

DOJ of the DES's defects as early as October 24, 2019.

Despite the fact that it has proven it can quickly make the requested change, DOJ has refused to modify the DES. It previously addressed a similar deficiency regarding the drop-down list for transferee's nation of origin—a deficiency FAI reported at the same time it raised the issue of undefined firearm subtypes—within weeks. Respondents have neither corrected the DES, nor has it implemented alternative procedures to facilitate the lawful transfer of “firearms with an undefined subtype,” including but not limited to the FAI Title I series of firearms, buntline revolvers, butterfly grip firearms, and barreled action firearms.

Respondents' motivation in delaying was to buy time to work with the Legislature to develop legislation designating FAI Title 1 style firearms as “assault weapons” and restricting their sale. The scheme proved successful because on August 6, 2020 the Legislature passed Senate Bill 118 (“SB 118”), which expanded the statutory definition of “assault weapon” to include any “semiautomatic centerfire firearm that is not a rifle, pistol, or shotgun, that does not have a fixed magazine, but that has any of a list of enumerated characteristics, like a forward pistol grip or thumbhole stock. The effect of SB 118 was to restrict FAI's transfer of centerfire versions of FAI Title 1 firearms to customers despite existing orders that long predated SB 118. Even after the adoption of SB 118, not all FAI's Title 1 firearms have been reclassified as assault weapons.

The first cause of action seeks a judicial declaration about the legality of Respondents' conduct regarding the DES and undefined firearm subtypes and an injunction to prevent Respondents from enforcing administrative and/or technological barriers that prevent the sale of lawful “firearms with an undefined subtype,” including but not limited to rimfire variants of the FAI Title 1 series of firearms, buntline revolvers, butterfly grip firearms, and barreled action firearms., and from enforcing the Roberti-Roos Assault Weapons Act in a manner that prohibits those who could have lawfully acquired and registered their FAI Title 1 style firearm but for Respondents' technological barriers.

The second cause of action is for a writ of mandate directing Respondents to design, maintain, and enforce updates to the DES such that it does not proscribe the lawful sale, transfer, and loan of a class of lawful firearms, including FAI's Title 1 firearms. It also asks the court to direct Respondents to design, implement, maintain, and enforce updates to their assault weapons registration process to permit the registration of variants of the FAI Title 1 style firearms by those whose orders were placed on or before August 6, 2020, or such time as deemed appropriate by the court.

The eighth cause of action is for declaratory and injunctive relief for Respondents' violation of the Administrative Procedure Act (“APA”). Petitioners seek a declaration that Respondents' de facto ban on the transfer of undefined firearm subtypes, including but not limited to the FAI Title 1 series of firearms, buntline revolvers, butterfly grip firearms and barreled action firearms, constitutes an underground regulation in violation of the APA and an injunction preventing enforcement of the underground regulation.²

2. Course of Proceedings

On February 25, 2021, the court sustained with leave to amend Respondents' demurrer to the First Amended Complaint (“FAC”).

² The third through seventh causes of action seek damages and have been stayed.

B. Applicable Law

Demurrers are permitted in administrative mandate proceedings. CCP §§1108, 1109. A demurrer tests the legal sufficiency of the pleading alone and will be sustained where the pleading is defective on its face.

Where pleadings are defective, a party may raise the defect by way of a demurrer or motion to strike or by motion for judgment on the pleadings. CCP §430.30(a); Coyne v. Krempeles, (1950) 36 Cal.2d 257. The party against whom a complaint or cross-complaint has been filed may object by demurrer or answer to the pleading. CCP §430.10. A demurrer is timely filed within the 30-day period after service of the complaint. CCP § 430.40; Skrbina v. Fleming Companies, (1996) 45 Cal.App.4th 1353, 1364.

A demurrer may be asserted on any one or more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading; (b) The person who filed the pleading does not have legal capacity to sue; (c) There is another action pending between the same parties on the same cause of action; (d) There is a defect or misjoinder of parties; (e) The pleading does not state facts sufficient to constitute a cause of action; (f) The pleading is uncertain (“uncertain” includes ambiguous and unintelligible); (g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct; (h) No certificate was filed as required by CCP §411.35 or (i) by §411.36. CCP §430.10. Accordingly, a demurrer tests the sufficiency of a pleading, and the grounds for a demurrer must appear on the face of the pleading or from judicially noticeable matters. CCP §430.30(a); Blank v. Kirwan, (1985) 39 Cal.3d 311, 318. The face of the pleading includes attachments and incorporations by reference (Frantz v. Blackwell, (1987) 189 Cal.App.3d 91, 94); it does not include inadmissible hearsay. Day v. Sharp, (1975) 50 Cal.App.3d 904, 914.

