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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

FRANKLIN ARMORY, INC. AND CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, Plaintiffs, **v.** **CALIFORNIA DEPARTMENT OF JUSTICE, XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA, AND DOES 1-10,** Defendants.	Case No. 20STCP01747 **REPLY TO OPPOSITION TO 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**

Defendants have carried their burden on summary judgment to show that one or more elements of the three remaining causes of action cannot be established by the plaintiff and that there is a complete defense pursuant to the discretionary immunity under Government Code section 820.2. Department of Justice (Department) employees are entitled to discretionary immunity because the statutes at issue confer discretion and did not impose a mandatory duty to modify the DES to add the "other" option to the long gun drop-down menu in accordance with the letter sent by plaintiff's counsel in October, 2019, before the Title 1 was rendered a banned assault weapon on August 6, 2020.

To satisfy its burden to show that a triable issue of material fact exists, plaintiff may not rely upon the mere allegations of its pleadings but instead must produce specific facts showing a material controversy as to the elements defendant claims cannot be established or as to the defense defendant is asserting. (Civ. Proc. § 437c (p)(2), *Weil & Brown*, Cal. Prac. Guide Civ. Pro. Before Trial (TRG 2024) §10:253.) Plaintiff seeks to avoid this burden by repeatedly referencing the prior demurrer and judgment on the pleadings rulings incorrectly asserting that these matters have been resolved relative to this motion. However, summary judgment motions "are law and motion proceedings entirely distinct from an attack on a pleading by demurrer." (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 634, fn. 10.)

For example, plaintiff incorrectly argues that the court has already determined that there was a mandatory duty to modify the DES but these rulings were based on plaintiff's allegations that are accepted as true on a demurrer. Also, plaintiff misstates Judge Chalfant's ruling, asserting that he ruled that there was a mandatory duty to modify the DES. He did not. In fact, in his June 3, 2021, order he noted that "respondents argue that these statutes do not include any mandatory requirement that the Department operate the DES in any particular manner. They instead provide the Department with discretion to utilize the DES or another method" and stated: "This is true . . . " (Order, 6/3/21, p. 7, last two paragraphs.) The court went on to note that "the DOJ has discretion in how it implements the electronic transfer system, but the discretion has limits" in that, based on *AIDS Healthcare Foundation v. Los Angeles County Dept. of Health*, (2011) 197 Cal.App.4th 693, the Department could not arbitrarily fail to act. Judge Chalfant

decided that the second amended complaint sufficiently pled that the Department's failure to act was arbitrary. (Order, 6/3/21, p. 8, first three paragraphs.) The *AIDS Healthcare Foundation* court dealt with a mandamus claim noting that mandamus will lie to command an exercise of discretion to take some action where there is an abuse of discretion. (*Id.* at p. 704.) In this context, "a decision is an abuse of discretion only if it is 'arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." (*Alejo v. Torlakson* (2013) 212 Cal.App.4th 768, 780.)

This mandamus standard does not apply in determining whether a duty to act or liability exists relative to a damages claim under the Government Claims Act. An example of this is the discretionary immunity under section 820.2 which applies to an act or omission of a Department employee whether or not the discretion be abused.

The opposition concedes that the Department cannot be held directly liable for the three remaining causes of action but incorrectly asserts that this disposes of the mandatory duty issue because Government Code section 815.6 applies to entity liability only. However, as discussed in the moving papers, in a case alleging a public employee's failure to take action, there must be a legal basis establishing a duty relative to plaintiff to act. A public employee has no duty to take affirmative action to assist another unless there is some relationship between them which gives rise to a duty to act. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128-1129.) "This rule derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter." (*Id.* at p. 1129.)

In addition, the Second District Court of Appeal has analyzed whether a statute or enactment establishes a mandatory duty or confers discretionary authority on public employees applying a Government Code section 815.6 mandatory duty analysis pursuant to *Haggis v. City of Los Angeles*, (2000) 22 Cal.4th 490. (*Hacala v. Bird Rides*, (2023) 90 Cal.App.5th 292, 305-306 (enactment at issue did not impose a mandatory duty but rather granted discretionary enforcement authority resulting in City employees entitlement to discretionary immunity).) As discussed further below, there is no legal basis establishing a mandatory duty on the part of any Department employee to have modified the DES. Before addressing the duty issue, defendants address the

failure of plaintiff to establish the required elements for the interference claims.

