Lawrence J. Kouns, State Bar No. 095417
Christopher J. Healey, State Bar No. 105798
John D. Edson, State Bar No. 185709
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3391
Telephone No.: (619) 236-1414
Fax No.: (619) 232-8311

Attorneys for Defendant Sturm, Ruger & Company, Inc.
SEE SIGNATURE PAGES FOR ADDITIONAL COUNSEL AND
PARTIES JOINING IN DEMURRERS AND MOTION TO STRIKE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

Coordination Proceeding Special Title (Rule 1550 (b)) FIREARM CASE Including actions: People, et. al. v. Arcadia Machine & Tool, Inc., et. al. People, et. al. v. Arcadia Machine & Tool, Inc., et. al. People, et. al. v. Arcadia Machine & Tool, Inc., et. al.	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4095 San Francisco Superior Court No. 303753 Los Angeles Superior Court No. BC210894 Los Angeles Superior Court No. BC214794 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' CONSOLIDATED DEMURRERS AND MOTION TO STRIKE PLAINTIFFS' COMPLAINTS** **[C.C.P. §§ 430.10(d), (e), (f) and 435-437]** Hon. Vincent P. DiFiglia Date: September 15, 2000 Time: 1:00 p.m. Dept.: 65 Trial Date: None Set

8/4

TABLE OF CONTENTS

I. INTRODUCTION . . . 1

II. THE COURT SHOULD DECLINE PLAINTIFFS' INVITATION TO REGULATE IN THIS AREA BECAUSE OF THE COMPLEX ECONOMIC AND SOCIAL POLICY ISSUES RAISED BY PLAINTIFFS' COMPLAINTS . . . 3

A. The Court Has Inherent Equitable Power to Decline Jurisdiction Over Plaintiffs' Claims . . . 3

B. The Court Should Abstain in Deference to the Legislative Branch, Given That Firearms Regulation is the Subject of Vigorous, Democratic Debate . . . 3

III. PLAINTIFFS CANNOT MAINTAIN A PUBLIC NUISANCE ACTION . . . 7

A. Courts in California Have Rejected Tort Theories That Would Impose Liability on Firearms Manufacturers When Their Products Are Intentionally Misused to Injure Others . . . 8

B. Nuisance Law Does Not Apply To The Lawful Manufacture And Sale Of Non-defective Products . . . 9

C. Plaintiffs Fail To Allege An Underlying Tort . . . 13

D. The Absence of Control Defeats A Claim for Nuisance . . . 14

E. Lawful Conduct Expressly Authorized by Federal And State Legislatures Cannot Constitute a Public Nuisance . . . 15

F. Plaintiffs Fail To Allege the Requisite Connection Between Defendants' Alleged Conduct and the Public Harm That Plaintiffs Seek To Prevent . . . 17

IV. PLAINTIFFS HAVE NOT ALLEGED A VIABLE "UNFAIR COMPETITION" CLAIM UNDER SECTION 17200 . . . 18

A. Plaintiffs Have Not Properly Alleged An Unlawful Practice Claim . . . 18

B. Plaintiffs' "Unfair" Business Practice Allegations State No Claim . . . 20

C. Plaintiffs Have Not Alleged a Viable Claim For Fraudulent Business Practices . 21

V. PLAINTIFFS HAVE NOT ALLEGED A VIABLE CLAIM FOR FALSE AND MISLEADING ADVERTISING UNDER SECTION 17500 . . . 21

A. Plaintiffs' Allegations Do Not Demonstrate The Requisite "Likelihood of Public Deception" . . . 22

B. Plaintiffs' Vague And General Allegations Fail To State A Claim Against Any Specific Defendant . . . 24

C. Plaintiffs' Section 17500 Claims Violate Defendants' Constitutional Rights Because They Are Predicated Upon Expressions of Opinion In The Public Debate Over Personal Security . . . 26

TABLE OF CONTENTS

VI. PLAINTIFFS CANNOT REGULATE A LAWFUL NATIONAL INDUSTRY BY IMPOSING THEIR OWN POLICIES ON THE REST OF THE NATION 27

VII. PLAINTIFFS' CLAIM FOR RESTITUTIONARY RELIEF UNDER SECTION 17203 AND SECTION 17535 SHOULD BE STRICKEN 31

VIII. CONCLUSION 34

1
TABLE OF AUTHORITIES

2 Cases | Page No.

3 Archer v. Arms Tech, Inc.
No. 99-912658 NZ, slip op. at 10 (Cir. Ct. Wayne City (Mich.) May 16, 2000) 12
4
Blatty v. New York Times Co.
5 (1986) 42 Cal.3d 1033
cert denied (1988) 485 U.S. 935 26
6
BMW of North America, Inc. v. Gore
7 (1996) 517 U.S. 559 n.17 .... 27, 29, 31

8 Bojorquez v. House of Toys, Inc.
62 Cal.App.3d at 933 .... 5, 9, 23
9
Bronco Wine Co. v. Frank A. Logoluso Farms
10 (1989) 214 Cal.App.3d 699 31

11 California Grocers Ass'n., Inc. v. Bank of America
(1994) 22 Cal.App.4th 205 5
12
Casillas v. Auto-Ordnance Corp.
13 (N.D.Cal. 1996) 1996 WL 276830, at *6 .... 5, 8, 9, 14, 17, 21

14 Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.
(1999) 20 Cal. 4th 163 .... 3, 20, 21
15
Chavez v. Citizens for A Fair Farm Labor Law
16 (1978) 148 Cal.App.3d 77 27

17 City of Bloomington v. Westinghouse Electric Corp.
(7th Cir. 1989) 891 F.2d 611 reh'g denied
18 *en banc* 1990 U.S. App. LEXIS 1234 (1990) 12

19 City of Boston v. Smith & Wesson Corp.
No. 1999-02590, slip opinion at 30-32 (Sup. Ct. (Mass.) July 13, 2000) 13
20
City of Cincinnati v. Beretta U.S.A., Corp.
21 No. A-9902369, 1999 WL 809838, at *2 (Ohio Com. Pl. Oct. 7, 1999) (same) 12, 13

22 City of San Diego v. U.S. Gypsum Co.
(1994) 30 Cal.App.4th 575
23 review denied (Feb. 23, 1995) 10-12, 17

24 Cochran v. Cochran
(1997) 56 Cal.App.4th 1115 8
25
Committee on Children's Television, Inc. v. General Foods Corp.
26 (1983) 35 Cal.3d 197 .... 24, 26

27 Commodore Home Systems, Inc. v. Superior Court
(1982) 32 Cal.3d 211 31

28

Community Communications Co. v. Boulder
(1982) 455 U.S. 40 . . . 29

Cortez v. Purolator Air Filtration Products Co.
23 Cal.4th 163 (2000) . . . 32, 33

County of Johnson v. U.S. Gypsum Co.
(E.D. Tenn. 1984) 580 F. Supp. 284
order set aside in part on other grounds,
664 F. Supp. 1127 (E.D. Tenn. 1985) . . . 12

Crosby v. Nat'l Foreign Trade Council
(2000) __ U.S. __, 120 S.Ct. 2289 . . . 29

Crusader Ins. Co. v. Scottsdale Ins. Co.
(1997) 54 Cal.App.4th 121 review denied,
1997 Cal. LEXIS 4245 (1997) . . . 5

Day v. AT&T Corp.
63 Cal.App.4th 325 (1998) . . . 32, 34

Dennis v. Higgins
498 U.S. 439 (1991) . . . 30

Detroit Bd. of Educ. v. Celotex Corp.
(Mich. App. 1994) 493 N.W.2d 513 . . . 12

Edgar v. MITE Corp.
(1982) 457 U.S. 624 . . . 30

FCC v. League of Women Voters
468 U.S. 364 (1984) . . . 27

Foley v. Interactive Data Corp.
(1988) 47 Cal. 3d 654 . . . 5, 6

Forni v. Ferguson
(N.Y. App. Div. 1996) 648 N.Y.S.2d 73 . . . 4

Freeman v. Time, Inc.
(9th Cir. 1995) 68 F.3d 285 . . . 21-24

Garcia v. Joseph Vince Co.
(1978) 84 Cal.App.3d 868 . . . 18

Harris v. Capital Growth Investors XIV
(1991) 52 Cal. 3d 1142 . . . 5, 6

Haskell v. Time, Inc.
(E.D. Cal. 1994) 857 F. Supp. 1392 . . . 22, 23, 25, 26

Healy v. Beer Inst.
(1989) 491 U.S. 324 . . . 29, 30

Hoag v. Superior Court of Los Angeles County
(1962) 207 Cal.App.2d 611 25

Holmes v. J.C. Penney Co.
133 Cal.App.3d at 219 . . . . 5, 9, 23

Huddleston v. United States
415 U.S. 814 (1974) 16, 28

Khoury v. Maly's of California, Inc.
(1993) 14 Cal.App.4th 612 . . . . 18, 24, 25

Knoll Pharma. Co. v. Sherman
(N.D.Ill. 1999) 57 F.Supp.2d 615 30

Kowis v. Howard
(1992) 3 Cal.4th 888 26

Kraus v. Trinity Management Services, Inc.
(2000) 23 Cal. 4th 116 . . . . 3, 33

Lazar v. Hertz Corp.
(1999) 69 Cal.App. 4th 1494,
review denied, 1999 Cal. LEXIS 2850 (1999) 5

Limandri v. Judkins
(1997) 52 Cal.App.4th 326 8

Longfellow v. County of San Luis Obispo
(1983) 144 Cal.App.3d 379 14

Mangini v. Aerojet-General Corp.
(1996) 12 Cal.4th 1087 14

Martinez v. Pacific Bell
225 Cal App.3d 1557
review denied (Mar. 13, 1991) 14, 15, 17

Mavilia v. Stoeger Industries
574 F. Supp. 107 (D. Mass. 1983) 23

McCarthy v. Olin Corp.
(2nd Cir. 1997) 119 F.3d 148 4

McCarthy v. Sturm, Ruger & Co.
(S.D.N.Y. 1996) 916 F.Supp. 366 4

Moore v. R.G. Industries, Inc.
(9th Cir. 1986) 789 F.2d 1326 9

Moore v. Regents of University of California
(1990) 51 Cal.3d 120
cert. denied, 499 U.S. 936 (1991) 15

National Foreign Trade Council v. Natsios
(1st Cir. 1999) 181 F.3d 38 ... 29, 30

New York Times Co. v. Sullivan
(1964) 376 U.S. 254 ... 27

Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.
1999 WL 493306, at *4 ... 22

Paradise Hills Associates v. Procel
(1991) 235 Cal.App.3d 1528
modified on other grounds, (1991) 91 Daily Journal D.A.R. 15349
disapproved on other grounds ... 26

Patterson v. Gesellschaft
(N.D. Tex. 1985) 608 F.Supp. 1206 ... 4

Penelas v. Arms Tech. Inc.
No. 99-01941 CA-06, 1999 WL 1204353, at *4 (Fla. Cir. Ct. Dec. 13, 1999),
appeal pending ... 12

People ex rel. Gallo v. Acuna
(1997) 14 Cal.4th 1090 & n.3
cert denied, 521 U.S. 1121 (1997) ... 10-13

People v. Lim
(1941) 18 Cal.2d 872 ... 11, 13, 17

People v. McKale
(1979) 25 Cal.3d 626 ... 18-20

San Diego Bldg. Trades Council v. Garmon
(1959) 359 U.S. 236 ... 27

San Diego Unified Port Dist. v. U.S. Citizens Patrol
(1988) 63 Cal.App.4th 964 n.6 ... 27

Serrano v. Priest
(1971) 5 Cal.3d 584
cert. denied (1977) 432 U.S. 907 ... 24

South Bay Chevrolet v. General Motors Acceptance Corp.
(1999) 72 Cal.App.4th 861, 878
review denied (Aug. 25, 1999) ... 21

Southern California Edison Co. v. State Farm Mut. Auto. Ins. Co.
(1969) 271 Cal. App.2d 744 ... 25

State Board of Funeral Directors & Embalmers v. Mortuary in Westminster Memorial Park
(1969) 271 Cal.App.2d 638 ... 22

Tioga Public School Dist. #15 v. United States Gypsum Co.
(8th Cir. 1993) 984 F.2d 915 ... 11

1 White v. Smith & Wesson
97 F.Supp.2d 816 (N.D. Ohio 2000) 13
2
Wolfe v. State Farm Fire & Casualty Ins. Co.
3 (1996) 46 Cal.App.4th 554 . . . . . 5, 6
4

5 Statutes

6 18 U.S.C. section 921 et seq. 6
7 18 U.S.C. section 922(a)(1)(A)(5) 28
8 18 U.S.C. section 922(a)(5) 16
9 18 U.S.C. section 923(g)(3)(A) 16
10 18 U.S.C. section 924(a)(1)(A) 16, 17
11 18 U.S.C. section 924(a)(2) 16
12 27 C.F.R. Part 178 6
13 27 C.F.R. section 178.126(a) 16
14 27 C.F.R. section 1787.129(b) 16
15 Business and Professions Code section 17200 . . . . . 1, 3, 18-21, 24, 26, 31, 33, 34
16 Business and Professions Code section 17203 . . . . . 31, 32, 34
17 Business and Professions Code section 17500 . . . . . 1-3, 21-26, 31
18 Business and Professions Code section 17535 . . . . . 31, 32
19 Civil Code section 1714.4 . . . . . 12, 23
20 Civil Code section 1714.4(a) 12, 14
21 Civil Code section 1714.4(b)(2) 6, 9, 11, 21
22 Civil Code section 3479 11
23 Civil Code section 3482 15
24 Code of Civil Procedure section 379(a)(1) 25
25 Code of Civil Procedure section 430.10(f) 25
26 Code of Civil Procedure section 430.70 4
27 Evidence Code section 452(b) 4
28 Evidence Code section 452(c) 4

