IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SECOND APPELLATE DISTRICT

FRANKLIN ARMORY, INC., and CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, Plaintiffs and Appellants, v. CALIFORNIA DEPARTMENT OF JUSTICE, XAVIER BECERRA, in his Official Capacity as Attorney General for the State of California, and DOES 1-10, Defendants and Respondents.	Case No. B340913

APPELLANTS' OPPOSITION TO RESPONDENTS' MOTION TO STRIKE PORTIONS OF APPELLANTS' BRIEF

Superior Court of California, County of Los Angeles
Case No. 20STCP01747
Honorable Daniel S. Murphy, Judge

C.D. Michel – SBN 144258
Jason A. Davis – SBN 224250
Anna M. Barvir – SBN 268728
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Email: abarvir@michellawyers.com

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

INTRODUCTION

The State's motion to strike portions of Appellants' Opening Brief is a belated and meritless attempt to conceal its own discovery failures. The challenged sections refer to evidence this Court has already judicially noticed—without opposition—based on official state records obtained through a Public Records Act request. Those records were responsive to Appellants' formal discovery requests in the court below and should have been produced long ago. Rather than address its failure to disclose the existence of those records, the State now seeks to exclude references to evidence that this Court has already accepted. Its motion to strike is not only procedurally improper but substantively unjustified. It should be denied.

ARGUMENT

I. THIS COURT SHOULD REJECT THE STATE'S BELATED ATTEMPT TO OPPOSE THE INTRODUCTION OF THE 2020 JIRA RECORDS AND APPELLANTS' REFERENCES TO THE STATE'S CONCEALMENT OF EVIDENCE

The State seeks to strike portions of Appellants' Opening Brief on the ground that Appellants improperly rely on material outside the appellate record. (Mot. p. 3, citing *C.J.A. Corp. v. Trans-Action Financial Corp.* (2001) 86 Cal.App.4th 664, *Pinter-Brown v. Regents of U. of Cal.* (2020) 48 Cal.App.5th 55, and *Pulver v. Avco Fin. Servs.* (1986) 182 Cal.App.3d 622.) Appellants concede, as they must, that the challenged references cite evidence outside the record. But the inclusion of those references is entirely proper given that, together with their opening brief, Appellants filed a Request for Judicial Notice, or Alternatively, Motion to Take Evidence under California Rules of Court 8.152, subsection (a) and

Evidence Code section 452, subdivisions (c) and (h), as well as California Rules of Court, rule 8.252(c), and Code of Civil Procedure section 909.

Appellants submitted that request to call the Court's attention to evidence—JIRA records related to the 2020 DES enhancement—obtained through the California Public Records Act but never disclosed in discovery despite Appellants' repeated requests and their clear relevance to Appellants' claims. (Req. Jud. Notice pp. 4-7; Davis Decl. Supp. Req. Jud. Notice ¶¶ 3, -4, 7-14.) In their Opening Brief, Appellants explicitly cited that pending request in the very portions the State now seeks to strike. (A.O.B. pp. 18, 30, 30 fn. 7.)

More importantly, Appellants unambiguously argued that this Court should consider the evidence because the State's failure to disclose it—whether inadvertent or deliberate—constitutes exceptional circumstances warranting appellate evidence-taking under section 909. (See Req. Jud. Notice at pp. 6-7, citing *Adams v. Bank of Am.* (2020) 51 Cal.App.5th 666, 674 fn.4 [recognizing that exceptional circumstances allow the reviewing court to notice material not presented below]; Davis Decl. ¶¶ 13-14.)

The State had a full and fair opportunity to *both* object to this Court taking judicial notice of the existence of Exhibit B *and* to rebut Appellants' characterization of its discovery conduct. It chose to do neither. And this Court granted Appellants' Request for Judicial Notice. (Order (June 10, 2025).) Having declined to oppose Appellants' request and motion, the State cannot now evade the consequence of that choice by moving to strike the very

material it declined to challenge. Its motion identifies no legal or factual basis for disregarding the Court's order granting judicial notice, nor does it explain why the State failed to respond when it had the chance. It is the State that waived its ability to strike the existence of those documents from the appellate record.

