

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JAMES M. MALONEY,

Plaintiff,

CV 03-786

- against -

ELIOT SPITZER, in his official capacity as
Attorney General of the State of New York,
and his successors,

(Spatt, J.)
(Orenstein, M.J.)

Defendants.

-----X

**BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT, PURSUANT TO FRCP RULE 56**

Respectfully submitted,

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PRELIMINARY STATEMENT

Attorney General Eliot Spitzer is named as a party Defendant in this proceeding by Plaintiff *pro se* (an attorney and martial arts expert), who brings this Motion for Summary Judgment pursuant to FRCP Rule 56 seeking a declaratory judgment that New York State Penal Law §§ 265.00 through 265.02 are unconstitutional and a violation of Plaintiff's Second and Ninth Amendment rights, to the extent such statutes criminalize the possession of "nunchaku" in the home. *See* Plaintiff's Memorandum of Law, pp. 8-19; *cf.* Complaint, Third and Sixth Causes of Action. Plaintiff cannot prevail and the Complaint must be dismissed, because:

1. This Court lacks subject matter jurisdiction in this matter, as this is not a justiciable case and controversy under Article III of the Constitution;

2. Plaintiff does not have standing to pursue this case as captioned, because:

(A) he cannot show that New York State Attorney General Eliot Spitzer (the only Defendant remaining in the case) is likely to enforce the provisions of Penal Law §§ 265.00 - 265.02 against Plaintiff;

(B) Plaintiff lacks standing to raise any claims with regard to Penal Law § 265.02, since based on the facts of this case, he could not be prosecuted

under the provisions of Penal Law § 265.02; and

(C) with regard to his Second Amendment claim, Plaintiff is not a member of a militia and therefore lacks standing to raise this particular constitutional challenge, as the Second Amendment does not guarantee a private individual's right "to keep and bear arms"; and

3. Plaintiff fails to state a cause of action for violation of any rights secured by the Second or Ninth Amendments.

STATEMENT OF FACTS

Based on an incident occurring at Plaintiff's home on or about August 24, 2000, Plaintiff was arrested by the Nassau County Police and charged by the Nassau County District Attorney with six violations of the Penal Law. *See* Defendant's Counter-Statement of Material Facts, para. "A"; *see* Appendix "A" to the Brief, Plea Allocution. Included among the charges was a violation of Penal Law § 265.01, based on Plaintiff's possession of nunchuks (also known as "chuka sticks" or "nunchaku"), a martial arts weapon the possession of which in New York State is outlawed by Penal Law § 265.01 (1). Incidental to Plaintiff's arrest, the nunchuks were confiscated by the Nassau County Police. *See* Complaint, ¶ 6. On January 28, 2003, Plaintiff pled guilty in First District Court, County of Nassau

before Hon. Thomas Feinman to one count of disorderly conduct involving a .38 caliber revolver, a violation, pursuant to Penal Law § 240.20 (7), and agreed to the County's destruction of the nunchuks, in satisfaction of all charges pending. *See* Defendant's Counter-Statement of Material Facts, para. "A"; *see* Appendix "A" to the Brief, Plea Allocution.

On or about February 8, 2003, Plaintiff commenced this action pursuant to 28 U.S.C. §§ 1331 and 2201 against Nassau County District Attorney Denis Dillon and New York State Attorney General Eliot Spitzer in their official capacities, seeking a declaratory judgment that New York State Penal Law §§ 265.00 through 265.02 are unconstitutional. More specifically, Plaintiff claimed that the provisions of those statutes, insofar as they apply to the possession of chuka sticks in the home, are an unconstitutional burden on rights secured to Plaintiff by the First, Second, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, and in addition, "unjustly restrain and deprive Plaintiff and other residents of New York from pursuing and obtaining happiness and safety". *See* Comp., ¶¶ 27-44.¹ On or about April 11, 2003, Plaintiff filed a stipulation of

¹ Plaintiff apparently has abandoned all but the Second and Ninth Amendment claims, enumerated in the Third and Sixth Causes of Action, as his Memorandum of Law in Support of the Motion for Summary Judgment is silent as to all the other Causes of Action. *Cf.* Complaint, Plaintiff's Memorandum of Law in Support.

discontinuance with the Court, discontinuing the action as against Defendant Nassau County District Attorney Denis Dillon, without prejudice to restoring him to the action at a later date, if necessary, pursuant to FRCP Rule 41(a)(1)(ii).