The sole issue on demurrer for failure to state a cause of action is whether the facts pleaded, if true, would entitle the plaintiff to relief. Garcetti v. Superior Court, (1996) 49 Cal.App.4th 1533, 1547; Limandri v. Judkins, (1997) 52 Cal.App.4th 326, 339. The question of plaintiff’s ability to prove the allegations of the complaint or the possible difficulty in making such proof does not concern the reviewing court. Quelimane Co. v. Stewart Title Guaranty Co., (1998) 19 Cal.4th 26, 47. The ultimate facts alleged in the complaint must be deemed true, as well as all facts that may be implied or inferred from those expressly alleged. Marshall v. Gibson, Dunn & Crutcher, (1995) 37 Cal.App.4th 1397, 1403. Nevertheless, this rule does not apply to allegations expressing mere conclusions of law, or allegations contradicted by the exhibits to the complaint or by matters of which judicial notice may be taken. Vance v. Villa Park Mobilehome Estates, (1995) 36 Cal.App.4th 698, 709.

For all demurrers filed after January 1, 2016, the demurring party must meet and confer in person or by telephone with the party who filed the pleading for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. CCP §430.31(a). As part of the meet and confer process, the demurring party must identify all of the specific causes of action that it believes are subject to demurrer and provide legal support for the claimed deficiencies. CCP §430.31(a)(1). The party who filed the pleading must in turn provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency. Id. The demurring party is responsible for filing and serving a declaration that the

CCP § 430.31

meet and confer requirement has been met. CCP §430.31(a)(3).

C. Governing Law

Under the Penal Code, there are three basic types of firearms: (1) handguns, also referred to as pistols and revolvers; (b) rifles; and (c) shotguns.

A handgun generally has a barrel length less than 16 inches and can be concealed on a person, and is synonymous with the terms pistol, revolver, and firearm capable of being concealed upon the person. Penal Code §§ 16530(a), 16640(a).

A rifle is a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger. Penal Code §17090.

A shotgun is a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger. Penal Code §17190. The term “long gun” generally refers to rifles and shotguns. *See, e.g.*, Penal Code, §16865.

In California, individuals generally must purchase firearms through a licensed dealer. Penal Code §26500(a). Individuals must also have a licensed dealer process transfers of firearms, including private sales, gifts, and loans. Penal Code §§ 27545, 28050.

When an individual goes to a gun dealer to initiate a purchase or other transaction involving a firearm, the dealer is required to obtain information and create a record of the transaction. Penal Code §28100(a). This record is referred to as a Dealer Record of Sale (“DROS”). Various information about the firearm must be included on the DROS, including the make of firearm, manufacturer’s name if stamped on the firearm, model name or number if stamped on the firearm, caliber, and type of firearm. Penal Code §28160(a). The DROS must also include information regarding the purchaser, including their name, date of birth, local and permanent addresses, place of birth, occupation, gender, physical description, all legal names and aliases ever used, and a “yes or no” answer whether they are in any of the categories of persons prohibited from purchasing a firearm. *Ibid.*

The dealer must transmit the DROS to DOJ and is required to wait at least ten days before completing the purchase and delivering the firearm to the purchaser, assuming the result of a background check has been received by then. Penal Code §§ 26815(a), (b), 27540(a).

The DROS must be submitted to DOJ electronically, except as DOJ otherwise permits. Penal Code §28205(c). DOJ shall prescribe the form of the register and the record of electronic transfer pursuant to Penal Code section 28105. Penal Code §28155. The DES is the method established by DOJ for the submission of purchaser information required by Penal Code section 28160(a). The DES is a web-based application designed, developed, and maintained by DOJ and used by firearm dealers to report the required information.

Any semi-automatic centerfire firearm that is not a rifle, pistol, or shotgun that has one or more specified characteristics is classified as an assault weapon. Penal Code §30515(a)(9)-(11). Individuals are restricted from possessing any firearm classified as an assault weapon unless they possessed the firearm prior to its classification as an assault weapon or are exempt as a member of law enforcement, military forces, or other specified entities. Penal Code §§ 30605, 30620, 30625,

Generally, mandamus may only be employed to compel the performance of a duty that is purely ministerial in character. Mandate will not issue if the duty is not plain or is mixed with discretionary power or the exercise of judgment. Mooney v. Garcia, (2012) 207 Cal.App.4th 229, 232-33.