1. One or more Elements of the Three Interference Claims Cannot be Established

The opposition misstates that the only support for Defendants' assertion that the $5 non-obligatory, refundable deposits are not valid contracts is *Lawrence's Anderson on the Uniform Commercial Code* which notes that making a deposit on goods does not establish that the parties made a contract. (*Id.* at § 2-204:137.) The opposition fails to address the additional clear authority in the moving papers that in determining whether a contract was formed, California law "places emphasis on the party's intent to be bound to the contract." (*Fleming v. Oliphant Financial, LLC* (2023) 88 Cal.App.5th 13, 22.) Nor does plaintiff attempt to address the *Williston on Contracts* authority that the parties must "have a present intention to be bound by their agreement . ." (1 Williston on Contracts (4th ed.) § 3:7.) *Williston* section 3.2 also makes clear that:

> "The test for enforceability of an agreement is: (1) whether *both or all parties*, with the capacity to contract, *manifest objectively an intent to be bound by the agreement***;** (2) whether the essential terms of the agreement are sufficiently definite to be enforced; (3) whether there is consideration; and (4) whether the subject matter of the agreement and its performance are lawful."

(1 Williston on Contracts (4th ed.) § 3:2 (emphasis added).)

In other words, "whenever one of the parties to an agreement can terminate without consequence, an enforceable contract does not exist. It is clear that parties may not agree that one or both may walk away from all obligations without rendering the contract unenforceable." (*Woll v. U.S.* (Fed. Cl. 1999) 45 Fed.Cl. 475, 478; *affirmed Woll v. U.S.* (Fed. Cir. 2000) 251 F.3d 171.) "Whether a contract is certain enough to be enforced is a question of law for the court." (*Patel v. Liebermensch* (2008) 45 Cal.4th 344, 348, fn. 1.)

Here, it is undisputed that the deposits did not establish an obligation to be bound to a purchase of a Title 1.[1] These undisputed facts make clear that there was not a present intention to be bound by an agreement to purchase a Title 1 and thus no contract.

[1] The opposition references that there were some dealer deposits that were full price but Franklin owner Jay Jacobson testified that, as to dealer deposits, they were never charged anything, no money ever exchanged hands and these were more of accounting entries. (Jacobson Dep. p. 129:9-130:7, Ex A1 to Reply Dec. of Lake)

Plaintiff's citation to *Jones v. Wide World of Cars,* (S.D.N.Y. 1993) 820 F.Supp. 132, actually provides further support for a finding of no contract in that the *Jones* court held that a consumer down payment on a product not specially made for the buyer, standing alone, could not be construed as an enforceable contract because the deposit was refundable if the transaction was called off. (*Id.* at p. 137-138 (Plaintiff recovered $50,000 deposit for vehicle).)

In addition, plaintiff makes the irrelevant assertion that there is continued interest in the Title 1 by misstating the record in *Briseno v. Bonta, et al.*, USDC, Central Dist. Case No. 2:21-cv-09018-ODW (PDx), that there are thousands of members of a class action that have joined the litigation who made Title 1 deposits. (Opp. p. 13:4-7, Plf. fact 64.) In fact, the *Briseno* court docket shows there are three plaintiffs and that no motion for class certification has been made and thus there are no class members who have joined the litigation. (Ex. K to Reply Req. for Jud. Notice.) (See e.g. *A. B. v. Hawaii State Department of Education* (9th Cir. 2022) 30 F.4th 828, 834-835 (discussing motion requirements to obtain an order for class certification).)

Furthermore, the court in *Briseno* ordered a stay of that action on August 12, 2022, pending the outcome of this action. (Order 8/12/22, Ex. L to Reply Req. for Jud. Notice, p. 12:13-19, 11:5-9 [noting that plaintiff cannot appeal the previous dismissal of its claims until the Superior Court reaches final judgment on the damages claims].) Also, the plaintiffs in *Briseno* seek a court declaration, under the Second and Fourteenth Amendments allowing them to register and take possession of a Title 1. (Order 8/12/22, Ex. L, p. 5:7-18.) However, the section 1983 claims in this case were dismissed based on the ruling that there is no right to obtain a Title 1 and plaintiff is relegated to a damages claim in this action. (Order 9/7/23, p. 9:3-10:2.) Thus, the claims in *Briseno* have no bearing or relevance to the three remaining interference claims in this case.