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is appropriate if it appears that “there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Summary judgment may be had only when a review of the evidence, examined in the light most favorable to the plaintiff, demonstrates that “no genuine issue of material fact” exists which would warrant a grant of relief to the plaintiff. Fariello v. Campbell, 860 F.Supp. 54, 63 (E.D.N.Y. 1994), affd., 22 F.3d 1090 (2nd Circ. 1994), and the Court must resolve “all ambiguities and draw all reasonable inferences in the light most favorable to the party opposing the motion”. Willner v. Town of N. Hempstead, 977 F.Supp. 182, 195 (E.D.N.Y. 1997)(Spatt, J.). In order for a party to resist a motion for summary judgment, he or she must come forward with “specific facts showing that a genuine issue for trial exists.” Fariello v. Campbell, 860 F.Supp. 54, 63 (E.D.N.Y. 1994), affd., 22 F.3d 1090 (2nd Circ. 1994), citing to Western World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2nd

Circ. 1990). To defeat a motion for summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50. Merely "offering purely conclusory allegations" is insufficient to defeat a summary judgment motion, Meiri v. Dacon, 759 F.2d 989, 998 (2nd Circ. 1985), as is offering evidence in opposition that is merely speculative. *See* Dister v. Continental Group, Inc., 859 F.2d 1108, 1116-1117 (2nd Circ. 1988). "Mere conclusory allegations, speculation or conjecture will not avail a party resisting summary judgment." Fariello v. Campbell, 860 F.Supp. 54, 63 (E.D.N.Y. 1994), *affd.*, 22 F.3d 1090 (2nd Circ. 1994).

**STANDARD OF REVIEW FOR DECLARATORY JUDGMENT
AND SUBJECT MATTER JURISDICTION UNDER ARTICLE III**

The Declaratory Judgment Act (28 USC § 2201 *et. seq.*) invests the district courts with discretionary authority to exert jurisdiction over an action in which the plaintiff seeks declaratory relief. ("In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not

further relief is or could be sought.” 28 USC § 2201 (a). In considering whether to exercise this authority, the court must compare the facts at issue against the two-prong standard adopted by the Second Circuit, to determine whether (1) a declaratory judgment in the case before it would serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether the judgment would finalize the controversy and offer relief from uncertainty. Dow Jones & Co. v. Harrods Ltd., 346 F.3d 357, 359-360 (2nd Circ. 2003).

Preliminarily, however, three basic considerations must be examined by the court when deciding whether to exercise the discretionary authority granted by the Act. First, does the action set forth in the pleadings raise an "actual controversy"; second, does this case come within the ambit of cases for which the Act was intended, and third, are there circumstances present in this case that render it sufficiently compelling to induce the Court to exercise this discretionary authority? *See Dow Jones & Co. v. Harrods Ltd.*, 237 F.Supp.2d 394 (S.D.N.Y. 2002), *affd.*, 346 F.3d 357 (2nd Circ. 2003).

Actions brought under the Declaratory Judgment Act are justiciable if, and only if, there is an "actual controversy" presented by the facts of the case. 28 U.S.C. § 2201 (a). This mirrors the criteria examined when determining whether a particular case satisfies the "case or controversy" requirement giving rise to federal

court jurisdiction derived from Article III of the United States Constitution. “The judicial power does not extend to abstract questions claims based merely upon ‘assumed potential invasions’ of rights are not enough to warrant judicial intervention.” See Public Serv. Comm’n of Utah v. Wycoff Co., 344 U.S. 237, 241- 42 (1952). The Court will examine whether the facts as alleged by plaintiff support the notion that there exists between the parties a “substantial controversy” of “sufficient immediacy and reality to warrant the issuance of a declaratory judgment”. See Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

This analysis also necessarily looks at whether the issue plaintiff brings before the federal court is ripe for its intervention. If the legal consequence feared by the plaintiff seeking declaratory relief merely is a possibility, or even a probability based on the occurrence of some future event that may not occur, the case is not ripe for federal court review and the Court should refrain from invoking its discretionary authority under 28 U.S.C. § 2201 (a). See Dow Jones & Co. v. Harrods Ltd., 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *affd.*, 346 F.3d 357 (2nd Circ. 2003)(citing Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 580 - 81 (1985)).

