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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

FRANKLIN ARMORY, INC., et al.,

Petitioners-Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF JUSTICE, et al.,

Respondents-Defendants.

Case No.: 20STCP01747

[Assigned for all purposes to the Honorable Daniel S. Murphy; Department 32]

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION

Hearing Date:	July 10, 2024
Hearing Time:	8:30 a.m.
Department:	32
Judge:	Hon. Daniel S. Murphy

Action Filed:	May 27, 2020
FPC Date:	August 8, 2024
Trial Date:	August 20, 2024

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INTRODUCTION

Defendants ask for a summary judgment in their favor on FAI's three remaining causes of action based on three arguments, all of which this Court should reject; indeed, it has already rejected most, if not all of those arguments—in some cases twice—in denying Defendants' second demurrer and motion for judgment on the pleadings. Defendants offer no reason why the Court should reverse course now on the legal questions of whether FAI has stated valid causes of action or whether Defendants enjoy immunity here. FAI has, and Defendants do not. The only question remaining is whether Defendants have proven that undisputed material facts confirm that Plaintiff cannot satisfy the elements of its three remaining causes of action. They have not. Defendants' motion should be denied.

STATEMENT OF FACTS

Plaintiff Franklin Armory, Inc. ("FAI") is a federally licensed firearms manufacturer incorporated under the laws of Nevada. (Pl.'s SUMF No. 21.) FAI manufactures a series of firearms that FAI has designated with the model name "Title l." (Pl.'s SUMF No. 22.)

Under California law, "firearm" is defined in several ways, generally including "a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion." (Pl.'s SUMF No. 23.) California further divides "firearm" into two types for transfer regulation: long guns and handguns. "Long guns" are firearms that do not qualify as handguns. As is relevant here, "long gun" means any firearm that is not a handgun or a machinegun. (Pl.'s SUMF No. 24.) Under the "long gun" classification, there are statutorily defined firearm subtypes, including but not limited to "rifles" and "shotguns." (Pl.'s SUMF No. 26.) FAI's Title 1 model firearm is, under California's statutory definition, a "long gun." (Pl.'s SUMF No. 25.) It does not, however, fall within any of the defined firearm subtypes. (Pl.'s SUMF No. 27.)

With limited exception, all firearm transfers in California must be processed through a dealer licensed by the federal, state, and local authorities (an "FFL") to engage in the retail sale of firearms. (Pl.'s SUMF No. 28.) When firearm purchasers present the required identification to purchase a firearm, the law requires the FFL to transmit the information to the California Department of Justice ("DOJ"). (Pl.'s SUMF No. 28.) Every FFL must keep a register or record of electronic or telephonic firearms transfers, in which must be entered certain information relating to a firearm transfer. (Pl.'s SUMF No.

29.) "The [DOJ] shall prescribe the form of the register and the record of electronic transfer pursuant to Section 28105." (Pl.'s SUMF No. 29.) The Attorney General must permanently keep and properly file and maintain all information reported to the DOJ pursuant to any law as to firearms and maintain a registry thereof. (Pl.'s SUMF No. 30.) Information that must be included in the registry includes the "manufacturer's name if stamped on the firearm, model name or number if stamped on the firearm, and, if applicable, the serial number, other numbers (if more than one serial number is stamped on the firearm), caliber, *type of firearm,* if the firearm is new or used, barrel length, and color of the firearm, or, if the firearm is not a handgun and does not have a serial number or any identification number or mark assigned to it, that shall be noted." (Pl.'s SUMF No. 30.)

California law mandates that, for all firearms, the register or the record of electronic transfer *shall* contain certain information, including the firearm's type. (Pl.'s SUMF No. 31.) It also mandates that DOJ *shall* determine the method by which FFLs submit firearm purchaser information to DOJ and that electronic transfer of the required information be the sole means of transmission, though DOJ is authorized to make limited exceptions. (Pl.'s SUMF Nos. 32-33). The method DOJ has established for submitting required purchaser information is known as the "Dealers Record of Sale Entry System" or "DES." (Pl.'s SUMF No. 34.) The DES is a web-based application designed, developed, and maintained by DOJ and used by FFLs to report the required information for firearm purchases to DOJ. (Pl.'s SUMF No. 35.) The law prohibits FFLs from entering inaccurate information into DES. (Pl.'s SUMF No. 36.)

By design, when FFLs make a DES entry, they must enter information related to the gun type (i.e., "long gun" or "handgun"). (Pl.'s SUMF No. 37.) Upon selecting "long gun," the DES is designed to and functions to populate a subset of fields. (Pl.'s SUMF No. 37.) Before October 1, 2021, if a DES user selected "long gun," the DES populated a list of just three options: "rifle," "rifle/shotgun," "shotgun." (Pl.'s SUMF No. 37.) And before the user was permitted to proceed, the DES required the user select one of those three options. (Pl.'s SUMF No. 37.) Unlike the subset of fields within the DES that populate for "Color," "Purchaser Place of Birth," and Seller Place of Birth," each of which contains a catch-all option for "Other," before October 1, 2021, the subset of fields that populated when a DES user selected "long gun" as the "gun type," did not include "Other" as an option. (Pl.'s SUMF No. 37.)

Thus, the DES system prevented FFLs from proceeding with the submission of information to

DOJ for the sale, transfer, or loan of certain firearms, including the Title I. (Pl.'s SUMF No. 37.) Unless DOJ authorizes an alternative procedure for submission of the purchaser and firearm information, the DES is the only method of submitting the necessary information to permit the lawful transfer of the undefined "firearm" subtypes. (Pl.'s SUMF No. 38.) The DOJ has authorized DES users to process certain firearms lacking a defined subtype through the DES using DES's "Comment" section. But the DOJ remained silent as to its position on whether the FAI Title 1 model firearms could be sold in California and how, in spite of Plaintiff's *repeated* requests for guidance. (Pl.'s SUMF No. 38.)