This motion is a thinly veiled effort to relitigate Appellants' request under the guise of a motion to strike—and to once again obscure key evidence about the timeline for developing the "Other" DES enhancement. The Court should reject this belated attempt to do so.

II. THIS COURT SHOULD DENY THE STATE'S MOTION TO STRIKE BECAUSE ITS FAILURE TO PRODUCE THE 2020 JIRA RECORDS CONSTITUTES EXCEPTIONAL CIRCUMSTANCES

In support of their Request for Judicial Notice, or Alternatively, Motion to Take Evidence, Appellants argued that the State's failure to produce discoverable documents—and to identify potentially knowledgeable witnesses—was prejudicial to Appellants' presentation of their case. (Req. Jud. Notice p. 6.) That failure constitutes the sort of "exceptional circumstances" that justify the introduction of Exhibit B (i.e., the 2019-2020 JIRA records) on appeal. (*Ibid.*, citing *Adams v. Bank of Am.* (2020) 51 Cal.App.5th 666, 674 [exceptional circumstances permit noticing material not presented below].) Appellants maintain that position in opposition to the State's pending motion to strike references to those documents and the State's discovery conduct.

Under Code of Civil Procedure section 909, this Court may "make factual determinations contrary to or in addition to those made by the trial court," and may "for any other purpose in the

interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal." This section is to be "liberally construed" so that cases "may be finally disposed of by a single appeal." (*Ibid.*) While appellate courts understandably exercise this power sparingly, it is appropriate where "exceptional circumstances" exist. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405; *De Angeles v. Roos Bros., Inc.* (1966) 244 Cal.App.2d 434, 443.) Here, the State's withholding of crucial evidence plainly satisfies that standard. Appellants were denied the opportunity to fully rebut the State's narrative about the development of the "Other" DES enhancement. That is just the sort of exceptional circumstance that would justify the introduction and consideration of new evidence on appeal.[1]

The State thus argues that Appellants waived any claim that the evidence was wrongly withheld because they did not move to compel after the State "objected to these requests on numerous grounds in its initial responses." (Mot. p. 3, citing *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403 and *New Albertsons,*

---

[1] Cf. *L.A. Airways, Inc. v. Hughes Tool Co.* (1979) 95 Cal.App.3d 1, 6 ["[N]ewly discovered evidence generally is not a ground for reopening that judgment *unless the concealment of that evidence prevented a fair adversary hearing, kept the claimant out of court entirely or utterly deprived him of a claim or defense*, or precipitated a grave miscarriage of justice such as the conviction of an innocent person."], italics added; *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal.4th 1, 11-13 [holding that there is no tort for spoliation of evidence, recognizing that various remedies already exist to deter such conduct and observing that the willful suppression of evidence is "relatively rare".].)

Inc. v. Superior Court (2008) 168 Cal.App.4th 1403.) This argument lacks merit.

A. The State's Boilerplate Objections and Selective Disclosure Obscured the Existence of the 2020 JIRAs

The State's "timely objections" were generic and non-substantive, and they failed to meaningfully inform Appellants that the State was refusing to produce responsive documents or its grounds for doing so. Indeed, in response to Franklin Armory's requests for production of documents related to the "Other" DES enhancement project(s), the State offered a string of rote objections, asserting that the request was "vague," "ambiguous," "overbroad," "overburdensome," and so on, providing no factual or legal basis for those objections. (Barvir Decl. Supp. Oppn., Exs. B and D.) In the case of the State's assertion of the attorney-client, work product, and official information privileges, the State's objections similarly lacked the specificity required under Code of Civil Procedure section 2031.240. (*Ibid.*)[2]