The question of standing also informs the analysis of whether plaintiff

correctly has invoked the court's jurisdiction under Article III and 28 U.S.C. § 2201 (a). Plaintiff can satisfy the standing analysis if he or she demonstrates (1) actual present harm or *a significant possibility of future harm*; and (2) a substantial and continuing controversy *between the parties to the lawsuit*; and (3) the ability of the court to issue relief that will redress plaintiff's grievance. See Bauer v. State of Texas, 341 F.3d 352, 357 (5th Circ. 2003)(emphasis added).

In any case, 28 U.S.C. § 2201 does not act as an independent source of jurisdictional power for the federal courts - rather, it may only be utilized where the federal court already possesses subject matter jurisdiction over the issues before it. Time, Inc. v. Regan, 539 F.Supp. 1371, 1373 (S.D.N.Y. 1982), *affd. in part, rev. in part*, Regan v. Time, 468 U.S. 641 (1984). The discretionary authority granted by 28 U.S.C. § 2201 (a) is reviewed deferentially on appeal, and generally will be set aside only where the lower court is found to have abused its discretion by basing its ruling on a mistake in law or fact. See Dow Jones & Co. v. Harrods Ltd., 346 F.3d 357, 359-360 (2nd Circ. 2003)(citing Wilton v. Seven Falls Co., 515 U.S. 277, 289 (1995) and U.S. v. Couto, 311 F.3d 179, 185 (2nd Circ. 2002)).

ARGUMENT

Point I

Summary Judgment Must Be Denied And The Complaint Dismissed, Because The Court Lacks Subject Matter Jurisdiction Under Article III

Based on the facts as alleged, Plaintiff cannot demonstrate that the Court possesses subject matter jurisdiction over his claims, as he does not possess an “actual case or controversy” involving the New York State Attorney General, the only named Defendant remaining in this lawsuit. In addition, Plaintiff lacks standing to bring this case, because he cannot show that he is likely to be prosecuted by the New York State Attorney General for violations of Penal Law §§ 265.00 - 265.02. Moreover, Plaintiff is not a member of a militia and therefore lacks standing to raise a constitutional challenge to the statutes under the Second Amendment (*see Point II, supra*).

A. Plaintiff Is In No Danger Of Being Prosecuted By The New York State Attorney General For Possessing Nunchuks In His Home.

Article III requires a potential plaintiff seeking access to the federal courts to demonstrate an “actual case and controversy”, such that he or she will be faced with actual present harm or a significant possibility of future harm, if the court doors are closed to him. The plaintiff must also demonstrate that there exists

a substantial and continuing controversy between the parties the plaintiff seeks to bring before the court. This Plaintiff can satisfy neither requirement.

It is well settled that in New York State, the local district attorneys alone generally decide whom to prosecute, when and in what manner the prosecution should be conducted. Baez v. Hennessy, 853 F.2d 73, 77 (2nd Circ. 1988), *cert. den.*, 488 U.S. 1014 (1989). Under certain limited circumstances, however, the Attorney General may undertake enforcement of criminal statutes. Such action is taken rarely, however, and only after the proper statutory authority has been invoked to vest the Attorney General with such powers.

The question of the New York State Attorney General's prosecutorial powers was examined by the New York State Court of Appeals in People v. Gilmour, 98 NY2d 126 (Ct. App. 2002). As explained by the Court:

"The New York State Constitution establishes the offices of Attorney General (*see* NY Const, art V, § § 1, 4) and District Attorney (*id.* at art XIII, § 13), but does not specify or allocate the powers of the respective offices. . . . Since 1796 the Legislature has never accorded general prosecutorial power to the Attorney General (*see People v DiFalco*, 44 N.Y.2d 482, 486, 377 N.E.2d 732, 406 N.Y.S.2d 279 [1978] [*per curiam*]). . . . The Attorney-General has no general authority [to conduct prosecutions] and is '*without any prosecutorial power except when specifically authorized by statute*'" (*People v Romero*, 91 N.Y.2d 750, 754, 675 N.Y.S.2d 588, 698 N.E.2d 424 [1998], quoting Della Pietra v State of New York, 71 N.Y.2d 792, 797, 530 N.Y.S.2d 510, 526 N.E.2d 1 [1988] [*emphasis in original*]).

People v. Gilmour, 98 NY2d 126, 127 (Ct. App. 2002).