In short, before October 1, 2021, FFLs had no way to accurately submit the required information through the DES for "long guns" without statutorily defined "firearm" subtypes, so they were effectively barred from accepting and processing applications from purchasers of such firearms, including FAI's Title 1. (Pl.'s SUMF No. 39.) While state law mandates that the firearm "type" (e.g., "long gun") be included in the register or record of electronic transfer, no law mandates a firearm "subtype" (e.g., rifle, shotgun, rifle/shotgun combination) be included. (Pl.'s SUMF No. 40.) DOJ could have thus chosen to remove the technological barrier within the DES that prevented FFLs from processing the transfer of Title 1s by enhancing the DES to allow the user to proceed without selecting a firearm subtype. (Pl.'s SUMF No. 40.) It could have authorized an "alternative means" for submitting the required information, including instructing FFLs to proceed by selecting existing options in DES and identifying the firearm as "Other" in one of DES's "comment" fields. DOJ opted not to do so. (Pl.'s SUMF No. 41.)

In light of all this, FFLs notified FAI that they could not process the transfer of Title 1s through the DES. (Pl.'s SUMF No. 42.) The DOJ was aware of these concerns (Pl.'s SUMF No. 43) but took no speedy action. On October 24, 2019, FAI's counsel sent a letter to then-Attorney General Xavier Becerra, notifying him and the DOJ that the DES precluded Title 1s from being processed for sale to their customers. (Pl.'s SUMF No. 44.) That letter also explained that FAI had publicly announced the release of the Title 1 on October 15, 2019, generating a substantial amount of interest and that FAI was receiving orders daily but was unable to fulfill them due to the DES defect. (Pl.'s SUMF No. 45.)

When FAI's customers were placing orders to purchase the Title 1, the advertised price was $944.99. (Pl.'s SUMF No. 46.) But, because FAI knew that the DES defect prevented the Title 1's transfer, FAI accepted refundable deposits toward purchase, to be completed once the DES defect was

corrected. (Pl.'s SUMF No. 46.) FAI collected nearly 35,000 deposits from its customers, including FFLs, for the purchase of Title 1s. (Pl.'s SUMF No. 47.) Those deposits ranged in amount from $5 to the full purchase price. (Pl.'s SUMF No. 47.) At the time FAI accepted those deposits, it was committed to fulfilling all orders for which people paid deposits. (Pl.'s SUMF No. 48.) And FAI remains committed to fulfilling those orders. (Pl.'s SUMF No. 48.) It has not done so, however, because of the DES issue and the subsequent legislation classifying Title 1s as "assault weapons." (Pl.'s SUMF No. 48.)

On January 8, 2020, in response to FAI's counsel's October 24, 2019 letter, Deputy Attorney General P. Patty Li confirmed receipt of FAI's letter and informed FAI that the DOJ was working to fix the DES deficiency the letter described. (Pl.'s SUMF No. 50.) DOJ was able to modify the DES within a month to fix a deficiency similar to the one that precluded the Title 1's transfer; namely, the DES omitted the "United Arab Emirates" from the list of countries available in the DES dropdown list of countries for place of birth. (Pl.'s SUMF No. 49.) FAI thus reasonably believed that the DOJ was working to fix the defect that was blocking the lawful transfer of its Title 1 firearms.

Notably, Cheryl Massaro-Florez, a Bureau of Firearms Informational Technology Supervisor testified that she oversaw two separate projects to make "enhancements" to the DES to add an "Other" option to the dropdown list for "long gun" firearm subtypes. (Pl.'s RSUMF No. 18; Pl.'s SUMF No. 51.) She testified that the first enhancement was completed up to beta testing, but just before going live, it was terminated for a reason unknown to her. (Pl.'s RSUMF No. 18; Pl.'s SUMF No. 51.)

On May 20, 2020, just months after Deputy Attorney General Li confirmed that the DOJ was working on a fix to the DES, the DOJ submitted a Budget Change Proposal (prepared by then-Bureau of Firearms Assistant Director Allison Mendoza) to the Department of Finance, requesting "$128,000 Dealers' Record of Sale Special Account in 2020-21, $862,000 in 2021-22, and $14,000 annually thereafter to regulate assault weapons that are currently not defined as a rifle, pistol, or shotgun." (Pl.'s SUMF No. 52.) The proposal was "intend[ed] to fix current loopholes in statute that allow[ed] manufacturers to make weapons that circumvent the intention of assault weapon laws." (Pl.'s SUMF No. 52.) As part of the Budget Change Proposal, DOJ also requested "[budget] trailer bill language necessary to implement this proposal." Attached to the proposal was proposed language that would ultimately be adopted via Senate Bill 118 ("SB 118"). (Pl.'s SUMF No. 53.)

SB 118 amended the definition of "assault weapon" to include, for the first time, a "centerfire firearm that is not a rifle, pistol, or shotgun," which amendment made the Title 1 an "assault weapon." (Pl.'s SUMF No. 55.) The law was adopted by the Legislature on August 4, 2020, and it was approved by the Governor on August 6, 2020. (Pl.'s SUMF No. 54.) And because it was adopted as a "budget trailer bill," the change in law took effect immediately upon the Governor's signature, without the 2/3 vote of the Legislature constitutionally required to adopt "policy bills" as "urgency legislation" and without the need to make a special finding of urgency. (Pl.'s SUMF No. 56.) Allison Mendoza, the current Director of the California Department of Justice, Bureau Firearms, testified that she could not think of another piece of firearm-related legislation that was adopted via the "budget trailer bill" process and that it was not a common practice. (Pl.'s SUMF No. 57.)