Despite repeating these sweeping objections, the State produced 26 pages of JIRA records evidencing the 2021 "Other" DES enhancement and directed Appellants to review "previously produced documents" and the depositions of Cheryle Massaro-

---

[2] While not required unless "necessary," Code Civ. Proc., § 2031.240, the State did not provide a privilege log identifying the evidence purportedly protected by the attorney-client, work product, or official information privileges. (See Barvir Decl. Supp. Oppn., ¶¶ 5-7, Exs. B & D.) Arguably, a privilege log was "necessary" here, since the State's boilerplate objections provided no factual information on which Appellants could have evaluated the merits of the State's claims of privilege. (*Id.*, Exs. B & D.)

Florez and Maricela Leyva. (Barvir Decl. Supp. Oppn., Ex. B; Davis Decl. ¶¶ 7-11.) It referenced those same 26 pages of 2021 JIRA records in response to Appellants' request for supplemental responses. (Barvir Decl. Supp. Oppn., Ex. D.) Such conduct reasonably led Appellants to believe that no earlier records existed or, at a minimum, that the State had produced all non-privileged documents responsive to their requests.

In short, the State's boilerplate objections—paired with its selective production—obscured the discovery landscape. Appellants had no meaningful notice that responsive 2020 JIRA records were being withheld, much less a clear basis on which to move to compel their production.

B. Concealment of the 2020 JIRA Records Excuses Any Alleged Waiver

Even assuming a motion to compel might have been warranted, the record shows that the State concealed the 2020 JIRA records, excusing any potential waiver. (See *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525.) In *Vallbona*, the appellants did not move to compel the production of withheld documents because the responding party had concealed their existence, falsely claiming that responsive documents had been stolen. (*Id.* at p. 325.) The court concluded that "[r]equiring plaintiffs here to seek a formal order to compel defendants to comply with discovery would have been … futile." (*Ibid.*)

Here, while Appellants' earlier request for judicial notice charitably acknowledges that the State's withholding of the records may have been inadvertent (Davis Decl. Supp. Req. Jud. Notice ¶ 14; A.O.B. 30 fn. 7.), deposition testimony suggests

otherwise. Indeed, DOJ employees offered evasive responses in their depositions, tending to prove that the State had engaged in deliberate concealment of the responsive evidence. Such conduct justifies the admission of Exhibit B on appeal and could warrant relief, like remand or a new trial. (*Campbell v. Superior Court* (2008) 159 Cal.App.4th 635, 647, *as modified on denial of reh'g* (Feb. 5, 2008) ["[W]e may consider new evidence to the extent necessary to determine whether, in the interests of justice, further proceedings before the trial court are required on the issue previously submitted to it."].)

1. Evasive Responses About 2020 JIRA Records: First, Cheryle Massaro-Florez admitted that an earlier "Other" DES enhancement was initiated and canceled, but she apparently could not recall when it started, whether it was documented with a JIRA, or who requested it, or why it was terminated. (Barvir Decl. Supp. Oppn., Ex. F at pp. 56-57, 59, 61-64 [Massaro-Florez Dep. (Sept. 8, 2023) pp. 38-39, 41, 64-67].) Despite acknowledging that JIRAs are standard for DES enhancements (*id.*, Ex. F at p. 57 [Massaro-Florez Dep. (Sept. 8, 2023), p. 39]), she repeatedly claimed that she did not recall when explicitly asked about JIRA records about the 2020 DES enhancement, indicating an intentional effort to avoid confirming its existence. She also provided clearer information about the 2021 project, suggesting selective memory or avoidance. (See A.A.XVIII 1859, 1862 [Massaro-Florez Dep. (Dec. 28, 2021), pp. 36, 39].)