The Gilmour Court went on to note that:

The Attorney General enjoys a sweeping statutory array of prosecutorial and other law-enforcement authority: to prosecute business frauds and other deceptive practices (*see Executive Law § 63 [12]; General Business Law § § 349 et seq.*); commence civil investigations in the public interest (*see Executive Law § 63 [8]*); bring actions to remove persons unlawfully in public or corporate office (*see Executive Law § 63-b*); enforce the State's anti-discrimination and human rights laws (*see Executive Law § 63 [9]-[10]*); enforce statutes regulating toxic substances in the workplace (*see Labor Law § 882*); prosecute "all persons indicted for corrupting or attempting to corrupt any member or member-elect of the legislature, or the commissioner of general services" (*Executive Law § 63 [4]*); bring actions to recover public funds (*see Executive Law § 63-c [1]*); defend the State's remainder interest in certain trusts (*see Executive Law § 63 [11]; Social Services Law § 366 [2] [b] [2]*); and other powers too numerous to mention (*see generally 96 NY Jur 2d, State of New York § 24 et seq.*).

Gilmour, 98 NY2d 126, 131.

Pursuant to Executive Law § 63 (3), the head of any department, authority, division or agency may activate the Attorney General's "latent powers [of prosecution]", by requesting the Attorney General to commence a prosecution under the authority of Executive Law § 63 (3). When this occurs, the Attorney General has the prosecutorial powers otherwise held by the District Attorney.

Gilmour, 98 NY2d 126, 131. Absent such a specific request, the Attorney General's powers are strictly derived from the statute, and the state courts strictly

interpret the source and nature of that prosecutorial authority. *See* People v. Romero, 91 N.Y.2d 750 (Ct. App. 1998)(*held*: although the district attorneys had plenary prosecutorial power in the counties where they were elected, the attorney general had no such general authority and was without any prosecutorial power except when specifically authorized by statute). The fact that the Attorney General is charged with defending the constitutionality of challenged state statutes and defending the state's interests from suit does not imbue him with authority to enforce statutes and concomitantly, does not make him a proper party defendant to an action challenging the constitutionality of a statute. *See* Warden v. Pataki, 35 F. Supp. 2d 354,359 (S.D.N.Y. 1999), *affd.*, Chan v. Pataki, 201 F.3d 430 (2nd Circ. 1999), *cert. den.*, Chan v. Pataki, 531 U.S. 849 (2000). Plaintiff has failed to allege that the head of any state agency has requested the Attorney General to prosecute Plaintiff for violations of the Penal Law at issue in this case. Moreover, the possibility that such a request might be made is so remote as to be practically nonexistent. Indeed, after Plaintiff was arrested by the Nassau County Police, the individual who prosecuted Plaintiff in this case was the Nassau County District Attorney.

Notwithstanding Plaintiff's sweeping statement that the Attorney General's recent investigation into the illegal transport of and sales of illegal

weapons indicates his willingness or intention to invade the homes of purchasers of nunchuks in an effort to confiscate the items and prosecute them under the state's criminal statutes (*see* Plaintiff's Memorandum of Law, pp. 4 -6), neither Plaintiff nor any other nunchuk aficionado appear to be in imminent danger of a raid by the Attorney General's office. A review of the Assurance of Discontinuance executed in the Bud-K investigation shows that the Attorney General did not seek to prosecute individual owners of nunchuks (such as Plaintiff), but rather brought civil proceedings against the manufacturer of those items, to redress that company's widespread consumer abuses and stop it from engaging in fraudulent practices in the future. In that instance, the Attorney General was acting *on behalf of* the victims/purchasers (*i.e.*, people such as Plaintiff) of the contraband items. The Assurance of Discontinuance includes provisions calling for Bud-K to issue a recall notice to New York consumers and to provide the Attorney General with a list of the names of New York State consumers who had purchased the prohibited items through Bud-K's misleading marketing practices. The ability to reach out to the numerous defrauded consumers allowed the Attorney General to monitor Bud-K's compliance with the terms of the Assurance. *See* Appendix "B" to the Brief in Opposition, Assurance of Discontinuance In the Matter of Bud-K.