It was not until October 1, 2021, that DOJ completed the "enhancement" to the DES adding the option to select "Other" from the dropdown list for "long gun" subtypes, finally allowing DES users to process the transfer of firearms without a defined subtype, like the Title 1. (Pl.'s SUMF No. 59.) [1] But the enhancement came too late to allow for the lawful transfer of FAI's Title 1s, which had been deemed "assault weapons" by SB 118 and could not be lawfully registered with DOJ unless they were possessed on or before September 1, 2020. (Pl.'s SUMF No. 60.) FAI could thus not lawfully transfer Title 1s to its deposit-paying customers before the enactment and enforcement of SB 118 because DES did not allow it and could not do so after because the AWCA would not allow it. (Pl.'s SUMF No. 60.) As a result, FAI suffered economic damage in the form of millions of dollars in lost profits. (Pl.'s SUMF No. 61.)

ARGUMENT

I. LEGAL STANDARD

Summary judgment is appropriate only if the moving party can show there is no triable issue of material fact and it is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) On summary judgment, courts view the evidence in the light most favorable to the nonmoving party, resolving any evidentiary doubts in their favor. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

II. FAI ASSERTS ITS REMAINING CLAIMS AGAINST INDIVIDUALS IN THEIR PERSONAL CAPACITY, NOT DOJ, RENDERING SECTIONS OF DEFENDANTS' MOTION IRRELEVANT

Defendants continue to argue that DOJ cannot be liable here. But, as has been made clear, FAI does not assert liability against DOJ for the three remaining causes of action. It brings them against individuals in their personal capacity. (SAC ¶ 8.) As a result, Defendants' arguments that DOJ has no liability because FAI asserts common law torts (Mot., pp. 16-17) and because FAI cannot satisfy the mandates of Government Code section 815.6 (Mot., pp. 22-28), are irrelevant.

To the extent that Defendants claim that section 815.6 controls Plaintiff's claims against individuals in their personal capacities, they are mistaken. Section 815.6 imposes a three-pronged test for determining liability of a "*public entity*," not individuals in their personal capacity, as is sought here. (Gov. Code, § 815.6, italics added.) The definition of "public entity" does not include individuals sued in their personal capacity, but rather only entities. (Gov. Code, § 811.2.) No authority that Plaintiff is aware of suggests that section 815.6 applies to public officials or employees sued in their personal capacity, and Defendants cite to none. On the contrary, the only precedent construing section 815.6 in this context comes from federal district courts, all of which have unanimously concluded that section 815.6 does not apply to defendants sued in their personal capacities. (*See Shead v. Vong* (E.D. Cal. Sept. 8, 2009, No. 09-cv-00006) 2009 WL 2905886, at *6 [holding that "§ 815.6 applies solely to governmental entities"]; *Rodriguez v. Brown* (E.D. Cal. Nov. 1, 2016, No. 15-cv-01754) 2016 WL 6494705, at *4 ["Defendant is certainly correct that he is not a public entity in his personal capacity."]; *W.V. v. Whittier Union High Sch. Dist*. (C.D. Cal., Oct. 20, 2016, No. 16-cv-6495 2016) WL 11520809, at *4, n. 4 [section 815.6 does not apply to "public entity liability due to its employee's statutory violation."].) Section 815.6 simply has no application to Plaintiff's remaining causes of action. Defendants' argument otherwise already failed in their motion for judgment on the pleadings. (Defs.' Mot. J. Pldgs., pp. 23-25.)

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[1] According to Ms. Massaro-Florez's testimony, this second project to enhance the DES to add an "Other" option for long gun subtypes took about three months to complete. (Pl.'s SUMF No. 51.)

III. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON ANY OF FAI'S THREE REMAINING CAUSES OF ACTION

A. FAI Is Prepared to Prove Each Element of Its Intentional Interference with Contract Claim; At a Minimum, Material Triable Facts Are in Dispute

The elements of intentional interference with contractual relations are: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pac. Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126; see also CACI No. 2201.) As to each element, Defendants have failed to prove that there is no material fact in dispute and that they are entitled to judgment as a matter of law.

1. FAI had *thousands* of valid contracts with third parties for the sale of centerfire Title 1 firearms.

At a minimum, there is a dispute over whether FAI had valid existing contracts with thousands of its customers. It is undisputed that FAI collected deposits from around 35,000 individuals. (Pl.'s SUMF No. 47.) The deposits saved a spot in line for prospective purchasers. (Pl.'s SUMF No. 46.) By accepting those deposits, FAI contractually bound itself to each depositor to provide a Title 1. As they did in their motion for judgment on the pleadings, Defendants argue that those refundable deposits alone do not constitute valid contracts. (Mot., pp. 18-19.) Their only support is a treatise on the Uniform Commercial Code. In their earlier motion, Defendants cited that same treatise, but also included a reference to *Jones v. Wide World of Cars, Inc.* (S.D.N.Y. 1993) 820 F.Supp. 132. (Defs.' Mot. J. Pldgs., p. 21.) Defendants curiously omit *Jones* here. Closer examination of that decision makes clear why Defendants chose to keep it from the Court this time around. *Jones* holds that while a money deposit may not bind the buyer, it certainly *can* bind the seller. (820 F.Supp. at p. 136 ["[C]ases under the statute of frauds itself suggest that it is the recipient accepting a down payment, not a buyer parting with the money, who may be bound."]; see also *CareandWear II, Inc. v. Nexcha L.L.C.* (S.D.N.Y. 2022) 581 F.Supp.3d 553, 557 ["[P]urchase orders are sufficient both to remove the bar of the Statute of Frauds and to confirm the existence of a contract between the parties."]; *Corestar Intern. Pte. Ltd. v. LPB Commcns., Inc.* (D.N.J. 2007) 513 F.Supp.2d 107, 117 [same].)