Penal Code section 12021 ... 7
Penal Code section 12022.5 ... 7
Penal Code section 12035 ... 7
Penal Code section 12036 ... 7
Penal Code section 12071 ... 7
Penal Code section 12071.1 ... 7
Penal Code section 12072 ... 7
Penal Code section 12072(d) ... 7
Penal Code section 12073 ... 7
Penal Code section 12075 ... 7
Penal Code section 12076 ... 7
Penal Code section 12077 ... 7
Penal Code section 12080 ... 7
Penal Code section 12082(a) ... 7
Penal Code section 12094 ... 7
Penal Code section 245(f) ... 11
Rule of Court, Rule 323(b) ... 4
U.S. Const., Art. I, § 8, cl. 3 ... 27, 29
U.S. Constitution, Amendment XIV, cl. 1 ... 27, 29
U.S. Constitution, Article I, section 10 ... 29
Welfare and Institutions Code section 8101 ... 7

Other Authorities

American Law of Product Liability sections 1:48;27:3 (1987) ... 12
Gary Kleck, Targeting Guns: Firearms and Their Control (1997) ... 26
John R. Lott, Jr., More Guns Less Crime: Understanding Crime and Gun Control Laws (1998) 26

1 I. INTRODUCTION

2 Plaintiffs in these coordinated cases seek to use a combination of injunctive relief, civil
3 penalties and claims for "restitution" to regulate and restructure the way firearms are
4 manufactured, distributed and sold, not only in California, but also well beyond its borders.[1] It is
5 ironic that plaintiffs and their colleagues who have filed virtually identical suits purport to act in
6 the name of "the people", since it clearly is plaintiffs' object by these actions to circumvent the
7 expressed will of the Legislature (the true representative of the people), as well as established case
8 law. The Court should dismiss the complaints for a number of reasons.

9 Plaintiffs are asking this Court, under the guise of public nuisance, unfair competition
10 claims under Section 17200 ("the unfair competition" or "UCL" statute) and "false advertising"
11 claims under Section 17500 of the Business and Professions Code,[2] to decide highly controversial
12 social policy questions related to firearms regulation. As numerous cases confirm, California's
13 unfair competition laws are not proper vehicles to resolve complex political, economic and social
14 policy issues that are reserved for the Legislature. Plaintiffs' attempted use of these statutes, and
15 their public nuisance claims, to add an ill-defined regulatory layer to existing laws through the use
16 of the Court's injunctive powers is clearly improper. The Court should abstain from regulating in
17 this area. *See* Section II below.

18 Even if the Court considers the individual claims, they do not withstand scrutiny.
19 Plaintiffs' nuisance claims against the manufacturers fail first and foremost because the lawful
20 manufacture and sale of non-defective firearms cannot constitute a public nuisance — such activity

21 ---

22 [1] The three coordinated actions are: (1) *People v. Arcadia Machine & Tool, et al.*, Los Angeles Superior Court No. BC214794 ("LA County"); *(2) People v. Arcadia Machine &*
23 *Tool, et al.,* Los Angeles Superior Court No. BC210894 ("LA City"); and (3) *People v.*
Arcadia Machine & Tool, et al., S.F. Superior Court No. 303753 ("SF"). Courtesy copies
24 of the complaints are attached as Exhibits 1-3 to Defendants' Notice of Lodgment ("NOL").
Specific paragraphs of these complaints are identified herein by the abbreviated case name,
25 such as "LA County, ¶ ___."

26 [2] The Los Angeles County and San Francisco complaints purport to set out three causes of action: (1) "public nuisance"; (2) "unfair, deceptive, untrue or misleading statements and
27 advertising" in violation of Cal. Bus. & Prof. Code § 17500; and (3) "unlawful, unfair or
fraudulent business practices" in violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.* The
28 LA City complaint does not allege a cause of action based on Section 17500. The
allegations against the defendants are otherwise virtually identical in all three complaints.

1 is authorized by law. Once the Court dispenses with the legal conclusions, impermissibly vague
2 allegations and vitriol, the lawful manufacture and sale of firearms comprises the only conduct on
3 which plaintiffs seek to base liability. And even if the Court accepts all of plaintiffs' "nuisance"
4 allegations at face value, the Court of Appeal has held that nuisance theory does not apply to the
5 manufacture and sale of products. The nuisance claims fail for two additional reasons: plaintiffs
6 have failed to allege an actionable tort underlying the nuisance claims and, under California law,
7 the manufacturers cannot be held responsible under a "nuisance" theory for the criminal acts of
8 others outside of their control. *See* Section III below.

9 The UCL actions fail because plaintiffs have not properly alleged an unlawful practice
10 claim or a claim for fraudulent business practices under the "reasonable consumer" test, and the
11 "unfair" conduct claims are not tethered to any legislatively declared policy. *See* Section IV
12 below. Likewise, the San Francisco and County of Los Angeles complaints fail to state viable
13 claims for false advertising under Section 17500. The allegations do not demonstrate the requisite
14 "likelihood of public deception" and the complaints impermissibly seek to enjoin expressions of
15 opinion in the public debate over personal security. *See* Section V below.

16 The complaints must be rejected on their face for additional, compelling reasons. The
17 unprecedented theories of liability and the corresponding relief sought are so sweeping as to
18 present violations of the Commerce and Due Process Clauses of the U. S. Constitution. *See* Part
19 VI below.

20 Finally, if the Court does not sustain defendants' general demurrer, the Court should strike
21 plaintiffs' claims for restitutionary relief under their unfair competition claims because plaintiffs
22 seeks *damages*, not restitution. Moreover, if plaintiffs are attempting to recover for unidentified
23 "gun purchasers," they have not alleged any facts showing that any sums were "wrongfully taken."

24 For all of the foregoing reasons, the court should sustain defendants' demurrers to each
25 cause of action in the three complaints in these coordinated actions.

26 ///

27 ///

28 ///

II. THE COURT SHOULD DECLINE PLAINTIFFS' INVITATION TO REGULATE IN THIS AREA BECAUSE OF THE COMPLEX ECONOMIC AND SOCIAL POLICY ISSUES RAISED BY PLAINTIFFS' COMPLAINTS

A. The Court Has Inherent Equitable Power to Decline Jurisdiction Over Plaintiffs' Claims.

Even before reaching the specific deficiencies of plaintiffs' public nuisance and Section 17200 and Section 17500 claims, the Court should dismiss the complaints for a more fundamental reason: the courts are simply the wrong institution through which to achieve what is essentially a legislative agenda. As stated in the recent UCL decision, Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal. 4th 163, 185, courts should defer to the legislative branch to resolve complex, unsettled questions of public policy:

> "[P]ublic policy" as a concept is notoriously resistant to precise definition, and . . . courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, "lest they mistake their own predilections for public policy which deserves recognition at law." (Citation omitted.)

Id at 185.

In an action in equity, a court has the inherent power to decline jurisdiction over any case, regardless of whether the pleading is technically sufficient. In particular, a court may exercise such equitable abstention if the requested use of its equitable powers raises a "potential for harm." Kraus v. Trinity Management Services, Inc. (2000) 23 Cal. 4th 116, 138 ("because a UCL action is one in equity, in any case in which a defendant can demonstrate a potential for harm . . . the court may decline to entertain the action as a representative suit").

As more fully set forth below, the "potential for harm" to the public and to the democratic process is manifest if this Court were to take up plaintiffs' call to regulate. The Court therefore can and should decline to exercise jurisdiction even if the complaints are technically sufficient.

B. The Court Should Abstain in Deference to the Legislative Branch, Given That Firearms Regulation is the Subject of Vigorous, Democratic Debate.

Plaintiffs' claims are premised on the notion that this Court, rather than the U.S. Congress and the Legislature (or the People through initiative), should be burdened with the task of deciding parameters of firearms regulation in California and, by implication, throughout the Country. Yet,

in case after case involving similar attempts to judicially legislate "gun control," courts have noted the complex social and economic policy issues underlying the firearms regulation debate and have referred plaintiffs to the legislative branch of government.[3/] Pursuant to California Code of Civil Procedure § 430.70, California Evidence Code § 452(b)-(c), and California Rule of Court 323(b), defendants request that this Court take judicial notice of the bills considered by the California Legislature relating to firearms listed in Exhibit A to the Declaration of Charles L. Coleman and attached as Exhibit B thereto.[4/]

California courts recognize and respect the difference between the legislative and judicial functions. Courts in this State have rightly declined to enter into disputes that present complex

---

[3/] See, e.g., McCarthy v. Sturm, Ruger & Co. (S.D.N.Y. 1996) 916 F.Supp. 366, 372 ("As judges . . . we [] are constrained to leave legislating to that branch of government."), aff'd sub nom., McCarthy v. Olin Corp. (2nd Cir. 1997) 119 F.3d 148; Patterson v. Gesellschaft (N.D. Tex. 1985) 608 F.Supp. 1206, 1216 ("[T]he judicial system is, at best, ill-equipped to deal with the emotional issues of handgun control . . . . [A]s a judge, I know full well that the question of whether handguns can be sold is a political one . . . and that this is a matter for the legislatures, not the courts."); Forni v. Ferguson (N.Y. App. Div. 1996) 648 N.Y.S.2d 73 ("While there have been and will be countless debates over the issue of whether the risks of firearms outweigh their benefits, it is for [the] Legislature to decide whether manufacture, sale and possession of firearms is legal."). Even plaintiffs acknowledge that firearms are extensively regulated at the federal, state and local levels. (See, e.g., LA County, ¶ 106.)

[4/] The Compendium of Legislative Actions attached as Exhibit A to the Coleman Declaration summarizes legislation (submitted in five volumes as Exhibit B) that the California Legislature has considered and passed or considered and declined to pass, and illustrates that the California Legislature has been and is actively engaged in addressing the issues that plaintiffs now seek to resolve by judicial fiat. Vol. I, Exhibit 1 through Vol. II, Exhibit 38 within Exhibit B illustrate the Legislature's active role regarding the criminal use, storage, sale, and possession of firearms under many circumstances. Vol. II, Exhibit 38 through Vol. III, Exhibit 20 illustrate the Legislature's actions regarding the general design, manufacture, distribution and transfer of firearms. Vol. III, Exhibit 23 is an example of the Legislature prohibiting the importation of firearms into California. Vol. III, Exhibit 24 through Vol. IV, Exhibit 28 illustrate the Legislature's actions regarding the transfer and possession of firearms. Vol. IV, Exhibit 29 through Vol. IV, Exhibit 32 illustrate the Legislature's actions regarding sales by "kitchen table" dealers and sales at gun shows. Vol. IV, Exhibit 33 and Vol. IV, Exhibit 34 are examples of bills that the Legislature has considered regarding the capacity of firearms. Vol. 4, Exhibit 35 through Vol. V, Exhibit 8 illustrate the Legislature's active role regarding firearm safety features. Vol. V, Exhibit 9 through Vol. V, Exhibit 31 illustrate the Legislature's active role regarding minors and the use and storage of firearms. Vol. V, Exhibit 32 through Vol. V, Exhibit 51 contain illustrations of miscellaneous bills considered by the Legislature regarding a wide variety of subjects including education programs, taxation of retail sales, and new laws regarding unsafe hand guns. The Legislative Compendium as a whole irrefutably illustrates that firearms regulation has been and should remain a task for the Legislature, not the judiciary.

policy issues better resolved by the Legislature and such reluctance becomes even more pronounced when the Legislature has regulated extensively in an area or has considered issues presented by a complaint. See, e.g., Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1169 ("[W]e are unwilling to engage in complex economic regulation under the guise of judicial decisionmaking.").[5]

In Harris, the California Supreme Court rejected plaintiffs' attempt to expand liability under the Unruh Act for alleged "economic discrimination" by landlords in screening prospective tenants through the use of a minimum income policy. The court noted that "plaintiffs' view of the Act would involve the courts of this state in a multitude of microeconomic decisions we are ill equipped to make." Harris, 52 Cal.3d at 1166. Like the matter here, the "trial [in Harris] would

---

[5] Accord, Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 694 ("Significant policy judgments affecting social policies and commercial relationships are implicated in the resolution of this question in the employment termination context. Such a determination, which has the potential to alter profoundly the nature of employment, the cost of products and services, and the availability of jobs, arguably is better suited for legislative decisionmaking."); Lazar v. Hertz Corp. (1999) 69 Cal.App. 4th 1494, 1502-03 review denied, 1999 Cal. LEXIS 2850 (1999) ("[C]ourts lack the power and the duty to determine the wisdom of economic policy. That is a matter for the Legislature alone. Judicial intervention in such economic issues is inappropriate."); Crusader Ins. Co. v. Scottsdale Ins. Co. (1997) 54 Cal.App.4th 121, 137-38 review denied, 1997 Cal. LEXIS 4245 (1997) ("[Plaintiff] contends that the Department of Insurance is not adequately performing its legislatively assigned task of regulating surplus line brokers . . . [and] seeks court-created regulation of surplus line brokers as well as nonadmitted insurers through the medium of damage awards, injunctions and 'restitution' orders. . . . The question of what type or level or regulation is adequate or appropriate is uniquely a question for executive or legislative policy choice."); Wolfe v. State Farm Fire & Casualty Ins. Co. (1996) 46 Cal.App.4th 554, 568 ("The availability of homeowners and earthquake insurance, its ramifications for the residential real estate market, and the need to guarantee that the insurers who write those policies can back them up when disaster are peculiarly matters within the legislative domain. The Legislature's expressed intent to address these issues, both now and in the future, mandates judicial restraint as much if not more so than had it refused to do so."); California Grocers Ass'n., Inc. v. Bank of America (1994) 22 Cal.App.4th 205, 218 ("This case implicates a question of economic policy: whether service fees charged by banks are too high and should be regulated. 'It is primarily a legislative and not a judicial function to determine economic policy.'"); Holmes v. J.C. Penney Co., 133 Cal.App.3d at 219 ("While allowing a cause of action for negligence in this case may not effect a ban on the sale of pellet guns by judicial fiat, permitting a cause of action would effect a ban on the sale of cartridges [which power pellet guns] for any of their other intended purposes . . . such limitations are not within the purview of the judiciary."); Bojorquez v. House of Toys, Inc., 62 Cal.App.3d at 933 ("[Plaintiff] asks us to ban the sale of toy slingshots by judicial fiat. Such a limitation is within the purview of the Legislature, not the judiciary."); see also Casillas v. Auto-Ordnance Corp., (N.D.Cal. 1996) 1996 WL 276830, at *6 ("Although the Court is sympathetic to the plight of plaintiffs and other victims of firearm violence, the judiciary is not the proper branch of government to provide the relief that plaintiffs seek.").