Similarly, Allison Mendoza claimed not to recall any JIRAs for an "Other" DES enhancement between 2019 and 2020 (Barvir

Decl. Supp. Oppn., Ex. H at p. 78 [Mendoza Dep. (June 7, 2024), p. 102]), and she denied knowing what the "original other gun project" referenced in an exhibit was (A.A.X 1307 [Mendoza Dep. (June 7, 2024), p. 129). Given that Mendoza claimed that conversations about the "Other" field began in late 2019 (A.A.X 1304 [Mendoza Dep. (June 7, 2024), p. 126]), her lack of recollection about a 2020 JIRA could indicate an attempt to obscure its existence, particularly since she confirmed the existence of a JIRA for the later enhancement project in August 2021 (Barvir Decl. Supp. Oppn., Ex. H at pp. 80-82 [Mendoza Dep. (June 7, 2024), pp. 125-127).

Finally, Christina Rosa Robinson acknowledged that work on adding the "Other" option began in February 2020, but did not recall if a JIRA for that project existed. (*Id.*, Ex. G at p. 70 [Robinson Dep. (Nov. 27, 2023), p. 40].) Her inability to confirm that JIRA records for the 2020 enhancement existed—despite admitting that work began in 2020 and later referencing the August 2021 JIRA—further suggests selective disclosure to downplay the earlier project ticket.

2. Omission of Key Individuals: Massaro-Florez also failed to mention Terence Pan when asked about team members involved in DES changes (A.A.XVIII 1859 [Massaro-Florez Dep. (Dec. 28, 2021), p. 36]), potentially concealing the role of a key figure who may have created JIRA records for the 2020 "Other" DES enhancement and who worked directly on the project. This omission is particularly suspicious given that the 2020 enhancement was a distinct project from the 2021 effort that she

discussed more openly. Massaro-Florez also could not recall specific Bureau of Firearms contacts who requested or terminated the 2020 enhancement (Barvir Decl. Supp. Oppn., Ex. F at pp. 61-62 [Massaro-Florez Dep. (Sept. 8, 2023), pp. 64-65), further obscuring the decision-making behind the 2020 JIRA records' creation or the cancellation of the project, which could indicate an intent to limit traceability.

3. Claims That No Records Existed: Massaro-Florez also claimed that she had no documents or correspondence regarding the 2020 "Other" DES enhancement (Barvir Decl. Supp. Oppn., Ex. F at p. 59 [Massaro-Florez Dep. (Sept. 8, 2023), p. 41]), and did not recall if it was documented with a JIRA, despite admitting that JIRA records are standard and should have been used (*id.*, Ex. F at p. 57 [Massaro-Florez Dep. (Sept. 8, 2023), p. 39). Given her supervisory role over the project (A.A. XVIII 1852-1854 [Massaro-Florez Dep. (Dec. 28, 2021), pp. 29-31]), Massaro-Florez's claim that there were no JIRA records for the 2020 DES enhancement suggests deliberate withholding or failure to maintain records to conceal the ticket.

Further, Massaro-Florez noted that the 2020 "Other" DES enhancement reached the quality assurance testing phase, which typically requires the creation of JIRA records (Barvir Decl., Ex. F at p. 64 [Massaro-Florez Dep. (Sept. 8, 2023), p. 67]), yet she could not provide a JIRA number or confirm whether a JIRA record even existed. This discrepancy provides even more support for Appellants' argument that the 2020 JIRA records were intentionally omitted or hidden.

4. Claims That No Relevant JIRA Record Was Created Until 2021: Finally, Mendoza and Robinson both confirmed that a JIRA for the "Other" DES enhancement was not created until August 2021 (A.A. X 1304 [Mendoza Dep. (June 7, 2024), p. 126]; Barvir Decl. Supp. Oppn., Ex. G at p. 70 [Robinson Dep. (Nov. 27, 2023), p. 40]), despite work and discussions starting in late 2019 or early 2020. If true, the absence of JIRA records for the 2020 enhancement suggests a decision to avoid formal documentation during the earlier effort.