Customers who paid earnest money toward the purchase of a centerfire Title 1 firearm thus entered into a contract with FAI, under which at least FAI was bound, even if the buyers could later cancel the sale. Assuming those firearms could ever be lawfully sold in California, FAI committed to fulfill those orders. (Pl.'s RSUMF No. 12; Pl.'s SUMF No. 48.) Moreover, the fact that thousands of individuals who made deposits are members of an ongoing class action lawsuit seeking to obtain a Title 1, and only a handful of the thousands of individuals who made a deposit have asked for a refund, even years later, demonstrates the continued interest in purchasing Title 1 firearms. (Pl.'s SUMF No. 64.) Subsequent behavior by parties can support existence of a contract, and in this case, that thousands have joined litigation to obtain a Title 1 and the overwhelming majority of deposit payers have not asked for a refund shows they intend to go through with the contract. (*C. Itoh & Co. (Am.) Inc. v. Jordan Intern. Co.* (7th Cir. 1977) 552 F.2d 1228, 1236.) But for Defendants' refusal to correct the DES, depositors would move forward with their purchase. At a minimum, this material fact is in dispute.

2. Defendants knew of the existence of FAI's contracts with third parties for the purchase of Title 1s.

It cannot reasonably be argued that Defendants did not know of FAI's contracts because FAI expressly notified Defendants about them in writing as early as October 2019. (Defs.' SUMF No. 1; Pl.'s SUMF No. 49; see also Jacobson Decl., ¶¶ 5, 7-8 & Ex. 8.) Still, Defendants claim that they could not have known about these contracts because the DES system that prevented the sale of Title 1 firearms predated the Title 1's existence. (Mot., p. 19.) But Plaintiff does not seek damages just because DES failed to accommodate the transfer of the Title 1 upon its introduction. Rather, FAI seeks damages for Defendants' intentional acts preventing the DES from accommodating transfer of the Title 1 *after* they learned of the Title 1 and were notified that customers were lining up to purchase it. (SAC ¶¶ 112, 120, 123, 179.)

3. Defendants intentionally induced a disruption of FAI's contractual relationships with its prospective Title 1 purchasers.

FAI is prepared to prove that Defendants intentionally stalled any fix to the DES that would have facilitated the Title 1's lawful transfer before it became an unlawful "assault weapon." Defendants argue that "it is logically impossible" that DES's inability to process Title 1 firearms was "intentional"

because DES's deficiency predated the firearm's existence. (Mot., p. 19.) But as this Court already held:

> [Because] Defendants were under a Penal Code mandate to provide a reporting system for 'all firearms,' including Title I firearms[],... [I]mplementing a reporting system that excludes a particular type of firearm that was legal to sell at the time, and required to be reported, constitutes an intentional act designed to prevent the sale of those firearms, and thereby interferes with the alleged sale contracts.

(Ruling on Defs.' Mot. J. Pldgs., p. 5 (Sept. 7, 2023).) Still, Defendants claim that inaction cannot be an intentional act. (Mot., p. 19.) But the only authority Defendants cite is a federal district case from Washington, D.C. (*Ibid.* [citing *Nanko Shipping v. Alcoa Inc.* (D.D.C. 2015) 107 F. Supp.3d 174].) Plaintiffs are aware of no California authority holding that an intentional failure to act cannot qualify as an "intentional act" for purposes of an intentional interference with contract claim. *And some jurisdictions have expressly held that it can be*. (See, e.g., *Gym Door Repairs, Inc. v. Young Equip. Sales, Inc.* (S.D.N.Y. 2016) 206 F.Supp.3d 869, 910, ["A tortious interference with prospective economic advantage 'claim begins to run when the defendant performs the action (*or inaction*) that constitutes the alleged interference.'"], italics added.)

Regardless, FAI does "not merely allege that DOJ sat idly by while certain consumers were unable to purchase Title I firearms. Instead, the SAC alleges that DOJ intentionally excluded Title I firearms from DES to delay their transfer until the Legislature could pass SB 118." (Ruling on Defs.' Mot. J. Pldgs., p. 5.) As this Court has already held, this "sufficiently constitutes an intentional act." (*Ibid*.) And FAI has established facts tending to prove that is exactly what Defendants did. Indeed, the evidence shows that DOJ was working on a DES fix that would have allowed the Title 1 to be transferred in early 2020. (Pl.'s RSUMF No. 15; Pl.'s SUMF No. 50.) DOJ had virtually completed that fix. (Pl.'s SUMF No. 51.) Yet, rather than implement that fix, which only took months to complete (Pl.'s SUMF No. 51), Defendants stalled it until SB 118 could pass on an expedited basis and immediately prevent FAI from selling any Title 1s to the public. (Pl.'s SUMF Nos. 53-58.) A bill that the DOJ itself proposed. (Pl.'s SUMF No. 53.)

The timing of SB 118 alone is sufficient circumstantial evidence to establish that Defendants acted intentionally to preclude Title 1 transfers. The Assault Weapon Control Act ("AWCA") was first adopted in 1989. (Cal. Penal Code, § 30600 (formerly §12280, subd. (a).) It has since been amended at

least five times to tweak the definition of what constitutes an "assault weapon." (See § 30510 (formerly § 12276) [listing "assault weapons" by make and model]; Sen. B. 263 (1991-1992 Reg. Sess.) (Cal. 1991) [expanding make/model list of]; 11 C.C.R. §§ 5495, 5499 (further expanding the list); § 30515, subd. (a)(1-3) (formerly § 12276.1, subd. (a)(1)-(3) [identifying "assault weapons" by features]; § 30515 (added by Assemb. B. 1135, 2015-2016 Reg. Sess. (Cal. 2016)); Sen. B. 880, 2015-2016 Reg. Sess. (Cal. 2016)) [defining "assault weapon" as any semiautomatic, centerfire rifle that does not have a "fixed magazine," if it has at least one of the features enumerated in section 30515, subdivision (a)].)