1 [have] devolve[d] into a battle of economic studies and experts, with each side arguing from
2 statistical and other evidence in support of its favorite criteria." Id.
3 On a fundamental policy level, plaintiffs want to shift responsibility for criminal gun
4 violence from the criminal shooters to firearms manufacturers, a position at odds with the policy
5 underlying Civil Code § 1714.4(b)(2) ("Injuries or damages resulting from the discharge of a
6 firearm or ammunition are not proximately caused by its potential to cause serious injury, damage
7 or death, but are proximately caused by the actual, discharge of the product."). To do so, the Court
8 would not only be engaged in economic policy decisionmaking — given the claims, considering
9 production levels of handguns, alternative methods of distribution, franchising, vertical
10 integration, the frequency and number of legal handgun sales (See, e.g., LA County, ¶¶ 83, 87-88,
11 90, LA City, ¶¶ 94, 98-99, 101, SF, ¶¶ 26, 30-31, 33) — but would also be engaged in sweeping
12 social policy questions — namely, whether manufacturers of non-defective products who make
13 and sell them lawfully should bear the costs of criminal gun violence. As the California Supreme
14 Court recognized in Foley, such issues are better resolved by legislatures: "Legislatures, in making
15 such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts,
16 and hold hearings at which all interested parties may present evidence and express their
17 views . . . ." Foley v. Interactive Data Corp., 47 Cal.3d at 694 n.31.
18 The need for judicial abstention is most acute where, as here, the Legislature has addressed
19 a perceived problem though "heavy regulation" and continues to "grapple" with the problem.
20 Wolfe v. State Farm Fire & Casualty Ins. Co., 46 Cal.App.4th at 563-68. Plaintiffs complain of
21 sales at gun shows, illegal straw purchases, multiple handgun sales and illegal street sales by
22 "kitchen table dealers," alleging that unauthorized persons such as felons and juveniles gain access
23 to firearms through an illegal secondary market created and fed by such sales. (See, e.g., LA
24 County, ¶¶ 80-81, 84, 90-93, 95, LA City, ¶¶ 91-92, 95, 101-104, 106, SF, ¶¶ 26, 30-31, 33.) Each
25 of these activities is regulated or prohibited by federal law. See infra Section III.E. See generally
26 18 U.S.C. § 921 et seq.; 27 C.F.R. Part 178.
27 California also heavily regulates the manufacture, distribution and sale of, and access to,
28 firearms. California specifically prohibits the possession of a firearm by a felon, narcotics addict

1 or minor. Penal Code § 12021; Welfare and Institutions Code § 8101. Logically, the State
2 prohibits "transfer, deliveries or sales" to such individuals. Penal Code § 12072. Prison time is
3 added for the use of a firearm in the commission of a felony. Penal Code § 12022.5. California
4 specifically prohibits transfers and possession of firearms with obliterated serial numbers. Penal
5 Code § 12094. The State regulates guns shows, Penal Code § 12071.1, and has established an
6 extensive licensing and reporting structure governing firearms dealers and retail sales. Penal Code
7 §§12071, 12073, 12075-77. With "street" sales in mind, California requires that private sales of
8 firearms take place either through a licensed dealer or through a law enforcement agency. Penal
9 Code §§ 12072(d), 12082(a). The State has criminalized the negligent storage of firearms where
10 such storage permits a child to gain access to the firearm and cause injury to himself or others.
11 Penal Code §§ 12035-36. Finally, the California Department of Justice prepares a pamphlet which
12 summarizes all California firearms laws. Penal Code § 12080. Retail dealers must have the most
13 recent pamphlet available for sale to retail purchasers or transferees. Id.

14 The California Legislature has devoted and continues to devote a great deal of time to the
15 issues surrounding the sale, possession and use of firearms. (See Compendium of Firearm
16 Legislation, Coleman Dec., Exs. A&B.) In 1999, Governor Davis signed into law several bills that
17 directly address some of plaintiffs' claims. Assembly Bill No. 106 addresses firearm safety
18 concerns by requiring all firearms that are sold, transferred or manufactured in California to be
19 accompanied by a firearm safety device. Also, Governor Davis signed Assembly Bill No. 295
20 (instituting regulations at gun shows), and Senate Bill No. 15 (criminalizing the making or selling
21 of an unsafe handgun). These three bills specifically address plaintiffs' claims.

22 Unauthorized access to, and the criminal misuse of, firearms are areas specifically
23 regulated at the federal and State level. Given such extensive regulation and the complex
24 economic and social policy issues raised by plaintiffs' complaints, this Court should abstain from
25 regulating under the guise of judicial decisionmaking.

26 **III. PLAINTIFFS CANNOT MAINTAIN A PUBLIC NUISANCE ACTION**

27 Plaintiffs' public nuisance claim improperly attempts to apply nuisance law to conduct and
28 circumstances it was never intended to govern. It is readily apparent that a vital element of the

alleged nuisance is the misuse of firearms by criminals. (See, e.g., LA County, ¶ 135, LA City, ¶ 144, SF, ¶ 77) (alleging that once some firearms are illegally diverted from legal channels of distribution, they are "thereafter used and possessed in connection with criminal activity"). Inventing a nuisance theory where none exists, plaintiffs improperly bootstrap the lawful manufacture and sale of firearms to the remote acts of criminals who misuse firearms.

A. Courts in California Have Rejected Tort Theories That Would Impose Liability on Firearms Manufacturers When Their Products Are Intentionally Misused to Injure Others.

While plaintiffs have lumped a hodgepodge of conclusory allegations and *non sequiturs* under the labels "public nuisance" and "unfair competition," the substance of their allegations amount to a "negligent distribution" claim. (See, e.g., LA County, ¶¶ 83-97, 135, 143-148, LA City, ¶¶ 94-107, 144, 152, 160, SF, ¶¶ 26-39, 77, 87(e-r).)[6] Under the "facts" alleged here, this claim would run headlong into California authority that rejects such a theory against firearms manufacturers (and distributors) when their products are criminally misused to injure others.

In Casillas v. Auto-Ordnance Corp., 1996 WL 276830, at *2-*3, plaintiffs brought a negligent distribution claim against a firearms manufacturer, basing their theory on the allegation that the manufacturer's affirmative acts of marketing a firearm that "was associated with criminal activity and [] had no legitimate sporting or self-defense purpose" made it reasonably foreseeable that the firearm "would be used to kill or injure innocent people in a violent criminal act."[7] The court rejected the claim, stating that "California law does not impose a duty on manufacturers to insure against third party misuse of their non-defective products." Id. at *2. The district court then noted the "California Legislature [has] confirmed that *users* of firearms, not manufacturers of legal, non-defective firearms, are responsible for injuries." Id. (citing and quoting Civil Code

---

[6] Although the Court must admit all material facts *properly* pleaded as true, the Court may disregard "contentions, deductions or conclusions of fact or law (citation omitted), and [it] may disregard allegations that are contrary to the law or to a fact of which judicial notice may be taken." Cochran v. Cochran (1997) 56 Cal.App.4th 1115, 1121. Moreover, regardless of the labels attached to plaintiffs' pleading, the Court may look past its form to its substance. Limandri v. Judkins (1997) 52 Cal.App.4th 326, 339.

[7] For the Court's convenience, copies of federal and non-California cases are attached to Defendants' Notice of Lodgment.

§ 1714.4(b)(2)) (emphasis added). Finding that the defendant had "lawfully sold all [of its firearms] exclusively to federally licensed firearms dealers," the court held:

> In sum, California statutory authority and case law persuade the Court that the California Supreme Court would not allow a claim against a firearm manufacturer for damages caused by a third party's illegal misuse of a legal non-defective firearm, whether under a product liability or a negligence theory.

Id. at *3-*4; see also Holmes v. J.C. Penney 133 Cal.App.3d at 218-19 (rejecting negligent marketing claim against retailer who sold carbon dioxide cartridges to a minor later used to power pellet gun); Bojorquez v. House of Toys, Inc. 62 Cal.App.3d at 933 (affirming dismissal of plaintiff's negligent distribution claim against the distributor and seller of slingshots); cf. Moore v. R.G. Industries, Inc. (9th Cir. 1986) 789 F.2d 1326 (applying California law, court rejects product liability and ultra-hazardous activity claims against maker of "Saturday night special" where firearm criminally misused to cause injury).

Here, plaintiffs allege that firearms manufacturers supply their products in a manner that "facilitates" the illegal acquisition and misuse of firearms by criminals and juveniles — in other words, plaintiffs believe they fail to control the distribution of their products. (LA County, ¶¶ 1, 84-86, LA City, ¶¶ 1, 95-97, SF, ¶¶ 1, 27-29). Like the plaintiffs in Casillas, plaintiffs here assert that, based on generalized knowledge that (unidentified) individuals may illegally transfer or criminally misuse firearms, manufacturers have a wide-ranging obligation to monitor distribution channels to prevent this third party misconduct, but fail to do so. Reduced to their core, plaintiffs' allegations track the "negligent distribution" theory rejected in Casillas.

B. Nuisance Law Does Not Apply To The Lawful Manufacture And Sale Of Non-defective Products.

Review of over 900 California state court decisions stretching back to 1851 establishes that no California court has recognized a public nuisance cause of action based on the lawful production, distribution sale of non-defective products. In fact, California courts have applied the theory in only two kinds of situations: (1) cases in which the purported nuisance involved a defendant's use of or effect on real property; and (2) cases in which the claimed nuisance arose

///

from specific violations of statutes or ordinance. The complaints do not allege the former and fail to adequately plead the latter.[8]

California courts have historically applied public nuisance law to uses of property or conduct on property of wholly localized origin coupled with an element absent here — exclusive, direct control over the offending conduct. Comment b of section 821B of the Restatement (Second) of Torts lists examples of public nuisances at common law: keeping diseased animals, maintaining a pond which breeds malarial mosquitoes, shooting fireworks in public streets, making loud and disturbing noises, obstructing a public way or navigable stream, maintaining a house of prostitution.[9] As these examples make clear, the defendants could be ordered to "abate" the nuisance directly: remove the dead animals, dredge the malarial pond, cease the shooting of fireworks, terminate the noisy behavior, clear the public way, close the house of prostitution. Contrast these circumscribed situations to the sweeping claim by the plaintiffs. They demand that manufacturers, lawfully making and selling their non-defective products to federally-licensed distributors and dealers, abate the illegal acquisition and subsequent misuse of those products by criminals outside of their control.

Plaintiffs thus urge this Court to adopt an expansive new category of manufacturer liability that, as plaintiffs would have it, imposes liability without fault, offers no substantive defenses or meaningful guidelines for compliance and can hold hostage any industry suddenly in disfavor with elected politicians. This position defies — literally — hundreds of years of common law, not to mention common sense, and fails to meet the statutory definition of a nuisance under California law.

These actions are not the first attempt in California at holding a manufacturer of a product liable under a nuisance theory for injuries allegedly caused by its product. In City of San Diego v. U.S. Gypsum Co. (1994) 30 Cal.App.4th 575, 587, review denied (Feb. 23, 1995), the Court of

---

[8] Plaintiffs conclusorily and vaguely allege "illegal acts" by unidentified manufacturers, but as Sections V.A and VI.B. below make clear, these allegations are insufficient as a matter of law.

[9] California has adopted Section 821B of the Restatement. See People ex rel. Gallo v. Acuna, (1997) 14 Cal.4th 1090, 1104-05 & n.3, cert denied, 521 U.S. 1121 (1997).

