guidelines” or
15 phrase the nature of the duty in “explicit and forceful language.” Thus, the logical reading of this
16 language is that the contents of the form was to be left up to the discretion of the Department.
17 Use of the word “shall” in section 28155 does not change this conclusion because it merely refers
18 to the general language for the Department to prepare the form for use in the DES. Any
19 discussion about whether the form should have contained different or additional information
20 requires a normative or qualitative debate over whether such information was adequate, which
21 precludes a finding of a mandatory duty. A duty to provide different or additional information in
22 the DES based on the general language of section 28155 cannot be implied.

23 The other two sections relied upon by plaintiff, Penal Code sections 28215 and 28220,
24 clearly do not impose any duty relative to the setup and operation of the DES. Penal Code section
25 28215 merely describes what the dealer and applicant are supposed to do in submitting an
26 application for approval of a firearm transaction. For example, the dealer must require the
27 purchaser to sign the record of transfer and the dealer signs as a witness to the signature and
28 identification of the purchaser. (Pen. Code, § 28215, subd. (a).)

1 Penal Code section 28220 sets out procedures to follow upon submission of firearm
2 purchaser information to the Department including examination of records pertaining to a
3 purchaser and submission of information to a dealer relating to whether the purchaser is
4 prohibited from receiving a firearm. There is no language mandating how to setup or modify the
5 DES at all.

6 Finally, the general and conclusory allegation that the Attorney General, being charged with
7 the duty to see that laws are uniformly and adequately enforced under the California constitution
8 does not establish any specific duty to modify the DES. In *State of California ex rel. Dept. of*
9 *Rehabilitation v. Superior Court*, (1982) 137 Cal.App.3d 282, the court rejected the assertion of
10 language from the California Constitution stating “it shall be the duty of the Attorney General to
11 see that the laws of the State are uniformly and adequately enforced” as imposing a
12 mandatory duty to enforce specific laws in a particular way. (*Id.* at 286-287.) Following *State of*
13 *California ex rel. Dept. of Rehab.*, the court in *Chodosh v. Commission on Judicial Performance*,
14 (2022) 81 Cal.App.5th 248, found that article V, section 13, of the California Constitution did not
15 impose a mandatory duty upon former Attorney General Becerra but rather it “imposes upon the
16 Attorney General a discretionary duty to enforce the law.” (*Id.* at 269.)

17 **b) The Penal Code Statutes Cited by Plaintiffs Fail to Satisfy the Second**
18 **Requirement that a Statute be Designed to Protect Against the Particular Kind of**
Injury the Plaintiff Suffered

19 “Second, but equally important, section 815.6 requires the mandatory duty be designed to
20 protect against the particular kind of injury the plaintiff suffered. The plaintiff must show the
21 injury is one of the consequences which the enacting body sought to prevent through imposing
22 the alleged mandatory duty. Our inquiry in this regard goes to the legislative purpose of imposing
23 the duty. That the enactment confers some benefit on the class to which plaintiff belongs is not
24 enough; if the benefit is incidental to the enactment’s protective purpose, the enactment cannot
25 serve as a predicate for liability under section 815.6.” (*Haggis, supra*, at p. 499.)

26 “Where the harm was not one of the evils sought to be prevented by the statute, there can
27 be no governmental liability.” (*Trinkle v. California State Lottery* (1999) 71 Cal.App.4th 1198,
28

1 1203 [Enactments were designed to protect the public from misleading or deceptive advertising
2 promoting lottery games, not to safeguard the profits of gaming operators].)

3 Here, even if a duty to add an “other” option to the DES prior to August 6, 2020, existed
4 which it did not, said duty is not designed to protect against the particular kind of injury the
5 plaintiff suffered, that is lost sales of the Title 1 before it was rendered illegal on August 6, 2020.
6 The clear purpose of the DES is to conduct background checks of potential purchasers of
7 firearms. Requiring an applicant to undergo a background check is “designed to ensure only that
8 those bearing arms in the jurisdiction are, in fact, law-abiding, responsible citizens.” (*People v.*
9 *Alexander* (2023) 91 Cal.App.5th 469, 479.) As noted by the *Bauer* court, “we have recognized
10 that public safety is advanced by keeping guns out of the hands of people who are most likely to
11 misuse them for these reasons.” (*Bauer, supra*, 858 F.3d at p. 1223; see also *People v. Correa*
12 (2012) 54 Cal.4th 331, 342 [Purpose of denying firearms to felons, who are considered more
13 likely to commit crimes with them, is to protect the public].)