Yet, only the amendment that made the Title 1 an "assault weapon" was adopted on an expedited basis within months. And, because it was adopted as a "budget trailer bill," the change in law took effect immediately—without the 2/3 vote of the Legislature required to adopt "policy bills" as "urgency legislation." (Pl.s' SUMF No. 56.) Odder still, the DOJ requested that the Budget Office introduce the bill on May 14, 2020, just months after the DOJ wrote to counsel for FAI, confirming receipt of FAI's October 24, 2019, letter and informing FAI that the DOJ was working to fix the DES deficiency the letter described. (Pl.'s SUMF No. 50, 52-53.)

The timeline is even more suspect considering the unconventional process employed by the DOJ, working with the Legislature, to reclassify the Title 1 as an "assault weapon." Earlier amendments to the AWCA were not made via a "budget trailer bill"; they were adopted in the normal course as "policy bills." But SB 118, the bill that made the Title 1 an "assault weapon," raced through the Legislature (with limited public debate) as a "budget trailer bill," becoming law and taking immediate effect mere months after it was dreamed up and presented by the DOJ. (Pl.'s SUMF Nos. 52-54, 56-57.) FAI knows of no other firearm legislation that was passed using the "budget trailer bill" process. Director Mendoza testified that she could not think of one, and she admitted that it was not a common practice. (Pl.'s SUMF No. 7.) Yet, it was the DOJ that submitted the proposal to the Department of Finance "request[ing] trailer bill language" to amend the definition of "assault weapon." (Pl.'s SUMF Nos. 52-53.) Notably, in that proposal, the DOJ explained that it needed the bill in order to "fix current loopholes in statute that allow[ed] manufacturers to make weapons that circumvent the intention of assault weapon laws." (Pl.'s SUMF No. 52.) The requested "fix" (that would ultimately become SB 118) classified the Title 1 as an "assault weapon" for the first time. (Pl.s' SUMF No. 53)

That the State identified these so-called "loopholes" just as the Title 1 was coming on the market is no coincidence. To believe that, one would have to accept that DOJ personnel just happened to discover these "loopholes" some 30 years after the AWCA's initial adoption—and within months of FAI informing them it was trying to sell the Title 1 in California but deficiencies in the DES were hindering its lawful transfer. (See Pl.'s SUMF Nos. 44-45, 50, 52-53.) That is, of course, nonsense. SB 118 was clearly designed to target the Title 1 and prevent its sale. Department of Finance staffers' communications about the bill expressly identified both FAI and the Title 1, but they identified no other manufacturer or firearm by name. (Pl.'s SUMF No. 58.) That it happened to sweep up other obscure firearms does not change the fact that FAI's Title 1 was SB 118's target.

The undisputed timeline combined with the unorthodox process by which SB 118 was adopted establishes that Defendants intentionally delayed the DES fix that would have facilitated the legal transfer of Title 1 firearms until SB 118 could take effect, preventing such transfers from ever being completed. Defendants may dispute that conclusion. But that means that, at a minimum, there is a dispute over whether they deliberately delayed fixing the DES to allow the processing of legal Title 1s, a quintessential material fact, making summary judgment improper.

Without citing any authority, Defendants also argue that "there must be a statutory basis establishing a mandatory duty to modify DES" for FAI to establish an intentional act by Defendants to prevail on this cause of action. (Mot., p. 19.) While it is unclear if that is an accurate statement of the law, it does not matter because it is clear that a mandatory duty existed. FAI has already (twice) briefed this issue. (Pls.' Oppn. to 2d Dem., pp. 19-26 (May 20, 2021); Pls.' Oppn. to Mot. J. Pldgs., pp. 15-18 (Aug. 3, 2023.) And this Court has both times rejected Defendants' arguments:

> Defendants argue that the Penal Code statutes Plaintiffs rely on do not impose a mandatory duty to reform DES in any particular way and instead grant discretion in how to implement an electronic reporting system. However, as Judge Chalfant held, ***discretion over the manner of implementing an electronic reporting system does not mean the discretion to refuse to implement a reporting system*** *entirely for certain firearms.* (June 3, 2021 Order re Demurrer, pp. 7-8.) Penal Code section 28155 provides that DOJ "shall prescribe the form of the register and the record of electronic transfer." Defendants allegedly failed to do this by refusing to provide any method for the reporting of Title I firearms.

(Ruling on Defs.' Mot. J. Pldgs., p. 6 (Sept. 7, 2023).) Indeed, "[i]f the DOJ has a ministerial duty to

implement some electronic transfer system, then it is no large jump to conclude that it cannot arbitrarily discriminate in the system it must implement." (*Id.* at p. 7.) By necessary extension, neither can public employees of regulatory bodies like the DOJ intentionally discriminate against those they regulate.

FAI was not asking the DOJ to move Heaven and Earth to facilitate the transfer of its lawful product. It was merely asking the DOJ to comply with its ministerial duty by removing a technological barrier that the DOJ itself had created. That it could not do so before undertaking the heavy lifting of proposing and advocating for legislation is all this Court needs to know about what really happened or, at least, shows a disputed material fact as to whether Defendants acted intentionally.

4. Defendants' intentional conduct resulted in the disruption of FAI's contractual relationships with its prospective Title 1 purchasers.