Appeal rejected a product liability claim against asbestos manufacturers, distributors and suppliers in the "guise of a nuisance action." The plaintiffs in City of San Diego alleged that the deterioration of asbestos-containing building materials created a nuisance, arguing that "[t]he stream of commerce can carry pollutants every bit as effectively as a stream of water." Id. at 584-85. The court rejected the plaintiffs' effort to frame their action as one for nuisance, notwithstanding the seemingly "broad" definition of nuisance in Cal. Civil Code § 3479.[10] The court noted that nuisance actions generally relate to the use or condition of property, not to products. Id. at 586. Citing other decisions in which courts rejected similar theories, the court commented that in those cases, the plaintiff's complaint concerned the defendant's acts as a manufacturer and not as property owner. Id. Recognizing that the application of a nuisance theory to a product "would become a monster that would devour in one gulp the entire law of tort," the court affirmed the lower court's dismissal of the claim on the pleadings. Id. (quoting Tioga Public School Dist. #15 v. United States Gypsum Co. (8th Cir. 1993) 984 F.2d 915, 921).

The allegations here are even more tenuous and likewise do not fall within the definition of a nuisance. It is not the lawful sale of a firearm by a manufacturer which is potentially injurious to the public's health, but the manner in which the firearm is ultimately used. See Civil Code § 1714.4(b)(2). The Penal Code also provides that when a person is convicted of certain crimes, involving the *use* of a firearm which is owned by the convicted individual, then the firearm is considered a nuisance and subject to confiscation. See Penal Code § 245(f). Thus, the California

///

---

[10] Section 3479 defines a nuisance as:

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance.

Section 3479 codifies "early common law categories of public nuisance." Gallo 14 Cal.4th at 1104. An action to abate or enjoin a public nuisance must satisfy the statutory definition of a nuisance under Section 3479. People v. Lim (1941) 18 Cal.2d 872, 880.

1 legislature has determined that responsibility for injuries stemming from gun violence lies with
2 those who misuse them, not the lawful manufacture and sale of the product.[11]

3 Like the City of San Diego court, courts across the country have expressly rejected efforts
4 to expand public nuisance to apply to the lawful sale of non-defective products, cognizant that to
5 do so would limitlessly expand the extensive remedies already available to those who have been
6 injured by a product. See City of Bloomington v. Westinghouse Electric Corp. (7th Cir. 1989) 891
7 F.2d 611, 613 reh'g denied, *en banc* 1990 U.S. App. LEXIS 1234 (1990) (no action for public
8 nuisance against manufacturer of PCBs); County of Johnson v. U.S. Gypsum Co. (E.D. Tenn.
9 1984) 580 F. Supp. 284, 294 (nuisance liability would "convert almost every products liability
10 action into a nuisance claim") order set aside in part on other grounds, 664 F. Supp. 1127 (E.D.
11 Tenn. 1985); Detroit Bd. of Educ. v. Celotex Corp. (Mich. App. 1994) 493 N.W.2d 513, 521
12 (manufacturers and sellers of purported defective products could not be held liable on a nuisance
13 theory for injuries caused by the defect because it would "significantly expand, with unpredictable
14 consequences, the remedies available to persons injured by products); Penelas v. Arms Tech. Inc.,
15 No. 99-01941 CA-06, 1999 WL 1204353, at *4 (Fla. Cir. Ct. Dec. 13, 1999) ("Public nuisance
16 does not apply to the design manufacture and distribution of a lawful product."), appeal pending;
17 City of Cincinnati v. Beretta U.S.A., Corp., No. A-9902369, 1999 WL 809838, at *2 (Ohio Com.
18 Pl. Oct. 7, 1999) (same), appeal pending. See generally Am. Law of Prod. Liab. §§ 1:48;27:3
19 (1987) ("[a] product which has caused injury cannot be classified as a nuisance to hold liable the
20 manufacturer or seller for the product's injurious effects").[12]

21

22 [11] A public nuisance claim against a firearms manufacturer for the lawful manufacture and sale of a *non-defective* product — a claim which ultimately carries with it a balancing test
23 weighing the social utility of an activity against the gravity of harm, Gallo v. Acuna 14 Cal.4th at 1104 — would seem to contravene the policies underlying Civil Code section
24 1714.4. The statute prohibits the use of a risk-utility test in a product liability claim based on a firearm's potential to cause injury. Civil Code § 1714.4(a).

25

26 [12] Three recent decisions permitting nuisance claims to proceed in suits brought by municipalities against the gun industry do not dictate a different result here. The trial court in Archer v. Arms Tech, Inc., No. 99-912658 NZ, slip op. at 10 (Cir. Ct. Wayne City
27 (Mich.) May 16, 2000) (application for leave to appeal pending), acknowledged that the Michigan Court of Appeals (relying in part on City of San Diego) had rejected private
28 nuisance theory in the product context, but simply refused to follow this and other applicable precedent. Notably, the trial court dismissed the plaintiffs' negligence claims.

C. **Plaintiffs Fail To Allege An Underlying Tort.**

As explained in the Restatement, the term "public nuisance" and cases addressing public nuisance provide "little assistance in determining what conduct amounts to a public nuisance." Restatement, § 821B cmt. d. Unlike statutes declaring specific conduct a public nuisance, the common law doctrine carries with it no meaningful standard against which conduct may be measured. "If a defendant's conduct in interfering with a public right does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established and recognized standard." § 821B cmt. e; see People v. Lim, 18 Cal.2d at 880 ("'Nuisance' is a term which does not have a fixed content either at common law or at the present time. . . . In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity."). Thus, "by analogy to the rules stated in § 822 [Private Nuisance], the defendant is held liable for public nuisance if his interference with the public right was intentional or was unintentional *and otherwise actionable under principles controlling liability for negligent or reckless conduct or for abnormally dangerous activities.*" § 821B cmt. e (emphasis added).[13]

Plaintiffs have not alleged, and cannot allege, actionable negligent conduct, intentionally tortious conduct or ultrahazardous activity by the defendants. As discussed above, a negligence

---

The federal district court in White v. Smith & Wesson, 97 F.Supp.2d 816 (N.D. Ohio 2000) (the "Cleveland" lawsuit), completely ignored the City of Cincinnati case decided under Ohio law, and in a one paragraph analysis, concluded that Cleveland stated a public nuisance claim under Ohio law, but noted the nuisance action would stand or fall on the same basis as Cleveland's negligence claim. Id. at 829. The recent Boston decision, City of Boston v. Smith & Wesson Corp., No. 1999-02590, slip opinion at 30-32 (Sup. Ct. (Mass.) July 13, 2000), is no different. The trial court failed to heed precedent from Massachusetts' highest court criticizing the use of public nuisance theory in fault-based tort cases and confining the doctrine to traditional applications. The Boston decision will be appealed.

[13] This theme is repeated in Section 822, which addresses "private nuisance": "The feature that gives unity to either public or private nuisance is the interest invaded. . . . These interests may be invaded by any one of the types of conduct that serve in general *as bases for all tort liability.*" Restatement, § 822 cmt a (emphasis added). The Supreme Court specifically approved these Restatement principles in Gallo, 14 Cal.4th at 1105 n.3 (quoting Restatement, § 821B cmt. e.).

predicate fails because plaintiffs cannot establish a legal duty.[14] Plaintiffs have not alleged that any defendant committed an intentional tort recognized under California law. Finally, plaintiffs cannot sustain an assertion that the manufacturers' lawful conduct in manufacturing and selling their non-defective firearms constitutes ultrahazardous or reckless activity. Casillas, 1996 WL 276830, at *4-*5. Plaintiffs' failure to plead facts supporting a cognizable tort claim against defendants also compels dismissal of the public nuisance claim.

D. The Absence of Control Defeats A Claim for Nuisance.

Plaintiffs' nuisance claims fail for the additional reason that, as a matter of law, these defendants did not control the activities alleged to be the nuisance. The activity which plaintiffs seeks to enjoin and abate is the criminal misuse of firearms by third parties. (See, e.g., LA County, ¶ 135, LA City, ¶ 144, SF, ¶ 77). It is purely fiction to suggest that any manufacturer can control or regulate the uses to which its products are put. See Martinez v. Pacific Bell, 225 Cal App.3d 1557, 1569 review denied (Mar. 13, 1991) (noting that the owners of a pay phone alleged to be a nuisance lacked the "legal or practical ability to control [] criminal actions of third parties"); Longfellow v. County of San Luis Obispo (1983) 144 Cal.App.3d 379, 384 (county which did not own or control the property at the time of the injury could not be liable under a nuisance theory). Moreover, where, as here, a party attempts to allege a continuing nuisance (See, e.g., LA County, ¶¶ 135-138), the defendant must have the ability to abate the nuisance. See Mangini v. Aerojet-General Corp. (1996) 12 Cal.4th 1087, 1097, (crucial test of continuing nuisance is whether the condition is abatable). Defendants cannot, as a matter of law, control or abate remote illegal transfers or the criminal misuse of firearms.

Martinez is conclusive on this point. In that case, a parking lot attendant who had been shot sued a telephone company for maintaining a public nuisance, alleging that the presence of a public telephone on a nearby lot attracted a criminal element and encouraged or facilitated

---

[14] Moreover, plaintiffs' "product liability" allegations that manufacturers have failed to incorporate "personalized safety technology" implicate the prohibition of Civil Code § 1714.4(a) (prohibiting a product liability claim based on a firearm's inherent function of discharging a projectile and potentially causing injury), and therefore cannot constitute a predicate for their nuisance or unfair competition law claims.

criminal activity. Martinez, 225 Cal.App.3d at 1564. The court affirmed the dismissal of plaintiffs' negligence and public nuisance claims. Id. at 1560. The court held that nuisance law could not be extended to cover the plaintiff's theory (which mirrors plaintiffs' claim here) that he should recover against the telephone company for injuries suffered in a robbery by third parties, on the rationale those third parties may initially have been attracted to the general area because of the pay phone's location. Id. at 1568. Characterizing this theory of liability as "totally inconsistent" with the "historical parameters" of liability and damages in nuisance actions, the court observed:

> Nuisance liability is certainly well recognized-indeed it is older than the concept of negligence, and stems as much from medieval laws of property as from tort concepts (citation omitted). Our Supreme Court has recently recognized, however, that ancient concepts of liability, derived from the very different conceptions of property prevailing in agrarian England under the Plantagenets, cannot simply be torn from their historical context nor be applied to new technological or social conditions without examination of the underlying policies in favor of extending those theories of liability.

Id. at 1568, n.2 (citing Moore v. Regents of University of California, (1990) 51 Cal.3d 120, 147, cert. denied, 499 U.S. 936 (1991)). The Martinez holding is grounded on the defendants' lack of control over the criminal actors: "We reject appellant's contention that venerable nuisance concepts should be manipulated so as to impose that duty and that vicarious liability on the owners of nearby property, who lack the legal or practical ability to control such criminal actions of third parties." Id. at 1569-70.

As in Martinez, the plaintiffs here assert that the purported manner in which defendant manufacturers distributed firearms attracted or encouraged the criminal or reckless misuse of firearms. The court in Martinez rightly rejected this theory as a basis for a nuisance action and this Court should do so here.

E. Lawful Conduct Expressly Authorized by Federal And State Legislatures Cannot Constitute a Public Nuisance.

In 1872, California's legislature declared that "[n]othing which is done or maintained under the express authority of a statute can be deemed a public nuisance." Civil Code § 3482. Thus, a governmental entity cannot label and punish as a public nuisance conduct that it has itself expressly authorized. Even if the conduct in question has not been expressly authorized, "if there

has been established a comprehensive set of legislative acts . . . governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance [] if [the actor] complies with the regulations." Restatement (Second) of Torts, § 821B cmt. f.

Comprehensive federal and State laws and regulations govern the manufacture, sale and transfer of firearms in California. See supra Section II.B. These statutes and regulations authorize firearms manufactures — who must obtain federal licenses — to sell their products to federally-licensed distributors or dealers within an explicit regulatory framework. See 18 U.S.C. § 922(a)(5). Failing to allege any specific wrongdoing by a manufacturer, plaintiffs seek to hold the manufacturers indirectly liable for the purported violation by distant third parties of statutes that govern the conduct of those third parties. See Huddleston v. United States, 415 U.S. 814, 819-30 (1974) (describing the federal regulatory scheme for the manufacture, distribution and sale of firearms, stating the "principal agent of federal enforcement is the [licensed] dealer," and affirming federal Gun Control Act conviction of individual who knowingly made a false statement in connection with the acquisition of three firearms from a pawnbroker).

Through the use of highly charged phrases such as "straw purchases," "multiple sales," "kitchen table dealers," and "gun shows," plaintiffs imply that manufacturers sell their products illegally or are complicit in the illegal acts of (unidentified) third parties. Yet, they ignore that federal and California statutory law address the very third party conduct about which they complain. For example, contrary to the plaintiffs' insinuations, a sale of multiple firearms to an otherwise legally entitled buyer is lawful. See 18 U.S.C. § 923(g)(3)(A). The details of multiple purchases must be reported to the BATF and a state law enforcement agency by the close of the business day on which the transactions took place, and these agencies are authorized to conduct whatever law enforcement investigation they deem appropriate. See 18 U.S.C. § 923(g)(3)(A); 27 C.F.R. §§ 178.126(a), 1787.129(b).

A "straw purchase" is a criminal act by one who, although legally entitled to acquire a firearm, intends to transfer the firearm to a proscribed individual. See 18 U.S.C. §§ 924(a)(1)(A), (a)(2). Absent knowledge of the straw purchaser's intent, the retail dealer has not acted unlawfully, let alone the upstream manufacturer which has no connection to the retail transaction.

Id. Thus, plaintiffs' statistics and purported examples of "negligent distribution," (LA County, ¶¶ 7-9, LA City, ¶¶ 7-20, SF, ¶ 2), do not give rise to a reasonable inference of wrongdoing by any manufacturer, distributor or retailer.