Respondents assert that none of the statutes on which Petitioners rely -- Penal Code sections 28155, 28205, 28215 and 28220 -- establish a mandatory, ministerial duty to modify the DES. Dem. at 15; Reply at 5.

In order to construe a statute as imposing a mandatory duty, the mandatory nature of the duty must be phrased in explicit and forceful language. The H.N. & Frances C. Berger Foundation, (2013) 218 Cal.App.4th 37, 48. A ministerial act is an act that a public officer is required to perform in a prescribed manner. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 700. Thus, language in a statute must specify a ministerial duty to act in a particular way. County of San Diego v. State of California, (2008) 164 Cal.App.4th 580, 593.

Petitioners rely on the statutory scheme for firearm transfer. The DOJ shall prescribe the form of the register and the record of electronic transfer pursuant to Penal Code section 28105. Pen. Code §28155. Penal Code section 28205 requires the DOJ to determine the method by which a dealer shall submit firearm purchaser information. On or after January 1, 2003 electronic transfer shall be the exclusive means by which information is transmitted to the department, except as permitted by the DOJ. Penal Code section 28215 describes the process through which dealer and applicant submit an application for approval of a firearm transaction. Penal Code section 28220 sets out procedures to follow upon submission of firearm purchaser information to the DOJ, including examination of records pertaining to a purchaser and submission of information to a dealer relating to whether the purchaser is prohibited from receiving a firearm.

Petitioners argue that these statutes create a clear ministerial duty for Respondents to maintain the DES in a manner that does not block the transfer of legal firearms. Petitioners rely on Penal Code Section 28160, which requires that “for all firearms, the register or record of electronic transfer shall include all of the following information...” Opp. at 15. The Penal Code then lists several items that the record of electronic transfer “shall” include, including the “[t]ype of firearm.” Pen. Code, §28160(a)(14). By refusing to correct the DES to facilitate the transfer of undefined firearm subtypes (Title 1 firearms, buntline revolvers, butterfly grip firearms, and barreled action firearms without stocks), the DOJ violates its duty to create a system that allows firearm retailers to include the statutorily required information for all firearms. Opp. at 15.

Respondents argue that these statutes do not include any mandatory requirement that the DOJ operate the DES in any particular manner. Dem. at 16-17; Reply at 5-6. They instead provide the DOJ with discretion to utilize the DES or another method. Id.

This is true, but Respondents misread Petitioners’ point. Petitioners acknowledge that the DOJ has discretion in the manner in which it implements the electronic transfer system for firearm transfer, and argue that this discretion does not affect the substance of its duty. Opp. at 17. Surely, even the DOJ would admit that it does not have discretion to refuse to implement an electronic transfer system entirely. Penal Code section 28160 requires as much. If 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. That is all Petitioners are saying and Penal Code section 28160’s reference to an electronic transfer system for all firearms supports

this ministerial duty. In other words, the DOJ has discretion in how it implements the electronic transfer system, but the discretion has limits.

In reply, Respondents argue that the reference to “all firearms” in section 28160 does not imply that there must be DROS information for every firearm. The phrase “all firearms” conveys that the same DROS information is required for both “handguns” and “firearms other than handguns,” which had not been the case prior to January 1, 2014 under Penal Code section 12077, which was repealed as of January 1, 2012. Mandamus does not lie to compel a public agency to exercise discretionary powers in a particular manner or based on a respondent's belief that the respondent should act in a different manner. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693. Reply at 6-7.

To some extent, these statutory interpretation arguments are best left for trial, particularly since Petitioners are correct that Respondents could have made these arguments about the DOJ's discretion in their first demurrer. Opp. at 16. In any event, the language of AIDS Healthcare fully supports Petitioners in that the SAC pleads that the DOJ has failed to act by including the omitted firearms in DES and this failure to act was arbitrary and in derogation of the applicable legal standards. 197 Cal.App.4th at 704. The SAC sufficiently pleads that the DOJ has excluded certain firearms from DES for arbitrary reasons.

3. Declaratory and Injunctive Relief

Respondents contends that the demurrer should be sustained as to the SAC's first and eighth causes of action for declaratory and injunctive relief because they are remedies, not independent causes of action. Dem. at 18-19; Reply at 8-9.