Because Defendants intentionally stalled the DES update to process transfers of the Title 1—*after they knew of DES's inability to allow its transfer*—FAI could not fulfill the contracts with its customers. Defendants never expressly dispute FAI's contention that licensed dealers could not lawfully process the transfer of centerfire Title 1s through DES. Instead, they disingenuously suggest that FAI cannot claim that Defendants would have prohibited its transfer because FAI never attempted to process a centerfire Title 1 through the DES. (Mot., p. 11.) Seemingly to that point, Defendants mention that FAI knew that FFLs had been successfully making DES entries for stockless long-guns that fire shotgun shells as "shotguns" for years even though such firearms are not *technically* "shotguns" under California law. (*Id.* at p. 10.) Defendants suggest that FFLs could have likewise processed FAI's Title 1 through a category of firearm that existed within DES at the time—even though the Title 1 was not *technically* any of those firearms under California law. (*Ibid.*) In other words, they claim that no fix to DES was needed to process the Title 1. That argument fails.

It is telling that Defendants do not indicate what category of arm within the DES menu FFLs could have selected when processing a transfer of a Title 1. And Defendants fail to explain how a "historic tradition" in place "for a number of years" of FFLs successfully processing a long-existing firearm type (stockless long-guns chambered for shotgun shells) is relevant to processing a completely new and unique product, like the Title 1. That is because it is not. Indeed, the fact that FFLs may have processed such firearms for years but expressed concerns about how to lawfully process the Title 1 cuts

against Defendants' argument that just trying to do so was a reasonable option for FFLs.[2]

In any event, neither FAI nor FFLs can be expected to assume that the DOJ would accept the practice of transferring a Title 1 as something that it is legally not, just because the DOJ has allowed others to do so in a different context—particularly when the potential consequences are so severe. As Defendants concede, FFLs must submit DES entries as being "true, accurate, and complete" under penalty of perjury. (Mot., p. 11; Pl.'s SUMF No. 36.) FFLs, therefore, not only would be gambling with their licenses (and their livelihood) *but their freedom*. It is unclear whether the DOJ had, at some point in the past, expressly clarified to FFLs that it would allow the practice of selling such firearms as "shotguns." But Defendants admit that "Blake Graham, a Special Agent Supervisor in the Bureau of Firearms" who has "expertise in firearms identification" (Mot, p. 7), informed FAI's president that stockless long-guns chambered for shotgun shells were allowed to be processed through DES as "shotguns." (*Id.* at pp. 10-11.)

Here, on the other hand, the DOJ remained silent as to its position on whether *and how* the Title 1 could be sold in California—despite FAI's *repeated* requests for guidance. (Pl.'s RSUMF No. 9; Pl.'s SUMF No. 38.) Perhaps even worse than Defendants' silence was their practical admission that the DES defect needed to be cured and that the DOJ was, in fact, doing so, but gave no instructions for how to process the transfers in the meantime (e.g., using the comments box to clarify the gun type). (Pl.'s SUMF No. 50; see also Davis Decl., Ex. 7 [Letter from P. Patty Li, Deputy Attorney General, California Department of Justice, to Jason A. Davis, Counsel for Franklin Armory, Inc. (Jan. 8, 2020)].)

5. FAI suffered economic damage as a result of the DOJ's induced disruption of its Title 1 contracts.

Finally, FAI suffered economic damage in the form of millions of dollars in lost profits because it could not lawfully complete the sale of and transfer the FAI Title 1 model firearm to its deposit-paying customers before the enactment and enforcement of SB 118. (Pl.'s SUMF No. 62.) Indeed. FAI had accepted tens of thousands of deposits, from both individual consumers and FFLs, toward purchase of a Title 1. (Pl.'s SUMF No. 47.) FAI's customers, by and large, intended to follow through with those

[2] Also, Defendants' claim that "receivers" have long been sold as something other than what they

purchases. And, assuming the centerfire Title 1 model firearm could ever be lawfully transferred in California, FAI was committed at the time it accepted deposits from customers to fulfill all orders for which people paid deposits. (Pl.'s SUMF No. 48.) FAI initially brought this suit to obtain an order allowing it to fulfill those orders. (Verified SAC, p. 42:9-43:17.) And it remains steadfast in its commitment to do so to this day. (Pl.'s SUMF No. 48.)

B. FAI Is Prepared to Prove Each Element of Its Intentional Interference with Prospective Economic Advantage Claim

The elements of a claim for intentional interference with prospective economic advantage are: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant". (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) To maintain such a claim, a plaintiff must demonstrate that the defendant engaged in an independently wrongful act. (*Id*. at p. 1158.) "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Id*. at p. 1159.) Defendants have failed to show that FAI cannot satisfy each element.

First, there existed an economic relationship between FAI and thousands of consumers, with the probability of future economic benefit to FAI. As explained above, FAI received thousands of money deposits for the Title 1. (See supra, Part II.A.1.) Even assuming those deposits did not constitute contracts, as this Court has already found, "placing a deposit is an overt act towards making a purchase and sufficiently creates a probability that FAI will profit from a sale" and thus "it may be reasonably inferred that FAI had existing economic relationships with its customers." (Ruling on Defs.' Mot. J. Pldgs., p. 6.) Nevertheless, Defendants reassert their argument that such deposits do not create an economic relationship without citing any authority, despite this Court's previous rejection of it on that basis. (Mot., p. 18.) This Court should continue to reject that argument.

Second, as explained above, Defendants were aware of FAI's relationship with its customers

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are, (Mot., p. 10), is not accurate. There is a dropdown menu option for long-gun "receivers" in DES.

who sought to acquire a Title 1. (See supra, Part II.A.2.)

Third, as explained above, Defendants intentionally acted to disrupt that relationship and committed independently wrongful acts in doing so, as this Court has already acknowledged and which FAI has provided evidence to further support. (See supra, Part II.A.3.)