While it is certainly true that an activity, legislatively authorized, can still constitute a nuisance based on the manner of performance, plaintiffs cannot escape the fact that their nuisance claims here are premised on an expansive new duty requiring federally-licensed manufacturers of lawfully made and sold products to prevent third parties, wholly outside of the manufacturers' control, from illegally acquiring and criminally misusing their products. California law rejects this assertion. See Casillas, 1996 WL 276830, at *2-*4.

Acceptance of plaintiffs' public nuisance theory in these circumstances would be an unprecedented expansion of the doctrine and would ignore the Court of Appeals' prior refusal to extend public nuisance theory to the manufacture and sale of products. City of San Diego v. U.S. Gypsum 30 Cal.App.4th at 586. Moreover, to the extent the lawful manufacture and legal sale of non-defective firearms could ever constitute a public nuisance, that decision should be made by California's legislature, not a court. People v. Lim, 18 Cal.2d at 880.

F. Plaintiffs Fail To Allege the Requisite Connection Between Defendants' Alleged Conduct and the Public Harm That Plaintiffs Seek To Prevent.

Plaintiffs' public nuisance claims are ultimately premised on the occurrence of *injuries* and *criminal activities* in their respective communities. (See, e.g., LA County, ¶¶ 135, 139-141, LA City, ¶¶ 144, 148-150, SF, ¶¶ 77, 81-82.) At a minimum, plaintiffs must plead and prove that defendants' conduct caused these alleged *injuries* that form the basis of their complaint. See Martinez, 225 Cal.App.3d at 1568-70.

Here, there are no allegations identifying the factual circumstances of the underlying injuries on which plaintiffs base their claims (other than passing references to alleged statistics concerning firearms accidents and shootings). (See, e.g., LA County, ¶¶ 7-9.) There are no allegations describing the means by which the criminal shooters in the underlying incidents acquired their guns and there are no allegations that even attempt to connect the alleged wrongful conduct of any of these defendants to the specific underlying events from which plaintiffs' claims

1 purportedly derive.[15] California law does not permit such faulty pleading. See Garcia v. Joseph
2 Vince Co. (1978) 84 Cal.App.3d 868, 874 ("Regardless of the theory which liability is predicated
3 upon, whether negligence, breach of warranty, strict liability in tort, or other grounds, it is obvious
4 that to hold a producer, manufacturer, or seller liable for injury caused by a particular product,
5 there must first be proof that the defendant produced, manufactured, sold, or was in some way
6 responsible for the product . . . .").

7 **IV. PLAINTIFFS HAVE NOT ALLEGED A VIABLE "UNFAIR COMPETITION" CLAIM UNDER SECTION 17200.**
8

9 Plaintiffs' complaints include claims for "unlawful," "deceptive," and "unfair" business
10 practices under Business & Professions Code section 17200. Plaintiffs have not alleged a valid
11 claim under any of the Section 17200 prongs, nor can they.

12 **A. Plaintiffs Have Not Properly Alleged An Unlawful Practice Claim.**

13 To state an unlawful practice claim under Section 17200, plaintiffs must plead facts
14 establishing a predicate violation of law. The mere conclusion that a defendant has violated a
15 statute, without specific facts to support that conclusion, is insufficient as a matter of law.
16 People v. McKale (1979) 25 Cal.3d 626, 635 (absent "supporting facts," allegation that challenged
17 conduct is "in violation of a specific statute is purely conclusory and insufficient to withstand
18 demurrer"); Khoury v. Maly's of California, Inc. (1993) 14 Cal.App.4th 612, 619.

19 Here, plaintiffs assert various violations of law as the alleged predicate for their unlawful
20 practice claim. The only one of these supposed violations that is alleged against all defendants is
21 the "nuisance" theory. For the reasons set forth above, plaintiffs' public nuisance allegations state
22 no claim. As such, these allegations cannot provide the predicate for an unlawful practice claim.[16]
23

24 [15] Indeed, plaintiffs' complaints merely assume causation under a *post hoc ergo propter hoc*
standard. Equally fatal, by improperly aggregating and masking the underlying incidents
25 from which their claims purportedly derive, the defendants are deprived of their
constitutional right to challenge the implicit assertion that their allegedly wrongful conduct
26 is causally related to those injuries that have been aggregated.

27 [16] Nor does plaintiffs' "private nuisance" allegation provide the predicate for an unlawful
practice claim. In addition to the defects discussed above in connection with the public
28 nuisance claim, plaintiffs have not alleged a substantial and unreasonable inference with
specific property, as is required to state a claim for private nuisance. See SDG&E v.

Moreover, even if plaintiffs could state a valid claim for nuisance, the violation of a civil legal doctrine, without more, cannot serve as the predicate violation under the "unlawful" prong of Section 17200. See Klein v. Earth Elements, Inc. (1997) 59 Cal.App.4th 965, 969 (rejecting strict products liability and implied warranty as basis for unlawful practice claim under Section 17200; "[w]hile these doctrines do provide for civil liability upon proof of their elements they do not, by themselves, describe acts or practices that are illegal or otherwise forbidden by law.").

Other than nuisance, the only other predicate "unlawful" acts are purported violations of the Roberti-Ross Assault Weapons Act and assault weapons advertising ban under Penal Code section 12020.5. These supposed violations are alleged against only a small subset of the defendants. (See, e.g., LA County, ¶¶ 153-155; LA City, ¶¶ 163-165; SF, ¶ 87.) Moreover, as a matter of law, none of these allegations satisfy the McKale requirements. The complaints are utterly devoid of facts sufficient to show when, where and how the defendants failed to comply with the Roberti-Roos Act. (See, e.g., LA County, ¶¶ 108, 154, LA City, ¶¶ 117, 164, SF, ¶¶ 48-51, 87(c).)[17] Indeed, with a single exception, plaintiffs do not even specify which defendants have supposedly violated this statute. Similarly, the conclusory allegation that unspecified defendants violated the Penal Code section 12020.5 ban against assault weapon advertising is likewise an insufficient predicate for unlawful business practices liability. This failure to plead the essential predicate facts showing an actual violation of any statute precludes any unlawful practice under Section 17200. McKale, 25 Cal.3d at 635.[18]

Superior Court (Covalt) (1996) 13 Cal.4th 893, 937-938.

[17] Plaintiffs' attempt to invoke "aiding and abetting" liability cannot change this result. Plaintiffs' utter lack of specificity is no more sufficient to allege aiding and abetting liability than it is to allege principal violator liability. Indeed, plaintiffs' "aiding and abetting" allegations fall even further below the mark because, in addition to alleging facts showing the liability of some principal, plaintiffs would also have to allege facts showing the three further elements of aiding and abetting liability. See CALJIC 3.01 (defining aiding and abetting to require "***knowledge*** of the unlawful purpose of the perpetrator," "the ***intent*** or purpose of . . . facilitating" the crime, and some overt "***act or advice***" to aid the crime).

[18] The same defects preclude reliance on the other, miscellaneous statutes that plaintiffs reference in other portions of the complaint, but do not expressly identify as an "unlawful" practice. For example, plaintiffs' allegation that unspecified defendants "undermined and impeded the restrictions" contained in a laundry list of statutes and regulations set forth in

B. **Plaintiffs' "Unfair" Business Practice Allegations State No Claim.**

Plaintiffs attempt to invoke the remedies of Section 17200 by casting their allegations as a claim for "unfair" business practices. This attempt fails as a matter of law. As the California Supreme Court recently stated, assertions of "unfair" conduct under Section 17200 must be "tethered to some legislatively declared policy." Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 186.[19] Moreover, Cel-Tech holds that plaintiffs "may not use the unfair competition law to condemn actions the Legislature permits." Id. at 184. Plaintiffs' "unfair" practices claim violates these principles.

Legislative policy concerning firearms regulation is reflected in the comprehensive array of gun-related laws that have been considered, debated and passed into law by the federal and state legislatures. Here, plaintiffs have failed to alleged facts showing that any defendant violated even a single one of these laws, and as such, it must be presumed for purposes of this demurrer that the defendants followed the applicable laws. See, e.g., C & H Foods Co. v. Hartford Ins. Co., 163 Cal.App.3d 1055, 1062 (1984) (in ruling on a demurrer, "facts not alleged are presumed not to exist"). It necessarily follows that plaintiffs have not alleged facts sufficient to show that defendants have violated any "legislatively declared policy" pertaining to firearms regulation.

Also, plaintiffs' "unfair" practices claim is predicated upon a theory that is specifically precluded by California law. The essence of plaintiffs' claim is that defendants, by their alleged conduct, have caused gun injuries and deaths. (See, e.g., LA County, ¶¶ 6-10; LA City, ¶ 2; SF,

---

paragraph 106 is wholly conclusory and does not even begin to provide the factual specificity required by McKale. The same is true of plaintiffs' allegation that "certain defendants" — again unspecified — violated laws pertaining to "junk guns." (See, e.g., LA County, ¶ 109; LA City, ¶ 118; SF, ¶ 53.) Plaintiffs do not allege that any defendant has actually sold an offending article in the identified jurisdiction or otherwise provide any specifics to show that any statute has been violated by any specific defendant.

[19] Although the Cel-Tech court limited its holding to so-called "competitor vs. competitor" unfair practices claims, the court's reasoning that Section 17200 claims should be "tethered to some legislatively declared policy" should apply with equal force to this case. See W. Stern, Unfair Business Practices and False Advertising: Bus. & Prof. Code § 17200 (Rutter Group 1999) at 3:73, p. 50 ("It would appear that analogy to the Court's holding in Cel-Tech Communications as to competitor cases, a similar standard might apply to consumer cases. In other words, no longer will courts be free to "impose their proper behavior and brand as "unfair" conduct they find inappropriate.").

¶¶ 6-20.) Yet, the California Legislature has specifically declared that gun injuries "are proximately caused by the actual discharge of the product." Civil Code § 1714.4(b)(2). Section 1714.4(b)(2) effectively precludes any attempt to fix responsibility for gun injuries on defendants (who are not involved in the actual discharge of the gun), based on allegedly "unfair" distribution practices or product design. Casillas, 1996 WL 276830 at *2-*4. Under Cel-Tech, plaintiffs may not use Section 17200 to end-run this preclusion. Cel-Tech, 20 Cal.4th at 184 ("a plaintiff may not bring an action under the unfair competition law if some other provision bars it.").

At bottom, the instant complaints are an attempt to advance plaintiffs' own notions of "proper" public policy on firearms regulation. As such, the complaints squarely defy the express limitations on Section 17200 "unfair practices" claims identified by the California Supreme Court. Cel-Tech, 20 Cal.4th at 185 (courts should leave "public policy" issues to legislative branch).

C. Plaintiffs Have Not Alleged a Viable Claim For Fraudulent Business Practices.

A cause of action for fraudulent business practices under Section 17200 must be supported by factual allegations sufficient to show that a "reasonable consumer" is likely to be deceived by the challenged conduct. See, e.g., Freeman v. Time, Inc. (9th Cir. 1995) 68 F.3d 285, 289. Here, plaintiffs' fraudulent business practice claims are based on the same allegations as their Section 17500 claim. As detailed below, plaintiffs' Section 17500 claims clearly state no claim. For the same reasons, plaintiffs' fraudulent practice claims fail.[20]

V. PLAINTIFFS HAVE NOT ALLEGED A VIABLE CLAIM FOR FALSE AND MISLEADING ADVERTISING UNDER SECTION 17500

Plaintiffs' claims under Business & Professions Code section 17500 attacks advertisements and "other statements" made by unspecified defendants allegedly touting the home protection

///

[20] The Hahn complaint (City of Los Angeles) does not allege a Section 17500 claim, but the complaint's Section 17200 "fraudulent business practices" claim is based on the same allegations as the other plaintiffs' Section 17500 claims. Courts judge a Section 17200 "fraudulent business practices" claim under the same standard ("likelihood of deception") as a Section 17500 claim. See Freeman, 68 F.3d at 287-89; South Bay Chevrolet v. General Motors Acceptance Corp. (1999) 72 Cal.App.4th 861, 878, review denied (Aug. 25, 1999). The City of Los Angeles' "fraudulent business practices" claim thus fails for the reasons stated in Section V.

benefits of guns.[21] These statements are false and misleading, plaintiffs allege, because guns in the home purportedly increase the "risk" of death or injury. (See, e.g., LA County, ¶¶ 126, 158; LA City, ¶¶ 135, 162; SF, ¶¶ 68, 84.) For several reasons, these allegations state no claim under Section 17500.

A. Plaintiffs' Allegations Do Not Demonstrate The Requisite "Likelihood of Public Deception".

Section 17500 prohibits "untrue or misleading" advertising or statements in connection with the sale of property or services. To state a Section 17500 claim, plaintiffs must plead facts sufficient to show a "likelihood of public deception," when considered from the perspective of a "reasonable consumer." See Haskell v. Time, Inc., (E.D. Cal. 1994) 857 F. Supp. 1392, 1399 ("the false or misleading advertising and unfair business practices claim must be evaluated from the vantage of a reasonable consumer"); Freeman v. Time, Inc., 68 F.3d at 289 (rejecting "unwary consumer" standard in favor of "reasonable person" standard); State Board of Funeral Directors & Embalmers v. Mortuary in Westminster Memorial Park (1969) 271 Cal.App.2d 638, 642 (applying standard of "what a person of ordinary intelligence" would conclude in a false advertising case).