With regard to the failure of the other required elements of the interference claims, plaintiff again improperly refers to the demurrer ruling which was based on plaintiff's allegations of implementation of a reporting system that excluded the Title 1. However, defendants have submitted undisputed evidence that the aspect of the DES system at issue, that is, the long gun drop-down menu with three options for rifle, shotgun and rifle/shotgun combination, had been in place since at least 2015, long before plaintiff introduced the Title 1 in October, 2019. Thus, the

act of setting up the DES drop-down menu without the "other" option could not logically have been an intentional act designed to interfere with the sales of a gun that would not be offered for sale until years later. Nor can non-compliance with an attorney demand letter from a gun manufacturer demanding a change in the DES to accommodate a new firearm logically be construed as converting an act that occurred years prior into a present intentional act of interference.

There is no California case ruling on a plaintiff asserting such a claim. The cases cited in the moving papers finding that interference claims resting on alleged inaction or the lack of an affirmative act fail as a matter of law are not binding authority. (*Nanko Shipping v. Alcoa Inc.,* (D. D.C. 2015) 107 F. Supp. 3rd 174, 182-183; *Knight Enterprises v. RPF Oil Co.* (Mich. Ct. App. 2013) 299 Mich.App. 275, 280.) But they are consistent with common sense and logic.

Gym Door Repairs, Inc. v. Young Equip. Sales, Inc. (SDNY 2016) 206 F.Supp.3d 869, cited by plaintiff is inapposite. The *Gym Door Repairs* court did not determine or even address whether inaction could satisfy the requirement of an intentional act designed to induce a breach or disrupt a relationship. The *Gym Door Repairs* court merely rejected an interference with business relationships claim on statute of limitations grounds noting that the limitations period would run from the time of the alleged action or inaction. (*Id.* at p. 910.)

With regard to the intentional and negligent interference with prospective economic advantage claims, the above discussion also applies, demonstrating there is no basis for either of these causes of action. As discussed in the moving papers, it must be "reasonably *probable* that the loss economic advantage would have been realized..." (*Youst v. Longo* (1987) 43 Cal.3d 64, 71 (emphasis in original).) It is undisputed that no depositor had any obligation whatsoever to complete a purchase of a Title 1. Thus, it cannot be construed as probable that there was a lost economic advantage. The assertion in the opposition that many depositors have not gone through the trouble of getting their $5 deposit back is not relevant and beside the point. Since there was no obligation to complete a sale, it is speculative, not probable, that an economic benefit would have been realized. It is also speculative to assume that a depositor would have been eligible to purchase the firearm by passing the required background check.

In addition, as discussed above, there was no knowledge or intentionally wrongful act designed to disrupt. Furthermore, plaintiff fails to show that there was an independently wrongful act of interference. This additional requirement also applies to a negligent interference claim. (*Lange v. TIG Ins. Co.* (1998) 68 Cal.App.4th 1179, 1185.) For an action to be independently wrongful it must be "unlawful, that is, if it is prescribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Ixchel Pharma v. Biogen* (2020) 9 Cal.5th 1130, 1142.) "Only defendants who have engaged in an unlawful act can be held liable for this tort." (*Korea Supply v. Lockheed Martin* (2003) 29 Cal.4th 1134, 1164.)

With regard to former Attorney General Becerra, plaintiff has not presented any evidence of any unlawful act by him or of any involvement relative to the modification to the DES. As to any other Department employee, none of whom has been identified, plaintiff has failed to identify legal authority showing that a anyone engaged in an unlawful act. Not taking action in response to the letter of plaintiff's counsel in October, 2019, requesting modification of the DES in the time frame demanded by plaintiff, cannot properly be construed as an unlawful act under this standard.