There is no reference, nor any indication in that document, that the

Attorney General intended then, or does now, to prosecute the individual purchasers/owners of these contraband items. Furthermore, Plaintiff also cannot show that any agency or authority has triggered the Attorney General's latent prosecutorial powers by requesting the Attorney General to do so. In the absence of such a request and given the strict limitation on the Attorney General's prosecutorial powers, Plaintiff's fear of prosecution by this named Defendant simply is unrealistic. The New York State Attorney General simply is the wrong party Defendant in this action. Until Plaintiff has named and served a defendant (*i.e.*, the Nassau County District Attorney) who has the authority to initiate such a prosecution against Plaintiff, *and* until Plaintiff can show a significant possibility of future harm and the existence of a substantial and continuing controversy between Plaintiff and that defendant, he will not possess standing to bring this suit, and lacks standing to bring this suit against the New York State Attorney General.

B. Based On The Facts As Alleged, Plaintiff Should Be In No Danger Of Prosecution For Violation of Penal Law § 265.02

Penal Law § 265.02 provides that a person is guilty of criminal possession of a weapon in the third degree (a class D felony) when he possesses contraband weapons under certain conditions. However, none of the provisions describing the elements of a crime under Penal Law § 265.02 fit the facts of this

case as alleged by Plaintiff, since Plaintiff pled guilty to only one count of disorderly conduct (Penal Law § 240.20 (7)). Disorderly conduct is a violation, not a crime, which by definition is limited to felonies and misdemeanors. *See* Penal Law § 10.00 (6). Absent some specific factual averment by Plaintiff that would bring him within any subsection of Penal Law § 265.02, Plaintiff lacks standing to sue anyone under this statute, let alone the Attorney General.

C. Based On The Facts As Alleged, Plaintiff Does Not Possess A Valid Claim Under The Second Amendment

It has long been established that the protections of the Second Amendment inure to the benefit of a state militia, do not guarantee an individual right to bear arms and/or own weapons, do not apply to anything other than firearms and do not apply to state actions, but only prevent federal government encroachment upon rights secured thereunder (*see Point II, infra*). Plaintiff has not alleged that he belongs to a state militia, is not challenging actions by the federal government to infringe upon the right of a state militia to bear arms and asks the Court to equate nunchuks with the type of firearms arguably envisioned by the Framers when they wrote the Constitution and Bill of Rights. Plaintiff lacks standing to bring this suit asking for a declaration that Penal Law §§ 265.00 - 265.02 violates the Second Amendment.

Point II

Summary Judgment Must Be Denied And The Complaint Dismissed, Because Plaintiff Fails To State A Cause of Action For Violations of Rights Secured By The Second or Ninth Amendments

A. The Second Amendment

The Second Amendment to the United States Constitution states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 462 - 63 (EDNY 2003). Currently, there are two schools of judicial thought interpreting the applicability and reach of the Second Amendment. The overwhelming majority of federal courts follow the long-standing Supreme Court interpretation of the Second Amendment: namely, that the Second Amendment does not secure a fundamental, private right of gun ownership, but rather, protects the right of state militias to bear arms, unfettered by constraints issued by the United States Congress. To that end, the term “arms” is deemed to include those firearms that would reasonably be expected to form part of the arsenal of an organized militia. *See, e.g., United States v. Miller*, 307 U.S. 174, 178 (1939); United States v. Toner, 728 F.2d 115, 128 (2nd Circ. 1984)(*see also* subsequent unpublished decisions of the 2nd Circuit, following Toner (United

States v. Sanchez-Villar, 99 Fed. Appx. 256, 258 (2004); United States of America v. Manuel, 64 Fed. Appx. 823, 827 (2003); United States v. Scanio, 165 F.3d 15 (Table), (1998); Lawson v. Kirschner, 152 F.3d 919 (Table), (1998). *See also*, *e.g.*, United States v. Cruikshank, 92 U.S. 542 (1875); Presser v. Illinois, 116 U.S. 252 (1886); Miller v. Texas, 153 U.S. 535 (1894); Lewis v. United States, 445 U.S. 55 (1980). *But see* United States v. Emerson, 270 F.3d 203 (5th Circ. 2001), *cert. den.*, 536 U.S. 907 (2002). Consistent with the view that the right to own and bear arms is not a fundamental right, the Supreme Court has repeatedly rejected the proposition that the entire Bill of Rights has been incorporated through the 14th Amendment Due Process clause to apply to the states, Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1317 - 1318 (EDNY 1996), as recently as 1964. *See* Malloy v. Hogan, 378 U.S. 1, 4 fn. 2 (1964), citing Presser v. Illinois, 116 U.S. 252, 265 for the proposition that Second Amendment guarantees were not safeguarded against state action by the Privileges and Immunities Clause or other provision of the Fourteenth Amendment.