Courts do not hesitate to apply this "reasonable consumer" standard to dismiss Section 17500 claims at the pleading stage. Haskell, 857 F. Supp. at 1399 ("[I]f the alleged misrepresentation, in context, is such that no reasonable consumer could be misled, then the allegation may also be dismissed as a matter of law."); Freeman, 68 F.3d at 289-90 (affirming dismissal of complaint where plaintiff failed to allege facts showing that a reasonable person would be misled).

Here, plaintiffs have not alleged facts even remotely sufficient to demonstrate that a "reasonable consumer" is likely to be deceived. Plaintiffs allege only that unspecified gun

---

[21] Plaintiffs' purported claims for misleading advertising and unfair business practices (second and third causes of action) do not seek recovery for injuries to third parties or for the provision of governmental services such as law enforcement or health care. Such claims would in any event be too remote and derivative to be recoverable, as a matter of law. See, e.g., Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 1999 WL 493306, at *4 (9th Cir. July 14, 1999) (rejecting claims of labor union medical funds against tobacco companies for expenses paid for smoking related ailments of fund participants as "too remote").

manufacturers have "promoted handguns with slogans such as 'homeowner's insurance,' 'tip the odds in your favor,' and 'your safest choice for personal protection.'" (See, e.g., LA County, ¶ 126; LA City, ¶ 135; SF, ¶ 68.) No reasonable consumer could conclude from these slogans that guns pose no potential risk. It is common knowledge that a gun has the potential to cause serious injury or death. It is likewise well known to the general public that gun-related accidents and injuries from careless handling and misuse can occur. See, e.g., Mavilia v. Stoeger Industries, 574 F. Supp. 107, 110-11 (D. Mass. 1983) ("[C]ommon sense requires the Court to find that the risks involved in marketing handguns for sale to the general public are not greater than reasonable consumers expect. Every reasonable consumer that purchases a handgun knows that the product can be used as a murder weapon. . . . [T]hat death may result from careless handling of firearms is known by all Americans from an early age."); Holmes v. J.C. Penney Co., 133 Cal.App.3d at 220 (holding dangers of pellet gun powered by carbon dioxide cartridges generally known); Bojorquez v. House of Toys, 62 Cal.App.3d at 934 ("Ever since David slew Goliath young and old alike have known that slingshots can be dangerous and deadly. (citation omitted) There is no need to include [such] a warning . . . .").

An allegedly false or misleading statement cannot be viewed in a vacuum, but instead must be considered "in context," even at the demurrer stage. Haskell, 857 F. Supp. at 1399. As reflected in Civil Code Section 1714.4 and numerous cases, the general public is well aware that firearms can cause death or serious injury. Indeed, as even plaintiffs implicitly acknowledge, defendants provide "warnings . . . regarding the risks of handguns in the home." (See, e.g., LA County, ¶ 126; LA City, ¶ 135; SF, ¶ 68.) The premise of plaintiffs' Section 17500 claim — that the challenged advertising "slogans" cause "reasonable" consumers to ignore specific warnings and forsake the basic understanding that guns can be dangerous — is simply untenable. No reasonable consumer could conclude that such an instrument, lethal to intruders by design, somehow magically poses no potential danger to its owner or other household residents. Where, as here, the allegations of deception are unreasonable in light of the surrounding circumstances, demurrer is properly granted. See Freeman, 68 F.3d at 290 (granting motion to dismiss because

///

"[a]ny ambiguity that [plaintiff] would read into any particular statement is dispelled by the promotion as a whole.").[22]

B. Plaintiffs' Vague And General Allegations Fail To State A Claim Against Any Specific Defendant.

Plaintiffs' Section 17500 claim fails for the additional, independent reason that the complaints do not satisfy even the most liberal interpretation of notice pleading. There are forty-four defendants in this case, yet plaintiffs have alleged only three supposedly deceptive slogans. (See, e.g., LA County, ¶ 126; LA City, ¶ 135; SF, ¶ 68.) Plaintiffs do not specify which defendants (if any) used these supposed slogans, attributing the slogans merely to unspecified "handgun manufacturers." (Id.) Thus, for at least forty-one of the forty-four defendants, plaintiffs have not alleged a single example of deceptive advertising.

A Section 17500 claim may be dismissed for lack of particularity where, as here, it fails to give adequate notice of the allegedly misleading statements. See Khoury 14 Cal.App.4th at 619 ("A plaintiff alleging unfair business practices under [Section 17200 and Section 17500] must state with reasonable particularity the facts supporting the statutory elements of the violation."); Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211-212 (a Section 17500 complaint must be sufficiently specific to "frame and limit the issues . . . and to apprise the defendant of the basis upon which the plaintiff is seeking recovery;" complaint there held sufficient because it left "no doubt as to what advertisements are at issue.")

The mere conclusion that a defendant violated Section 17500, without supporting factual allegations, is wholly insufficient to survive demurrer. Serrano, 5 Cal.3d at 591. Further, plaintiffs' conclusory allegations that treat "all" forty-four defendants as a single monolith do not provide fair notice to any specific defendant. These and other deficiencies clearly make plaintiffs'

---

[22] Here, plaintiffs' assertion that warnings regarding gun risks have been "negated" or "undercut" by the alleged advertising slogans is an unwarranted conclusion that must be disregarded at the demurrer stage. See, e.g., Serrano v. Priest (1971) 5 Cal.3d 584, 591 cert. denied (1977) 432 U.S. 907 (a demurrer does not admit "contentions, deductions or conclusions of fact or law"). It is the Court's job, not plaintiffs, to reach the legal conclusion of whether the defendants' statements as a whole might be misleading to a reasonable consumer. See Freeman, 68 F.3d at 290 (rejecting plaintiff's allegations that statements were ambiguous and finding no ambiguity as a matter of law).

allegations subject to demurrer based on uncertainty. See C.C.P. § 430.10(f) ("uncertain" pleading subject to demurrer).

The deficiencies in plaintiffs' aggregative pleading approach are compounded by the improper attempt to join claims against forty-four distinct defendants in one action. In order properly to join multiple parties in a single lawsuit, plaintiff must plead facts sufficient to show both: (1) a right to relief arising out of the same transaction, occurrence or series of transactions or occurrences; and (2) common questions of law and fact. Cal. Code Civ. Proc. § 379(a)(1). Both prongs of the test must be met. Hoag v. Superior Court of Los Angeles County (1962) 207 Cal.App.2d 611, 620. These requirements cannot be met where, as here, plaintiffs' claims purport to be predicated on separate and distinct shootings by criminals using weapons of unspecified manufacture, origin and history. Clearly, the complaints do not allege facts sufficient to show the required connecting factor between the disparate allegations against the various defendants. *See* Southern California Edison Co. v. State Farm Mut. Auto. Ins. Co., (1969) 271 Cal. App.2d 744, 748 (sustaining demurrer for misjoinder where insufficient *nexus* was alleged between conduct of three insurance companies and their insureds with respect to multiple car accidents that harmed plaintiffs electrical equipment).[23]

Plaintiffs' failure to expressly allege even a single misstatement by any specific defendant is no mere technical defect. Section 17500 expressly limits liability to statements "made before the public in this State" and statements "from this State before the public in any state." Bus. & Prof. Code § 17500. Because plaintiffs have not pleaded the essential statutory element that a statement was made in or from California, plaintiffs have failed to state a Section 17500 claim. Khoury, 14 Cal. App. 4th at 619 (complaint must allege facts "supporting the statutory elements of the violation").

Also, where a Section 17500 claim is based on "vague, highly subjective" advertising, courts regularly grant demurrer for the straightforward reason that no reasonable consumer would rely on such claim. Haskell, 857 F. Supp. at 1399. To state a claim, plaintiffs must plead

---

[23] Indeed, plaintiffs' improper aggregative pleading also applies to their public nuisance claims.

"specific, detailed factual assertions." Id. Here, the few statements that plaintiffs have identified — such as the slogans "homeowner's insurance" and "tip the odds in your favor" — fall far short of meeting this standard.

C. Plaintiffs' Section 17500 Claims Violate Defendants' Constitutional Rights Because They Are Predicated Upon Expressions of Opinion In The Public Debate Over Personal Security.

Preliminarily, the only statements alleged to be "misleading" are "nonactionable expressions of opinion." See Committee on Children's Television, 35 Cal.3d at 213 n.15. The 17500 claims fail for this reason alone.

Further, it is well-settled that the First Amendment establishes an "absolute bar" to liability under Section 17500 (and Section 17200) for claims based on protected speech. Blatty v. New York Times Co. (1986) 42 Cal.3d 1033, 1041 cert denied (1988) 485 U.S. 935.[24] Where a Section 17500 claim attacks protected speech, a demurrer must be sustained without leave to amend. Id.

Here, although plaintiffs attempt to obfuscate the issue with vague and non-specific allegations, the Section 17500 claim is predicated, at least in part, on speech that is protected by the First Amendment. For example, plaintiffs challenge defendants' statements in opposition to "research" studies that supposedly demonstrate "that the presence of handguns in the home increase [sic] the risk of harm to firearm owners and their families." (See, e.g., LA County, ¶¶ 127-129, 158; LA City, ¶¶ 136-138, 162; SF, ¶¶ 69-71, 84.) This Court may take judicial notice of the fact that this issue has been the subject of extensive public debate in which several researchers have expressed a different view of the utility of firearms, particularly possession of a firearm for lawful self-defense purposes. See, e.g., John R. Lott, Jr., More Guns Less Crime: Understanding Crime and Gun Control Laws (1998); Gary Kleck, Targeting Guns: Firearms and Their Control (1997), the title pages and table of contents of which are attached as Exs. 34, 35 to Defs. NOL.

---

[24] Although Blatty involved a newspaper defendant, it is not limited to the media or freedom of the press, but extends to protect freedom of speech for all. Paradise Hills Associates v. Procel (1991) 235 Cal.App.3d 1528, 1543 modified on other grounds, (1991) 91 Daily Journal D.A.R. 15349, disapproved on other grounds, Kowis v. Howard, (1992) 3 Cal.4th 888.

1 Statements reflecting defendants' opinions on the important public issues raised by the firearms
2 regulation debate — including whether guns do or do not enhance personal security — are clearly
3 subject to First Amendment protection. See, e.g., FCC v. League of Women Voters, 468 U.S. 364,
4 381 (1984) ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy
5 of First Amendment values.'"); Chavez v. Citizens for A Fair Farm Labor Law (1978) 148
6 Cal.App.3d 77, 81 ("'Under the First Amendment there is no such thing as a false idea. However
7 pernicious an opinion may seem, we depend for its correction not on the conscience of judges and
8 juries but on the competition of other ideas.'"). Thus, an injunction prohibiting defendants' speech
9 would not pass constitutional muster. See San Diego Unified Port Dist. v. U.S. Citizens Patrol
10 (1988) 63 Cal.App.4th 964, 971-72 n.6 (citations and internal quotations omitted) ("prior restraint
11 on [protected] expression bears a heavy presumption against its constitutional validity").

12 **VI. PLAINTIFFS CANNOT REGULATE A LAWFUL NATIONAL INDUSTRY BY IMPOSING THEIR OWN POLICIES ON THE REST OF THE NATION**

13

14 In addition to being legally insufficient, plaintiffs' complaints are so broadly drafted as to
15 manifest regulatory ambitions that run afoul of the United States Constitution. Under the
16 Commerce Clause[25] and Due Process Clause[26] of the U.S. Constitution, these plaintiffs may not
17 regulate the lawful national industry which is before this Court by imposing upon the entire
18 nation — or, more precisely, by trying to induce the judiciary to impose upon the entire nation —
19 their particular regulatory views regarding the industry's manufacturing and distribution
20 practices.[27] Plaintiffs' objective of changing the way firearms are designed, marketed and sold on
21 a national basis is obvious. For example, plaintiffs' complaints contain such statements as:

22 > The widespread availability and misuse of firearms by minors, convicted criminals and other unauthorized users is one of the most
23 > serious problems *facing this nation*.

24

25 [25] U.S. Const., Art. I, § 8, cl. 3.

26 [26] U.S. Const., Amendment XIV, cl. 1.

27 [27] "State power may be exercised as much by a jury's [or judge's] application of a state rule of law in a civil lawsuit as by a statute." BMW of North America, Inc. v. Gore, (1996) 517
28 U.S. 559, 572 n.17, citing, New York Times Co. v. Sullivan, (1964) 376 U.S. 254, 265 and San Diego Bldg. Trades Council v. Garmon, (1959) 359 U.S. 236, 247.

1 > Handguns move from jurisdictions with relatively weak gun control laws to jurisdictions with stronger gun control laws. . . . According
2 > to ATF statistics, approximately 30% of the firearms traced in Southern California were *originally sold at retail locations outside*
3 > *of California*, principally Nevada and Arizona.

4 (See, e.g., LA County, ¶¶ 70 and 83 (emphasis added). Given allegations such as these, and
5 others, there is no doubt that plaintiffs seek in this action to impose their own piecemeal regulatory
6 regime upon this lawful national industry engaged in highly regulated interstate and foreign
7 commerce and to regulate the lawful flow of firearms beyond, as well as within, California's
8 borders.

9 For example, plaintiff's public nuisance claim can only be read to mean that plaintiffs seek
10 to abate the lawful manufacture, distribution and sale of the defendant manufacturers' products
11 anywhere in the United States or, indeed, the world (since these products can reach California
12 through mere fortuity). (See, e.g., All complaints, Prayer, ¶ 1.) Likewise, their demands for civil
13 penalties and restitution seek to punish conduct — defendants' lawful distribution practices —
14 occurring beyond the borders of not only California, but even the nation. (See, e.g., LA County,
15 Prayer ¶¶ 4 and 5.)