14 **4. The Discretionary Immunity Under Government Code Section 820.2 Also Precludes**
15 **Liability Against Defendants**

16 The “most significant” of the Government Claims Act's immunity provisions confers a
17 general immunity for discretionary acts taken within the scope of authority. This immunity was
18 long recognized at common law and preserved in Government Code section 820.2. (*Leon v.*
19 *County of Riverside* (2023) 14 Cal.5th 910, 928.) Government Code section 820.2 states:
20 “Except as otherwise provided by statute, a public employee is not liable for an injury resulting
21 from his act or omission where the act or omission was the result of the exercise of the discretion
22 vested in him, *whether or not such discretion be abused.*” (Gov. Code § 820.2 (emphasis
23 added).) “Immunity applies even to lousy decisions in which the worker abuses his or her
24 discretion, including decisions based on woefully inadequate information.” (*Gabrielle A. v.*
25 *County of Orange* (2017) 10 Cal App.5th 1268, 1285 [Immunity provided by sections 815.2 and
26 820.2 is broad, and includes immunity for social workers’ removal and placement decisions].)
27 If an employee is immune, the employing entity has no liability under Government Code section
28 815.2. (*Id.* at p. 1287.)

1 Claims for interference with contract or prospective economic advantage are subject to the
2 immunity provided by section 820.2. (*Lundeen Coatings Corp. v. Department of Water & Power*
3 (1991) 232 Cal.App.3d 816, 834, fn. 11.)

4 One does not qualify for discretionary immunity “solely on grounds that the affected
5 employee's *general course of duties* is discretionary.” (*Caldwell v. Montoya* (1995) 10 Cal.4th
6 972, 983 (emphasis in original).) A showing that “the specific conduct giving rise to the suit
7 involved an *actual* exercise of discretion, i.e., a conscious balancing of risks and advantages” is
8 required. (*Id.* (emphasis in original).) However, this showing “does not require a *strictly careful,*
9 *thorough, formal, or correct* evaluation.” (*Id.* (emphasis in original).)

10 The *Caldwell* court provided examples of lower-level or “ministerial” decisions that do not
11 qualify for the immunity such as “a bus driver's decision not to intervene in one passenger's
12 violent assault against another.” (*Id.* at 981; *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40
13 Cal.3d 780, 793-795.) The *Caldwell* court cited *Thompson v. County of Alameda*, (1980) 27
14 Cal.3d 741, as an example of when the discretionary act statute does immunize officials and
15 agencies. (*Caldwell, supra*, 10 Cal.4th at p. 982.) In *Thompson*, the court affirmed the sustaining
16 of a demurrer finding that the County's decision to release a violent juvenile offender into his
17 mother's custody, who later attacked the plaintiff, was immunized under section 820.2.
18 (*Thompson, supra*, 27 Cal.3d at p. 747-749.)

19 A review of other cases that have applied the discretionary immunity statute to bar liability
20 show that the process of deciding whether or not to undertake a project to modify the DES and
21 the timing thereof clearly falls under the discretionary immunity. In *Curcini v. County of*
22 *Alameda*, (2008) 164 Cal.App. 4th 629, the court affirmed the sustaining of a demurrer without
23 leave to amend finding that alleged fraud in the awarding of a public contract was barred under
24 Government Code section 820.2. “Because the award of a public contract involves the exercise
25 of discretion, the government employees and entities involved are immune from liability.” (*Id.* at
26 p. 648.) The immunity applied despite allegations that the defendants intended to “rig” the bid
27 because to allow a cause of action based upon such allegations “would eviscerate the immunity
28

1 provided by Government Code section 820.2 for the public employees' exercise of discretion."
2 (*Id.* at pp. 648-649.)

3 In *Hacala v. Bird Rides, Inc.*, (2023) 90 Cal.App.5th 292, the court affirmed the sustaining
4 of a demurrer on behalf of the City of Los Angeles under Government Code Section 820.2. (*Id.*
5 at p. 300, 306.) *Hacala* was based on an incident wherein one of the plaintiffs tripped on a
6 vendor's electric scooter left on a City sidewalk. (*Id.* at p. 300.) Relying on *Posey v. State of*
7 *California*, (1986) 180 Cal.App.3d 836, and *Bonds v. State of California ex. rel. Cal. Highway*
8 *Patrol*, (1982) 138 Cal.App.3d 314, the court concluded that the City was immune from liability
9 because its employees had discretion but were not under a mandatory duty to remove improperly
10 parked scooters. (*Id.* at p. 306.)

11 In *Posey*, CHP officers drove past a vehicle parked on a street shoulder but failed to stop,
12 inspect or remove it. The plaintiff later collided with this vehicle. (*Posey, supra*, 180 Cal.App.3d
13 at p. 841.) The *Posey* court affirmed the sustaining of a demurrer finding the immunity of
14 Government Code section 820.2 "fully applicable" because the inspection and removal of
15 vehicles under the applicable statute is a discretionary act. (*Id.* at p. 852.) The *Bonds* court
16 similarly held that a decision whether to remove a stranded vehicle is an immunized discretionary
17 action. (*Bonds, supra*, 138 Cal.App.3d at p. 322.)