Respondents argue that requests for declaratory and injunctive relief are not independent causes of action but merely types of remedies. Batt v. City and County of San Francisco, (2007) 155 Cal.App.4th 65, 82. Nor is declaratory relief proper where it is duplicative of the primary claim. California Ins. Guarantee Assn. v. Superior Court, (1991) 231 Cal.App.3d 1617, 1623-24 (The object of the declaratory relief statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues). A demurrer is properly sustained as to a claim for declaratory relief which is wholly derivative of the statutory claim. Ball v. FleetBoston Fin. Corp. (2008) 164 Cal.App.4th 794, 800.

Respondents are correct about injunctive relief and that a declaratory relief claim may be subsumed in mandamus, but Petitioners are correct that declaratory relief is a cause of action under CCP section 1060. Opp. at 18. Respondents cite to Batt, which lists certain remedies that are not causes of action, including declaratory relief. 155 Cal.App.4th at 82 (citing Witkin). Witkin explains that declaratory relief is an equitable action that results an equitable remedy. 5 California Procedure (Pleading), (5th ed. 2008) §850, pp. 265-66. Thus, declaratory relief is a remedy, but a CCP section 1060 claim is a cause of action that results in that remedy.

The first cause of action is for declaratory relief seeks to compel the DOJ to correct the DES. The second cause of action for mandamus also seeks to direct Respondents to design, maintain, and enforce updates to the DES such that it does not proscribe the lawful sale, transfer, and loan of a class of lawful firearms. Arguably, the proper action between these two is declaratory relief, not mandamus and the court will not sustain the demurrer to the declaratory relief claim as subsumed within mandamus. The eighth cause of action is for declaratory and injunctive relief. While injunctive relief is a remedy, declaratory relief is not, and the demurrer is overruled on that

ground.

4. Administrative Procedure Act

Respondents also demur to the eighth cause of action on the ground that the configuration of the DES is not a regulation governed by the APA. Dem. at 19. The SAC contends that the Respondents' conduct of operating the DES in a way that prevents the transfers of certain firearms constitutes an unlawful underground regulation in violation of the APA.

The APA establishes the procedures by which state agencies may adopt regulations. Tidewater Marine Western, Inc. v. Bradshaw, (1996) 14 Cal.4th 557, 568. No state agency shall issue, utilize, enforce, or attempt to enforce a regulation without complying with the APA's notice and comment provisions (Govt. Code, §11340.5(a)). Id. at 570. The APA defines "regulation" as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it or to govern its procedure." Govt. Code, §11342.600.

Respondents argue that the configuration of the DES is not a regulation under the APA. It is an electronic web-based system that the DOJ uses to receive and process information submitted regarding firearm transfers. SAC ¶¶ 53-54. The configuration of the DES is not a "rule," "regulation," "order" or "standard," as those terms are used in Government Code section 11342.600. No court has determined that any similar web-based system or program constitutes a regulation subject to the APA. Moreover, the configuration of the DES does not result in any specific interpretation of law or legal determination being imposed with respect to a purchaser or other applicant or to a firearm. Govt. Code section 11340.9(c) specifically excludes forms prescribed by a state agency or any instructions relating to the use of the forms from consideration as regulations. Dem. at 20; Reply at 9-10.

Petitioners do not dispute that the DES configuration itself does not constitute a regulation under the APA. Opp. at 20. Instead, Petitioners argue that the SAC does not allege that the DES configuration itself is the underground regulation, but rather Respondents' policy in blocking the transfer of legal firearms is an internal rule or standard of general application that is an underground regulation. Opp. at 19.

Petitioners are correct. Respondents note (Reply at 9) that the SAC specifically describes the alleged underground regulation as "technological and administrative barriers" to the transfer of "undefined subtype" firearms. SAC ¶186. The only alleged "technological" or "administrative" barriers is the configuration of the DES. The only alleged manifestation or expression of the purported "internal" rule is the configuration of the DES. Reply at 9. True, but the SAC also alleges that it is challenging enforcement of policies and procedures that prohibit the transfer of firearms to lawful purchasers. SAC ¶85. These policies are implemented through the barriers created in the configuration of DES. SAC ¶93.

The demurrer to the eighth cause of action is overruled.

E. Conclusion

Respondents' demurrer to the SAC is overruled. Respondents have 20 days to answer only.