16 Plaintiffs' intended regulations are not confined to California and the extraterritorial reach
17 of the plaintiffs' intended regulation would extend directly to each manufacturers' door. As the
18 complaints confirm, firearms may reach California and plaintiffs' communities in a variety of ways
19 that have no connection with the manufacturer, a firearms distributor or a retail dealer. For
20 example, a gun made in Connecticut, lawfully sold to a federally licensed distributor in Ohio, then
21 lawfully resold to a federally licensed retail dealer in Illinois who lawfully sells it to a legal
22 purchaser,[28] could be stolen from its owner and transported to San Francisco and used in a crime.
23 Or an adult non-felon who purchased the gun legally and had never before committed a criminal
24 act, could move to San Francisco and commit a crime with that firearm. And so on.
25

26 [28] This is the very distribution scheme envisioned by Congress when it enacted the Gun Control Act of 1968. Firearms manufacturers are prohibited by law from selling directly to
27 individual consumers. See 18 U.S.C. § 922(a)(1)(A)(5). As the Supreme Court observed in Huddleston v. United States, 415 U.S. at 826: "[I]t is apparent that the focus of the
28 federal scheme is the federally licensed firearms dealer, at least insofar as the [Gun Control Act] directly controls access to weapons by users."

What this means for purposes of the Commerce Clause is this: in practical effect, the plaintiffs' regulation would necessarily abate the very first lawful sale to the Ohio distributor because the manufacturer cannot control remote transfers or uses after initial legal sale. Plaintiffs' action thus would control commercial transactions lawful in other jurisdictions and well beyond the borders of California. Add to this, the existence of 39,000 governments at levels other than the federal government, National Foreign Trade Council v. Natsios, (1st Cir. 1999) 181 F.3d 38, 54, aff'd sub. nom, Crosby v. Nat'l Foreign Trade Council (2000) __ U.S. __, 120 S.Ct. 2289 and the Court can readily see the full Commerce Clause implications of this, and other similar, lawsuits. See Healy v. Beer Inst., (1989) 491 U.S. 324, 336 ("[T]he practical effect . . . must be evaluated not only by considering the consequences of the . . . [regulation] itself, but also by considering . . . what effect would arise if not one, but many or every . . . [county or city] adopted similar [regulations] . . . .").[29/]

In light of such realities, plaintiffs' lawsuit clearly seeks to impose a national regulatory program on the firearms industry. Such regulation is barred, however, by the Interstate and Foreign Commerce Clauses (U.S. Const. art. I, § 8), the Import/Export Clause (U.S. Const. At. I, § 10) and the Due Process Clause of the Fourteenth Amendment (U.S. Const. Amend. XIV, § 1).

The Supreme Court has clearly articulated that a State, much less a municipality or other local unit of state government,[30/] may not establish:

> policy for the entire Nation . . . or even impose its own policy choice on neighboring States . . . . Similarly, one State's power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce . . . but is also constrained by the need to respect the interests of other States.

BMW of North Am., Inc. v. Gore at 571 (citing Healy v. Beer Inst., (1989) 491 U.S. 324, 335-36 ("[T]he Constitution's special concern both with the maintenance of a national economic union

---

[29/] Nor can the plaintiffs be heard to argue that the defendants can simply ensure that guns don't reach Los Angeles. See National Foreign Trade Council, 181 F.3d at 70 (where the court, responding to a similar argument by plaintiffs in that case, stated that to accept such an argument would be to read the Commerce Clause out of the Constitution).

[30/] Municipalities and other local units of state government, such as counties, do not enjoy the same deference given to states under our federal constitutional system. See Community Communications Co. v. Boulder, (1982) 455 U.S. 40.

unfettered by state-imposed limitations on interstate [and international] commerce and with the autonomy of the individual States within their respective spheres. . . .").

The Healy Court in turn relied on Edgar v. MITE Corp., (1982) 457 U.S. 624, which held that the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, *whether or not the commerce has effects within the State.*" Id. at 642-43 (emphasis added). Healy elaborated these principles concerning the extraterritorial effects of state economic regulation as follows:

> The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State . . . . [T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one State's regulatory regime into the jurisdiction of another State . . . . And, specifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another. . . .

491 U.S. at 336-37 (citations omitted).[31]

As the foregoing authorities confirm, the Commerce Clause is not only a "power-allocating provision" as between federal and state governments, but also a "substantive 'restriction on permissible state regulation' of interstate commerce . . . . 'long . . . recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.'" Dennis v. Higgins, 498 U.S. 439, 447 (1991) (citations omitted). That "self-executing limitation" precludes the national regulatory ambitions and schemes manifested by plaintiffs' lawsuit.

---

[31] See also National Foreign Trade Council, 181 F.3d at 69-70 (holding Massachusetts law that restricted ability of state agencies to purchase goods and services from companies doing business with Burma violated Commerce Clause because state was "attempting to regulate conduct beyond its borders and beyond the borders of this country"); Knoll Pharma. Co. v. Sherman, (N.D.Ill. 1999) 57 F.Supp.2d 615, 623-24. (holding Illinois regulation prohibiting advertising of controlled substances, as applied to pharmaceutical manufacturer's national advertising campaign of its prescription diet drug, violated Commerce Clause because the "State of Illinois [sought] to impose its own policy against advertising prescription drugs classified as controlled substances on other states.").

Beyond its Commerce Clause analysis, Gore further held that "it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States. . . . [n]or may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." Gore, 517 U.S. at 572-73. This principle is central to Gore's due-process holding that "'[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort'". Id. at 573, n.19 (citation omitted). Such holding is of particular importance here because plaintiffs seek to regulate conduct of the defendant manufacturers beyond the borders of California, in other jurisdictions in which that conduct is entirely lawful. Not even a sovereign state, much less a municipality, may "impose sanctions on . . . [defendants] in order to deter conduct that is lawful in other jurisdictions." Id. at 573.

Under the United States Constitution and the federalism principle the Supremacy Clause (art. VI) embodies, neither the plaintiffs — purportedly acting on behalf of the people of California — nor the other municipalities which seek regulate the national firearms industry through lawsuits like this one, may impose their policy notions upon the nation. The complaints purport to allege claims, and to seek relief, that on its face is barred under the foregoing constitutional provisions and are therefore subject to demurrer.

VII. PLAINTIFFS' CLAIM FOR RESTITUTIONARY RELIEF UNDER SECTION 17203 AND SECTION 17535 SHOULD BE STRICKEN

If the Court sustains the demurrers as to plaintiffs' Section 17200 and Section 17500 claims, the motion to strike is moot. If for any reason, those claims survive, the Court should — at a minimum — grant the defendants' motion to strike.

Where a complaint includes a prayer for relief that is not supported by the cause of action alleged, or is otherwise improper, a motion to strike lies. See, e.g., Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal.3d 211, 214-15 (striking punitive damage claim; no cause of action properly alleged to support punitive damages); See Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal.App.3d 699, 719, 721 (reversing trial court for failing to grant motion to strike improper restitution claim on behalf of third parties).

Here, in addition to the request for "civil penalties" and injunctive relief, plaintiffs seek monetary relief under Section 17203 and Section 17535 in the form of "restitution and/or disgorgement." Plaintiffs apparently seek the following categories of restitution: (1) for governmental entities which have allegedly incurred expenses to combat criminal activity involving firearms; (2) for persons injured or killed as a result of gun violence; and (3) for consumers who have purchased guns for home protection based on supposedly "deceptive" advertising.

None of these three categories reflects a valid claim for restitution. The first two categories – governmental entities and injured persons – set forth claims for *damages*, not restitution. "[D]amages are not available under Section 17203." Cortez v. Purolator Air Filtration Products Co., 23 Cal.4th 163, 173 (2000). As explained in Cortez:

> A UCL action is an equitable action by means of which a plaintiff may recover money or property *obtained from the plaintiff* or persons represented by the plaintiff through unfair or unlawful business practices. It is not an all-purpose substitute for a tort or contract action. (emphasis added) (citations omitted).

Id. Rather, "Section 17203 operates only to return to a person those *measurable amounts* which are *wrongfully taken* by means of an unfair business practice." Day v. AT&T Corp., 63 Cal.App.4th 325, 338-39 (1998) (emphasis original). This rule applies whether the claim for monetary relief is characterized as "restitution" or "disgorgement" Id.

Here, the members of the "government" or the "injured persons" groups cannot qualify for restitution. Plaintiffs do not and cannot allege that the defendants obtained a single penny from these groups, wrongfully or otherwise. The "governmental" and "injured persons" groups thus have no claim for restitution. Any compensation they seek for extra expenses they have incurred or injuries they have suffered are classic money damages that do not include an element of restitution. Cortez, 23 Cal.4th at 174 (classifying claims for pain and suffering, physical injury, property damages and lost wages as claims for damages that "would not include an element of restitution").[32]

---

[32] One of the reasons for limiting UCL claims to restitution rather than damages is that only the former is consistent with the UCL's "streamlined" procedure. "To permit individual

Nor can plaintiffs state a valid claim for restitution with regard to the "gun purchasers" group. Although these people may have paid money to the certain of the defendants, plaintiffs have not alleged facts showing that any of the sums paid were "wrongfully taken." As set forth in the accompanying demurrer, no "reasonable consumer" could have believed that guns are free from potential risks. Restitutionary relief is accordingly improper.

Plaintiffs cannot avoid the foregoing conclusions by arguing for some broader claim based on "disgorgement of profits." This is so for at least three reasons. First, the Supreme Court recently held that a court exceeds its power under Section 17200 if it orders disgorgement that goes beyond restitution of specific amounts to specific persons. Kraus, 23 Cal.4th at 137-38. There, the defendant unlawfully charged its tenants certain fees. The trial court ordered the defendant to disgorge these unfairly obtained fees into a fluid recovery fund "for the purpose of providing financial assistance for the advancement of legal rights and interests of residential tenants in the City and County of San Francisco." Id. at 124. The Supreme Court ruled that (i) this order exceeded the trial court's authority, and (ii) that permissible monetary relief was limited to allowing refunds to actual tenants from whom the fees had been collected:

> To the extent that the trial court ordered defendants to make any refunds other than to refund moneys to tenants and former tenants, the award was not authorized by the UCL and was not a permissible exercise of the court's equitable powers. The judgment of the trial court for disgorgement of sums collected [through the unfair fee] may be enforced only to the extent that it compels restitution to those former tenants who timely appear to collect restitution.

Id. at 138. Here, plaintiffs do not and cannot identify any specific persons from whom the defendants have wrongfully obtained money. Under Kraus, therefore, no order of disgorgement is permissible.

Second, plaintiffs cannot justify a claim for non-restitutionary disgorgement on the grounds that it is necessary to deter future acts of alleged unfair competition. This precise

---

claims for compensatory damages to be pursued as part of such a procedure would tend to thwart this objective by requiring the court to deal with a variety of damage issues of a higher order of complexity." Cortez, 23 Cal.4th at 173-74. The staggering complexity of calculating alleged damages to the "governmental" and "injured person" claimant categories is plainly inconsistent with the streamlined UCL procedure.

argument was raised by the plaintiffs in Day and rejected by the Court of Appeal. Day, 63 Cal.App.3d at 338-39 ("in the absence of a measurable loss [Section 17203] does not allow the imposition of a monetary sanction merely to achieve this deterrent effect.").

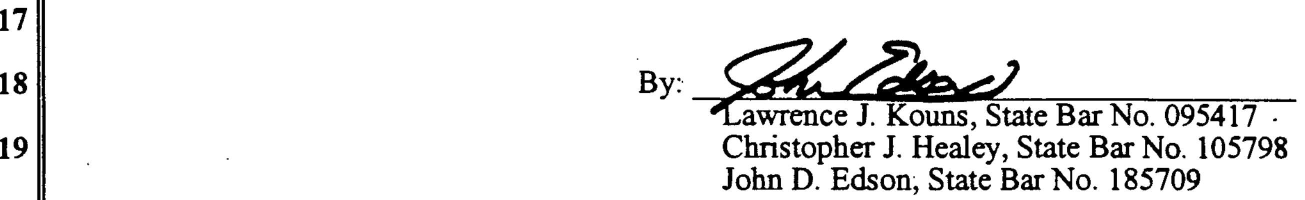
Finally, even if a disgorgement remedy were permissible in this case in theory, it would be barred in practice. Consistent with the equitable purposes of Section 17200, an order for disgorgement must be "objectively measurable as that amount which the defendant would not have received but for the unfairly competitive practice." Day, 63 Cal.App.4th at 339 n. 9. A claim for disgorgement necessarily falters where the amount to be disgorged is not objectively measurable. Id. at 339. Here, plaintiffs cannot even begin to suggest that there is any measurable amount that the defendants have obtained by their allegedly unfair practices. The absence of such a measurable amount makes any disgorgement remedy improper.

VIII. CONCLUSION

For the foregoing reasons, the demurrers of the undersigned defendants should be sustained. Because it is evident that amendment would be futile, defendants respectfully request that the demurrers be sustained without leave to amend.