Fourth, actual disruption occurred between FAI and its customers. Indeed, as a result of Defendants' intentional refusal to fix the DES in a timely manner, as described above, FAI could not lawfully transfer a Title 1 firearm to its customers through the DES before it became illegal to do so, as a result of SB 118. (See supra, Part II.A.4.)

Finally, as explained above, FAI suffered economic harm from Defendants' actions. (See supra, Part II.A.5.) But for Defendants intentionally precluding a fix to the DES that would have allowed the transfer of the lawful Title 1 firearm, FAI would have likely completed the lawful sale of many thousands of Title 1 firearms.

C. FAI Is Prepared to Prove Each Element of Its Negligent Interference with Prospective Economic Advantage Claim

The elements of negligent interference with prospective economic advantage are essentially the same as for intentional interference, except that the plaintiff must establish that the defendant "was aware or should have been aware that if [defendant] did not act with due care its actions would interfere with th[e] relationship [that defendant knew existed between plaintiff and a third party] and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship" and "the defendant was negligent [which] negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship." (*Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1078; see also CACI No. 2204.) Defendants have failed to show that FAI cannot satisfy each element.

Even assuming a lone footnote may be sufficient to put this cause of action at issue, (Mot., p. 20, fn. 5), Defendants' specific footnote is insufficient. While it accurately notes that a plaintiff must show that the defendant owed the plaintiff a duty of care, Defendants' footnote fails to make any argument as to why FAI cannot establish that Defendants owed it a duty of care, let alone any argument as to why

Defendants did not breach that duty or that their failure to act with reasonable care caused Plaintiffs' harm. (Mot., p. 20, fn. 5.) Thus, if this Court finds that an economic relationship existed between FAI and its customers, that Defendants knew about that relationship, and that such relationship was disrupted by Defendants' conduct, thereby causing FAI harm, then this Court cannot grant Defendants' motion on this cause of action because they have not even attempted to show that FAI cannot establish the elements of duty and breach.

Even if this Court believes it can rule on this claim despite Defendants' lack of argument, Defendants' motion still must fail. FAI can clearly meet the remaining elements, or at least those elements are the subject of material facts in dispute. First, as explained above, this Court has already ruled that FAI sufficiently alleged an independent wrongful act that establishes the existence of a duty that was violated: the failure of the State to provide a method by which Title 1 firearms can be legally transferred. (Ruling on Defs.' Mot. J. Pldgs., p. 5.) That is critical to the negligent interference claim because a defendant's conduct is blameworthy—and thus violates a duty of care—if it was independently wrongful apart from the interference itself. (*Lange v. TIG Ins. Co*. (1998) 68 Cal.App.4th 1179, 1187, citing 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 661, at p. 755.)

Second, the reasonableness of Defendants' failure to fix the DES to allow for transfers of Title 1 firearms for over two years is not something that can be disposed of on a motion for summary judgment. It is well established that "[r]easonableness is generally a question of fact to be resolved by a jury." (*Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191, 1206, *as modified* (Dec. 13, 2012).) And in the negligence context, "[f]oreseeability of harm and breach of the standard of care are ordinarily questions of fact for the jury's determination." (*Regents of Univ. of Cal. v. Super. Ct.* ("*Rosen*") (2018) 29 Cal.App.5th 890, 912.) The only way such questions can be resolved on a motion for summary judgment is if, under the undisputed facts there is no room for a reasonable difference of opinion and "no reasonable jury could find the defendant failed to act with reasonable prudence under the circumstances." (*T.H. v. Novartis Pharm. Corp.* (2017) 4 Cal.5th 145, 188 [citing *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 773].) That is certainly not the case here. On the contrary, all indications are that Defendants acted to intentionally sabotage the DES fix or, at least, acted with utter disregard to fix it in a timely manner, for the reasons described above.

Indeed, it is undisputed that Defendants received a letter from FAI's counsel on October 24, 2019, notifying them that DES would not allow transfers of the then-legal Title 1 firearm. (SUMF No. 13.) But the DOJ took over *two years* to resolve that issue, long after the centerfire Title 1 had been banned by SB 118. (Pl.'s SUMF No. 59.) A similar issue with DES identified in FAI's letter was resolved within just one month. (Pl.'s SUMF No. 49.) Defendants raise various excuses for why it took so long to resolve the issue with DES, mostly pointing to the DOJ's labyrinth bureaucracy and discretionary allocation of resources. (Defs.' SUMF Nos. 14-17.) At minimum, though, the sheer length of time it took to correct a problem that resulted from the DOJ's own negligence in the first place means that there is at least room for "a reasonable difference of opinion" over whether Defendants' delay was reasonable. (*Bigbee v. Pac. Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 56.) That takes this question outside the realm of summary judgment or adjudication.

* * * *

Finally, Defendants claim that *Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc.* (2017) 2 Cal.5th 505, forecloses all three of FAI's interference causes of action. It does not. There, the Supreme Court declined to extend interference torts to the public contract bidding process. It did so because "[p]ublic works contracts are a unique species of commercial dealings," in which "the public entities retain[] broad discretion to reject all bids" and "could give no preference to any bidder" but "were required to accept the lowest responsible bid." (*Roy Allan Slurry Seal, Inc.*, *supra*, at p. 510.) As a result, those regulations preclude a bidder on a public works job from establishing the element of an interference tort that there was "an 'economic relationship' containing the 'probability of future economic benefit'" between the bidder and the public entity. (*Id*. at p. 516.)