Plaintiff also infers wrongdoing by the lack of response to the inquiry from Mr. Jacobson as to whether a dealer could process a Title 1 for transfer in the DES by selecting one of the drop-down menu options available and then adding a description of the Title 1 such as "other" in the DES comment section.[2] However, plaintiff cites no authority that would have imposed such a duty on any Department employee. Such an assertion of a duty to respond to plaintiff was rejected by the court in the Sacramento action wherein it noted that the Department did not have a duty to respond to plaintiff's inquiry about whether the Title 1 was an assault weapon. (Order, 6/12/19, Sacramento Action, p. 3-4, Ex. J to Reply Req. for Jud. Notice.) Thus, not responding to this inquiry cannot be construed as an unlawful act.

[2] Plaintiff does not to explain why a dealer could not have done this on their own or why an advisory opinion from the Bureau in this regard would be required.

Furthermore, since the statutory authority relative to the DES confers discretion on Department employees as to the whether and when to modify the DES, not acting to modify the DES before the Title 1 was banned cannot be construed as an unlawful act.

In addition, the opposition infers wrongdoing by Department employee's support for the passage of SB 118 as a trailer bill. However, no wrongdoing or liability can be premised on a Department employee advocating for firearms legislation, including SB 118, 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; *Manistee Town Ctr. v. City of Glendale* (9th Cir. 2000) 227 F.3d 1090, 1092.) "The doctrine immunizes petitions directed at any branch of government, including the executive, legislative, judicial and administrative agencies." (*Id.*) "*Noerr–Pennington* applies to conduct by both private and government actors." (*Committee to Protect our Agricultural Water v. Occidental Oil and Gas Corporation* (E.D. Cal. 2017) 235 F.Supp.3d 1132, 1155.) In addition, neither a public entity nor a public employee is liable for an injury caused by the adoption of an enactment. (Gov. Code, §§ 818.2, 821.) Thus, no unlawful or wrongful act by a Department employee can be derived from supporting SB 118.

The negligent interference claim also carries the additional requirement that plaintiff must show that the defendant owed the plaintiff a duty of care. (*Lange, supra,* 68 Cal.App.4th at p. 1187.) As discussed further below, no Department employee owed plaintiff a duty of care.

2. There Is No Legal Basis Establishing a Mandatory Duty on the Part of Any Department Employee to Have Modified the DES

Even assuming arguendo that inaction could be construed as an intentional act of interference, there must be a legal basis establishing a duty on the part of a Department employee to have taken the action to modify the DES before the Title 1 was banned. Clearly, the writing of a letter by plaintiff's counsel demanding such a change cannot, as a matter of law, provide a basis for such a duty. Thus, there must be some statutory basis specifically imposing such a duty. Therefore, the mandatory duty discussion in the moving papers also applies to an analysis of the potential duty of an employee, as was done in *Hacala*.

As discussed in the moving papers, the statute dealing with the setup and operation of the DES, Penal Code section 28205, clearly confers discretionary authority which is specifically confirmed by the plain language of Penal Code section 28245 which states that acts or omissions as it pertains to long guns under the DES statute are deemed to be discretionary within the meaning of the Government Claims Act.

The opposition attempts to avoid the application of section 28245 by asserting that it applies only to the Department's conduct, not its employees. But the statutes relied upon by plaintiff as establishing a duty to have modified the DES also are directed only to the "Department", not employees. Thus, following this logic, these statutes cannot apply as a basis for establishing a duty as to any Department employee to have modified the DES and the analysis ends there. There is no duty and thus no liability.

If, on the other hand, the Penal code statutes asserted as a basis for establishing a duty can be construed as applying to Department employees, then it must follow that the terms of section 28245 must also apply to employees. In this regard, "a public entity can only act through its employees." (*Yee v. Superior Court* (2019) 31 Cal.App. 5th 26, 32, 40.)

Although Penal Code section 28155 is not part of the same article as section 28245, this does not alter the clear conclusion that section 28155 does not establish a basis for a mandatory duty to modify the DES on a Department employee for a number of reasons. First, the form of the register and record of electronic transfer is contained within the DES and the authority to set-up, operate and modify the DES falls under section 28205. Second, the one sentence general language of section 28155, by its own terms, does not establish a duty to have modified the DES. Use of the word "shall" in this sentence merely indicates that it is the Department, as opposed to the legislature or another agency, who is authorized to create the DROS in the DES. The lack of any specificity as to how this is to be done makes clear that it is left to the Department's discretion to decide the format and information to be included in the DES. Any discussion about whether the form in the DES should have contained different or additional information requires a normative qualitative debate over whether such information was adequate, which precludes a

finding of a mandatory duty. A duty to provide different or additional information in the DES based on the general language of Section 28155 cannot be implied.