DATED: August 4, 2000

LUCE, FORWARD, HAMILTON & SCRIPPS LLP



By: ______________________
Lawrence J. Kouns, State Bar No. 095417
Christopher J. Healey, State Bar No. 105798
John D. Edson, State Bar No. 185709

Attorneys for Defendant
STURM, RUGER & COMPANY, INC. and
Co-Liaison Counsel for Defendant
Manufacturers

SEE SIGNATURE PAGES FOR ADDITIONAL COUNSEL AND PARTIES JOINING IN DEMURRERS AND MOTION TO STRIKE

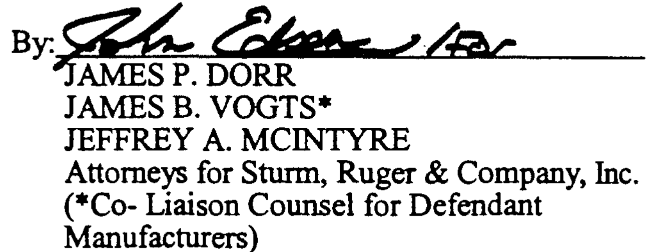
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FIREARMS CASES

SIGNATURE PAGES

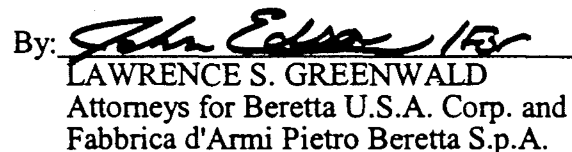
ATTORNEYS FOR MANUFACTURING DEFENDANTS

JAMES P. DORR
JAMES B. VOGTS*
JEFFREY A. MCINTYRE
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive, Suite 2800
Chicago, IL 60606
Tel: (312) 201-2000
Fax: (312) 201-2555



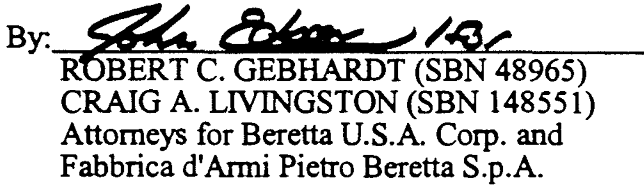
By: ______________________
JAMES P. DORR
JAMES B. VOGTS*
JEFFREY A. MCINTYRE
Attorneys for Sturm, Ruger & Company, Inc.
(*Co- Liaison Counsel for Defendant Manufacturers)

LAWRENCE S. GREENWALD
GORDON, FEINBLATT, ROTHMAN, HOFFBERGER & HOLLANDER, LLC
The Garret Building
223 East Redwood Street
Baltimore, Maryland 21202
Tel: (410) 576-4000
Fax: (410) 576-4246



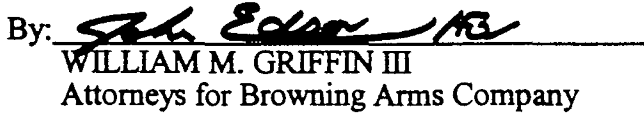
By: ______________________
LAWRENCE S. GREENWALD
Attorneys for Beretta U.S.A. Corp. and Fabbrica d'Armi Pietro Beretta S.p.A.

ROBERT C. GEBHARDT
CRAIG A. LIVINGSTON
SCHNADER HARRISON SEGAL &
LEWIS LLP
601 California Street, Suite 1200
San Francisco, California 94108-2817
Tel: (415) 364-6700
Fax: (415) 364-6766



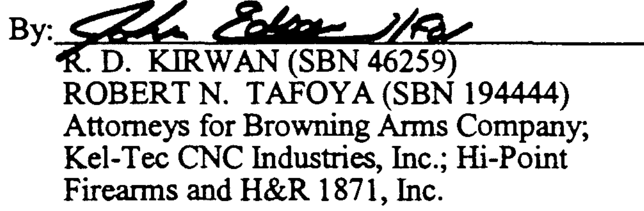
By: ROBERT C. GEBHARDT (SBN 48965)
CRAIG A. LIVINGSTON (SBN 148551)
Attorneys for Beretta U.S.A. Corp. and
Fabbrica d'Armi Pietro Beretta S.p.A.

WILLIAM M. GRIFFIN III
FRIDAY, ELDREDGE & CLARK
2000 Regions Center
400 West Capitol
Little Rock, Arkansas 72201-3493
Tel: (501) 376-2011
Fax: (501) 376-2147



By: WILLIAM M. GRIFFIN III
Attorneys for Browning Arms Company

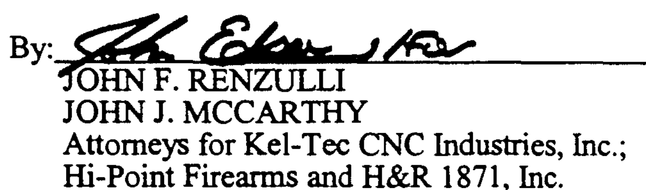
R. D. KIRWAN
ROBERT N. TAFOYA
AKIN, GUMP, STRAUSS, HAUER &
FELD, LLP
2029 Century Park East, Suite 2600
Los Angeles, California 90067
Tel: (310) 229-1000
Fax: (310) 229-1001



By: R. D. KIRWAN (SBN 46259)
ROBERT N. TAFOYA (SBN 194444)
Attorneys for Browning Arms Company;
Kel-Tec CNC Industries, Inc.; Hi-Point
Firearms and H&R 1871, Inc.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOHN F. RENZULLI
JOHN J. MCCARTHY
RENZULLI & RUTHERFORD, LLP
300 East 42nd Street
New York, N.Y. 10017
Tel: (212) 599-5533
Fax: (212) 599-5162

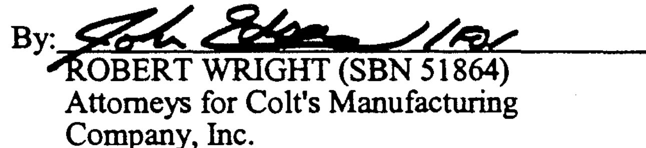


By: ____________________
JOHN F. RENZULLI
JOHN J. MCCARTHY
Attorneys for Kel-Tec CNC Industries, Inc.; Hi-Point Firearms and H&R 1871, Inc.

MICHAEL C. HEWITT
BRUINSMA & HEWITT
380 Clinton Avenue, Unit C
Costa Mesa, California 92626
Tel: (949) 497-1551

By: ____________________
MICHAEL C. HEWITT (SBN 148678)
Attorneys for Bryco Arms and B.L. Jennings, Inc.

ROBERT WRIGHT
WRIGHT & L'ESTRANGE
701 "B" Street, Ste. 1550
San Diego, California 92101
Tel: (619) 231-4844
Fax: (619) 231-4844

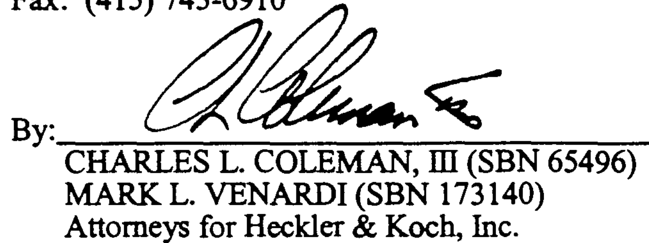


By: ____________________
ROBERT WRIGHT (SBN 51864)
Attorneys for Colt's Manufacturing Company, Inc.

STEVEN A. SILVER
LAW OFFICE OF STEVEN A. SILVER
1077 W. Morton Avenue, Suite C
Porterville, California 93257
Tel: (559) 782-1552
Fax: (559) 782-0364

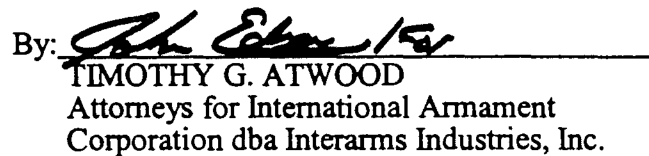
By: ______________________
STEVEN A. SILVER (SBN 143926)
Attorney for Excel Industries, Inc.

CHARLES L. COLEMAN, III
MARK L. VENARDI
HOLLAND & KNIGHT LLP
44 Montgomery Street
San Francisco, California 94104
Tel: (415) 743-6900
Fax: (415) 743-6910



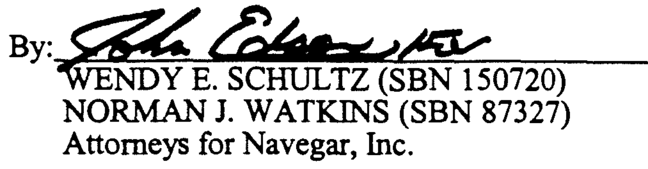
By: ______________________
CHARLES L. COLEMAN, III (SBN 65496)
MARK L. VENARDI (SBN 173140)
Attorneys for Heckler & Koch, Inc.

TIMOTHY G. ATWOOD
237 Canal Street
Shelton, CT 06484
Tel: (203) 924-4464
Fax: (203) 924-1359



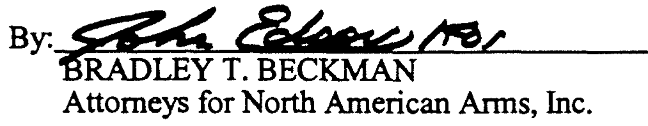
By: ______________________
TIMOTHY G. ATWOOD
Attorneys for International Armament Corporation dba Interarms Industries, Inc.

WENDY E. SCHULTZ
NORMAN J. WATKINS
LYNBERG & WATKINS, P.C.
888 So. Figueroa Street, 16th Floor
Los Angeles, California 900178-5465
Tel: (213) 624-8700
Fax: (213) 892-2763



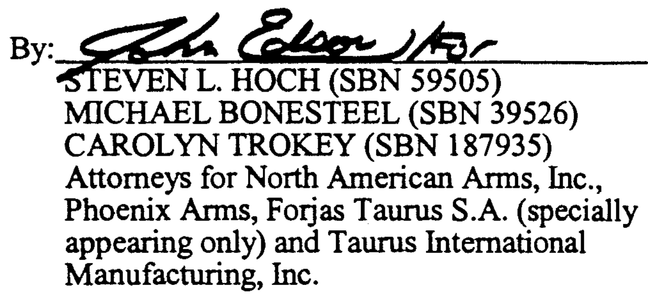
By: ______________________
WENDY E. SCHULTZ (SBN 150720)
NORMAN J. WATKINS (SBN 87327)
Attorneys for Navegar, Inc.

BRADLEY T. BECKMAN
BECKMAN & ASSOCIATES
1601 Market Street, Suite 2330
Philadelphia, PA 19103
Tel: (215) 569-3096
Fax: (215) 569-8769



By: ______________________
BRADLEY T. BECKMAN
Attorneys for North American Arms, Inc.

STEVEN L. HOCH
MICHAEL BONESTEEL
CAROLYN TROKEY
JOE DURAN
HAIGHT, BROWN & BONESTEEL LLP
1620 26th Street, Suite 4000 North
Santa Monica, California 90404-4013
Tel: (310) 449-6020
Fax: (310) 829-5117



By: ______________________
STEVEN L. HOCH (SBN 59505)
MICHAEL BONESTEEL (SBN 39526)
CAROLYN TROKEY (SBN 187935)
Attorneys for North American Arms, Inc., Phoenix Arms, Forjas Taurus S.A. (specially appearing only) and Taurus International Manufacturing, Inc.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TIMOTHY A. BUMANN
DANA S. MANCUSO
BUDD LARNER GROSS ROSENBAUM
GREENBERG & SADE
127 Peachtree Street, N.E.
Atlanta, Georgia 30303
Tel: (404) 688-3000
Fax: (404) 688-0888

By: John Edson / for
TIMOTHY A. BUMANN
DANA S. MANCUSO
Attorneys for Taurus International Manufacturing, Inc. and Forjas Taurus S.A. (specially appearing only)

MICHAEL J. ZOMCIK
MICHAEL BRANISA
ROBERT TARICS
TARICS & CARRINGTON, P.C.
5005 Riverway, Suite 500
Houston, Texas 77056
Tel: (713) 729-4777
Fax: (713) 227-0701

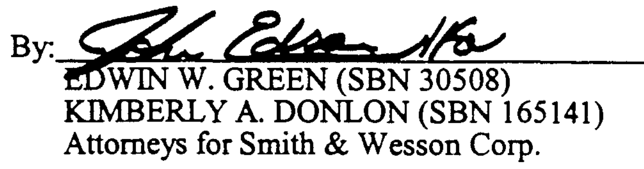
By: John Edson / for
MICHAEL J. ZOMCIK
MICHAEL BRANISA
ROBERT TARICS
Attorneys for Phoenix Arms

ROBERT L. JOYCE
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER
150 East 42nd Street
New York, New York 19917
Tel: (212) 490-3000
Fax: (212) 490-3038

By: John Edson / for
ROBERT L. JOYCE
Attorneys for Sigarms, Inc.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EDWIN W. GREEN
KIMBERLY A. DONLON
ALLEN MATKINS LECK GAMBLE &
MALLORY LLP
515 South Figueroa Street
Seventh Floor
Los Angeles, California 90071
Tel: (213) 622-5555
Fax: (213) 620-8816



By: ______________________
EDWIN W. GREEN (SBN 30508)
KIMBERLY A. DONLON (SBN 165141)
Attorneys for Smith & Wesson Corp.

JEFF NELSON
SHOOK, HARDY & BACON, LLP
1200 Main Street, 27th Floor
Kansas City, Missouri 64105-2118
Tel: (816) 474-6550
Fax: (816) 421-5547

By: ______________________
JEFF NELSON
Attorneys for Smith & Wesson Corp.