Taken together, this testimony supports Appellants' position that the State withheld or concealed JIRA records related to the 2020 "Other" DES enhancement project. Indeed, the depositions reveal inconsistent narratives, unexplained omissions, and selective memory, all of which reinforce the inference of a deliberate effort to obscure the 2020 project's tracking and documentation and to conceal evidence responsive to Appellants' discovery requests and potentially crucial to their case.

The State cannot weaponize its own lack of transparency to argue waiver now. The prejudice to Appellants—and the relevance of the 2020 JIRA records—only became apparent after they were obtained via a public records request well after trial court proceedings had ended. That context underscores the extraordinary circumstances in this case and justifies this Court's exercise of discretion to consider Exhibit B in resolving this appeal.

III. THE STATE'S CLAIM THAT THE RECORDS DID NOT EXIST UNTIL FEBRUARY 2025 IS MISLEADING

The State argues that Exhibit B—Appellants' judicially noticed report of JIRA records relating to the 2020 "Other" DES

enhancement—was not created until February 12, 2025, and therefore could not have been withheld during the underlying litigation. (Mot. p. 4.) On that ground, the State claims that Appellants' references to any such withholding should be stricken. (*Ibid.*) The State's argument conflates the date of the report's generation with the existence of the underlying data it reflects.

For context, JIRA is a project management tool that records requests for software enhancements and tracks work on those requests in real time. Each JIRA entry corresponds to an update made at or near the time the enhancement was being developed. Exhibit B reflects entries with creation dates of January 23, 2020, February 6, 2020, and February 24, 2020. (Davis Decl. Supp. Req. Jud. Notice, ¶ 6, Ex. B.) In other words, the records existed as of early 2020—before entry of judgment in the court below.

The fact that the DOJ compiled those records into a report in 2025 does not change the fact that the underlying records existed and were in the DOJ's possession during litigation but were never disclosed. This is crucial. Appellants are relying not on evidence developed after judgment but on contemporaneous records that the State failed to produce despite being responsive to Appellants' discovery requests. The February 2025 report is merely a format for organizing and producing electronically stored information that was always available to the State internally.

Appellants formally requested all JIRA records related to the relevant "Other" DES enhancements. The State objected in boilerplate fashion, then selectively produced 2021 JIRA records while failing to disclose the 2020 entries. This reasonably led

Appellants to believe that no responsive earlier records existed. The State cannot now rely on the export date of the JIRA report to avoid accountability for failing to produce these contemporaneous records in discovery. The records were created in 2020, were responsive to Appellants' discovery requests, and should have been produced. The State's failure to do gives the Court grounds to consider Exhibit B on appeal, rendering the State's motion to strike baseless.

CONCLUSION

For these reasons, Appellants ask that the court deny the State's motion to strike portions of Appellants' Opening Brief.

Date: July 7, 2025

MICHEL & ASSOCIATES, P.C.

s/ Anna M. Barvir
Anna M. Barvir
Attorneys for Plaintiffs-Appellants

PROOF OF SERVICE

Case Name: *Franklin Armory, Inc., et al. v. California Department of Justice, et al.*
Court of Appeal Case No. B340913
Superior Court Case No. 20STCP01747

I, Laura Fera, 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, Long Beach, California 90802.

On July 7, 2025, I served a copy of the foregoing document described as **APPELLANTS' OPPOSITION TO RESPONDENTS' MOTION TO STRIKE PORTIONS OF APPELLANTS' BRIEF**, on the following parties, as follows:

Kenneth G. Lake
Kenneth.Lake@doj.ca.gov
Andrew F. Adams
Andrew.Adams@doj.ca.gov
Office of the Attorney General
300 South Spring Street
Los Angeles, CA 90013

Attorneys for Respondent

These parties were served as follows: I served a true and correct copy by electronic transmission through TrueFiling. 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 July 7, 2025, at Long Beach, California.

Laura Fera
Declarant