18 In *Roseville Community Hosp. v. State of California*, (1977) 74 Cal.App.3d 583, the court
19 affirmed the sustaining of a demurrer based on the discretionary immunity statute. (*Id.* at p. 585,
20 590.) *Roseville Community Hosp.* was premised on the failure of the State and the Attorney
21 General to take action to stop a health care service provider, who later was adjudicated as
22 bankrupt, from operating. (*Id.* at p. 586.) In finding that Government Code section 820.2
23 immunity precluded liability, the *Roseville Community Hosp.* court stated:

24 "Law enforcement and regulatory activity entail continual choices among
25 priorities. A decision to devote available facilities and personnel to selected areas
26 and to abstain from active pursuit of others is a policy or planning decision at a
relatively high internal level."

27 (*Id.* at p. 590.)

28

1 Similarly, here, the Department's operation of the DES is clearly law enforcement and
2 regulatory activity. One of the primary purposes of the DES is to conduct firearms background
3 checks. Furthermore, as discussed above, the declaration of Director Mendoza indicates that in
4 the latter part of 2019, the Bureau initiated a review to evaluate the resources that would be
5 required to for a potential enhancement of the DES to add an "other" option in the drop-down
6 menu which required the leadership of the Bureau, in collaboration with the Application
7 Development Bureau (ADB) and the Department's attorneys, to engage in the balancing of
8 multiple factors and weighing of competing priorities among the multiple proposed DES
9 enhancement requests pending at that time.

10 The Department evaluated and weighed the allocation of available resources for such an
11 enhancement including the number of personnel required, budgeting of the enhancement and the
12 time it would take to complete it which was complicated by the onset of the pandemic in March,
13 2020. The review indicated that the enhancement would take many months to implement
14 requiring changes to many other applications and databases and would involve well over a dozen
15 personnel many of whom would have had to have been diverted from other projects. For these
16 reasons, the department explored the possibility of an alternative temporary enhancement
17 applicable to the Title 1 only with a permanent enhancement to be implemented at a later date.
18 However, the ADB determined that this proposal would present operational difficulties in
19 properly recording the sales and transfers of the Title 1 in the DES which raised significant public
20 safety concerns. Taking these factors into account, the Department decided not to proceed with
21 the temporary enhancement. After SB 118 was enacted on August 6, 2020, rendering the Title 1
22 a prohibited assault weapon, the Department weighed competing priorities among the multiple
23 proposed DES enhancements pending at the time in the middle of the pandemic and decided to
24 implement the permanent enhancement to add the "other" option at a later date which occurred on
25 October 1, 2021.

26 These factors clearly show that the Department engaged in a decision making process
27 considering multiple factors that were reviewed and considered at a high level within the
28 Department. As was the situation in *Roseville Community Hospital*, the Bureau was required to

1 make choices among priorities taking into consideration available facilities and personnel relative
2 to the DES. Clearly, the Department has demonstrated that a conscious balancing of risks and
3 advantages took place. While it is expected that plaintiff will take issue with the Department's
4 decision-making process and assert that its decisions as to the timing of the DES modification
5 were incorrect, *Caldwell* does not require a strictly careful, thorough, formal, or correct
6 evaluation.

7 In addition, as discussed above, the Penal Code statutes pertaining to the operation of the
8 DES confer discretionary authority on the Department. This conclusion is further bolstered by
9 Penal Code section 28245 which makes clear that any of defendants' acts or omissions relative to
10 the DES statute, Penal Code section 28205, as it pertains to long guns, are discretionary under the
11 Government Claims Act. It is undisputed that the gun type drop-down menu at issue in this case
12 relates to long guns only. For these reasons, Government Code section 820.2 precludes liability
13 and provides an additional basis for granting summary judgment.

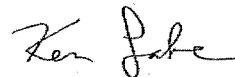
14 **IV**

15 **CONCLUSION**

16 For the reasons set forth above, defendants respectfully request that the court grant the
17 motion for summary judgment in its entirety. There are no genuine issues of material fact and
18 they are entitled to judgment, as a matter of law.

19 Dated: April 26, 2024

20 Respectfully submitted,
21 ROB BONIA
22 Attorney General of California

23 

24 KENNETH G. LAKE
25 Deputy Attorney General
26 *Attorneys for State of California, acting by*
27 *and through the California Department of*
28 *Justice and Former Attorney General*
Xavier Becerra

DECLARATION OF SERVICE BY MESSENGER

Case Name: **Franklin Armory, Inc. v. California Department of Justice**

No.: **20STCP01747**

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; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013-1230.

On April 26, 2024, I caused the attached **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANTS FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES** to be personally served by **ACE ATTORNEY SERVICE** by placing a true copy thereof for delivery to the following person(s) at the address(es) as follows:

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Anna M. Barvir
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Attorneys for Plaintiffs-Petitioners

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 April 26, 2024, at Los Angeles, California.

Sandra Dominguez

Declarant

/s/ Sandra Dominguez

Signature