Defendants wholly ignore that portion of *Roy Allan Slurry Seal*. Instead, they focus exclusively on its consideration of "whether expanding tort liability in the area of public works contracts 'would ultimately create social benefits exceeding those created by existing remedies for such conduct, and outweighing any costs and burdens it would impose.'" (Mot., p. 32, citing *Roy Allan Slurry Seal*, 2 Cal.5th at p. 520.) And, its admonition that "[c]ourts must act prudently when fashioning damages remedies 'in an area of law governed by an extensive statutory scheme.'" (*Ibid*.) But Defendants' superficial analysis of those considerations does not accurately reflect the decision's effect.

Tellingly, the *Roy Allan Slurry Seal* Court distinguished public work contract bids from a case involving companies' "bids to the Republic of Korea to provide military equipment." (2 Cal.5th at p. 513, citing *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134.) It reasoned that "[s]ignificantly, . . . there is no indication that the bidding process . . . was constrained in a manner similar to the statutory rules that govern California public works contracts." (*Ibid*.) Specifically, it explained that the plaintiff there had a relationship with an expectation of economic advantage that was interfered with. (*Ibid*.) This distinction eviscerates Defendants' claimed effect of *Roy Allan Slurry Seal*. Indeed, if international sales of military arms are not exempt from interference torts, then surely domestic civilian firearm sales are not. Regulation involved with the former is certainly more "extensive" than with the latter. Yet, the *Roy Allan Slurry Seal* Court did not focus on the *extent* of the regulation, but rather the *nature* of the regulation, i.e., whether the regulation was incompatible with the elements of interference torts.

In any event, in seeking to have DES altered, FAI was not trying to circumvent the regulatory protections that California has put in place on firearm sales. To the contrary, it wanted Defendants to perform their mandatory duty to process its products through the regulatory process. So, the public policy concerns that the Court discussed in *Roy Allan Slurry*, are simply not present here. For these reasons, *Roy Allan Slurry Seal* is not an impediment to FAI's causes of action.

IV. DEFENDANTS ARE NOT ENTITLED TO IMMUNITY UNDER SECTION 820.2

As a last resort, Defendants regurgitate the argument that they enjoy discretionary immunity under section 820.2 for their refusal to fix the DES, which argument has already been rejected *twice* in this case, first by Judge Chalfant and then by this Court. (on Defs.' Mot. J. Pldgs., pp. 6-7; see also Order re Demurrer, pp. 7-8 (June 3, 2021).) Defendants have provided this Court with no reason to change its mind.

None of the new cases that Defendants cite change the analysis, as none involve mandatory duties, as is the case here. By Defendants' own admission, in *Hacala v. Bird Rides, Inc*. (2023) 90 Cal.App.5th 292, "the City was immune from liability because its employees had discretion but were not under a mandatory duty to remove improperly parked scooters." (Mot., p. 30.) The State also cites *Roseville Community Hosp. v. State of California* (1977) 74 Cal.App.3d 583, but the State fails to

mention *Roseville* is clear that the plaintiff there failed because he could identify no mandatory duty: "The hospital charges the state with liability but fails to identify any mandatory duty breached by its agent, the Attorney General. The Knox-Mills provisions imposed upon the Attorney General only one positive duty it directed him to maintain a registry of health care service plans. The hospital's pleading alleges no breach of that duty." (*Id.* at pp. 587-588.)

Defendants then launch into excuse-making for why they could not prioritize the DES fix. (Mot., pp. 31-32.) Were there no mandatory duty under Penal Code section 28155, they may have a point. But, because there *is* a mandatory duty, their arguments fail. Otherwise, the government could always shirk its mandatory duties by pointing to competing priorities, which will always exist.

Finally, recycling yet another argument from their motion for judgment on the pleadings, Defendants claim that Penal Code section 28245's apparent carveout for long guns establishes that any actions it took were discretionary. (Mot., p. 32.) But as FAI also noted in opposition to that motion, section 28245 speaks only to the DOJ's conduct, not the Attorney General's or its employees. Plaintiffs have confirmed they are not pursuing damages against the DOJ as to the Third, Fourth, or Fifth Causes of Action. More importantly, section 28245 limits its application to "[w]henever the Department of Justice acts pursuant to **this article**…." Penal Code section 28155, which is the basis for the mandatory duty at issue here, is not in the same article as section 28245. It is in the *prior* article, Article 2, called "Form of the Register or the Record of Electronic Transfer (§ 28150 to § 28190)." Thus, Penal Code section 28245 has no relevance here, even if it did apply to individual Defendants.

While factual development is one thing, FAI should not have to defeat the same *legal* arguments over and over. If Defendants disagree with prior rulings, that is what appeals are for. There is no reason for this Court to revisit decided legal questions.

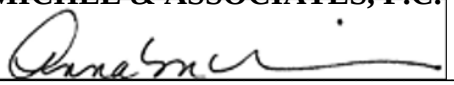
CONCLUSION

At bottom, as this Court has already acknowledged, FAI has sufficiently pled its three remaining causes of action as a matter of law; thus, the only remaining question is whether the undisputed material facts support its claims. As demonstrated above, at minimum, the facts are in dispute as to whether Defendants intentionally or unreasonably delayed the DES fix to allow Title 1 transfers. For those reasons and the ones explained above, this Court should deny the State's motion for summary judgment

and its alternative motion for summary adjudication, allowing this case to proceed to trial.

Date: June 26, 2024

MICHEL & ASSOCIATES, P.C.



Anna M. Barvir
Attorneys for Petitioner-Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

On June 26, 2024, I served the foregoing document(s) described as

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof by the following means, addressed as follows:

Kenneth G. Lake
Deputy Attorney General
Email: Kenneth.Lake@doj.ca.gov
Andrew Adams
Email: Andrew.Adams@doj.ca.gov
California Department of Justice
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Attorney for Respondents-Defendants

X (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission through One Legal. Said transmission was reported and completed without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 26, 2024, at Long Beach, California.

Laura Palmerin