Third, it is undisputed that the DES did contain the register and record of electronic transfer. In fact, the opposition concedes that the DES contained the required information as to firearm type and that the Department had discretion as to the register or the record of electronic transfer information to be included in the DES. (Opp., p. 8:11-18.) In this regard, the opposition notes that the statute mandates the firearm type (e.g. "long gun") which was included in the DES, but there was no requirement to include the drop-down menu with options for rifle, shotgun, or rifle/shot gun combination in the long gun menu at all. Thus, plaintiff effectively agrees that the inclusion of this drop-down menu going back to at least 2015 was discretionary and that the Department had discretion to remove it altogether. The opposition provides a second example of the Department's discretion with regard to the register or record of electronic transfer in the DES noting that the Department could have authorized an alternative by instructing a dealer to proceed by selecting one of the existing options in the DES and then adding "other" in the DES comment field.

Clearly, reading sections 28205, 28155 and 28245 together, the Department had discretionary authority with respect to making modifications to the DES and thus, as a matter of law, there was no mandatory duty imposed on any Department employee to have modified the DES in the manner requested by plaintiff in the time frame requested.[3]

3. The Discretionary Immunity Under Government Code Section 820.2 Precludes Liability Against Defendants

Once again, plaintiff incorrectly asserts that the overruling of a demurrer by Judge Chalfant established a mandatory duty. As discussed above, the applicable standard on a summary judgment motion is completely different from a demurrer or motion for judgment on the pleadings. Judge Chalfant's ruling provides a contrast to evaluating section 820.2 discretionary immunity in that he noted that the statutes at issue did confer discretion but mandamus relief

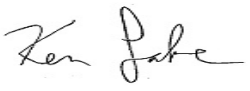
[3] The opposition does not contest that Penal Code sections 28215 and 28220 do not provide a basis for a mandatory duty.

could be available for an abuse of discretion by arbitrarily failing to act. In clear contrast, a monetary damage claim under the Government Claims Act is completely different. Government Code section 820.2 specifically immunizes public employees for *acts or omissions whether or not such discretion be abused.*

In addition, the above discussion makes clear that the Penal code sections relative to the operation of the DES confer discretionary authority upon Department employees. The Declaration of Bureau Director Alisson Mendoza, as well as her deposition testimony, sets forth in detail that the decision by the Bureau as to the timing of the modification of the DES to add the "other" option in 2021 was the result of the exercise of discretion in that the highest level officials at the Bureau engaged in a decision making process considering multiple factors requiring them to make choices among competing priorities during the Covid pandemic. In this regard, the letter of Department attorney Patty Li, sent before the start of the pandemic, and the testimony of Cheryle Massaro-Florez that technical staff were working on a possible modification to the DES to add the "other" option in 2020 is consistent with Director Mendoza's statements that the top level officials at the Bureau in 2020 undertook a review of both a permanent and temporary enhancement which included having technical staff review what would be required for either modification. (Mendoza Dec. ¶¶ 8-11.) This process does not require a *strictly careful, thorough, formal, or correct* evaluation because this immunity was designed to protect against claims of carelessness, malice, bad judgment or abuse of discretion. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 983-984.) Plaintiff of course asserts that the evaluation by defendants as to the timing of the DES modification was incorrect, but it has not and cannot controvert the fact that this decision making process occurred thus entitling defendants to immunity under section 820.2.

Dated: July 5, 2024

Respectfully submitted,



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Deputy Attorney General
Attorneys for Defendants

DECLARATION OF SERVICE BY ELECTRONIC MAIL

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

I declare: I am employed in the City of Los Angeles, County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 300 South Spring Street, Room 1700, Los Angeles, California 90013. On July 5, 2024, I served the documents named below on the parties in this action as follows:

REPLY TO OPPOSITION TO MOTION BY DEFENDANTS FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES

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

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

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

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

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

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

Executed on July 5, 2024, at Los Angeles, California.

Sandra Dominguez
Declarant

Sandra Dominguez
Signature