Plaintiff would have this Court reject long-standing Supreme Court precedent that is nearly universally-recognized in the Second Circuit, as well as among our sister circuits, in favor of the strained interpretation of the Second Amendment's reach as expressed by the Fifth Circuit in United States v. Emerson,

270 F.3d 203, 264 (5th Circ. 2001)(“We agree . . . that the Second Amendment protects the right of individuals to privately keep and bear their own firearms that are suitable as individual, personal weapons and are not of the general kind or type excluded by Miller, regardless of whether the particular individual is then actually a member of a militia”)(citing United States v. Miller, 307 U.S. 174, 178 (1939) for the proposition that private ownership of weapons such as sawed-off shotguns - *i.e.*, arms commonly used by criminals, rather than a militia - does not enjoy Second Amendment protection). However, the decision in Emerson has limited, if any, utility in the context of this case, because the Emerson court considered the constitutionality of a federal statute (18 USC § 922(g)(8) prohibiting interstate transport of firearms by individuals who are under court order restraining them from stalking, harassing or threatening an “intimate” partner or his or her child, and not, as here, a state statute prohibiting ownership of outlawed weapons.

Plaintiff also erroneously points to Silveira v. Lockyer as another case rejecting long-standing precedent in this area. However, the Silveira court specifically limited its holding to whether the plaintiff in that case had standing to sue, and never reached the question of whether the Second Amendment enjoined state action. *See* Silveira v. Lockyer, 312 F.3d 1052, 1067, n. 17 (9th Circ. 2003).

Plaintiff also asks the Court to take a “global” approach when finding

the meaning of “arms” for purposes of applying the Second Amendment. While nunchaku may have enjoyed a long and varied usage in Far Eastern culture, it is highly doubtful that the Framers envisioned a nunchaku-wielding militia valiantly defending the fledgling States from British imperialism when it drafted the Second Amendment. Furthermore, the tools of modern warfare encompass not only weapons capable of precisely targeting and decimating large numbers of combatants, but easily portable weapons of mass destruction capable of obliterating a civilization. It is highly unlikely that the nunchaku would constitute the weapon of choice for a modern militia.

Until the Supreme Court reconsiders and explicitly rules on the Second Amendment issues raised by Plaintiff, the law to be followed is the law that was expressed by the Supreme Court in United States v. Miller, 307 U.S. 174, 178 (1939), United States v. Cruikshank, 92 U.S. 542 (1875), Presser v. Illinois, 116 U.S. 252 (1886), Miller v. Texas, 153 U.S. 535 (1894) and Lewis v. United States, 445 U.S. 55 (1980). As the Supreme Court emphatically declared in Agostini v. Felton, 521 U.S. 203, 237 - 238 (1997):

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the

case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. 477 at 484 (1989).

The Court should deny the Motion for Summary Judgment and dismiss the Complaint, based on established Supreme Court and 2nd Circuit precedent.

B. The Ninth Amendment

The Ninth Amendment states that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Ninth Amendment provides a rule of construction for interpretation of the applicability and reach of those rights and powers enumerated in the Constitution and Bill of Rights. "The full scope of the specific guarantees is not limited by the text, but embraces their purpose to provide broad freedom from all 'arbitrary impositions and purposeless restraints'". *United States v. Bifield*, 702 F.2d 342, 349 (2nd Circ. 1983), *cert. den.*, *Bifield v. United States*, 461 U.S. 931 (1983).

The Ninth Amendment "has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation." *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1125

(9th Circ. 1996), citing Schowengerdt v. United States, 944 F.2d 483, 490 (9th Circ. 1991) (rejecting Navy civilian engineer's Ninth Amendment claim arising out of allegedly improper investigation and discharge), *cert. den.*, 503 U.S. 951 (1992); *see also* Strandberg v. City of Helena, 791 F.2d 744, 748-49 (9th Circ. 1986) (rejecting plaintiffs' § 1983 claim based on the penumbra of the Ninth Amendment in the absence of some specific constitutional guarantee); *accord* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 776 n.14 (2nd ed. 1988) ("It is a common error, but an error nonetheless, to talk of 'ninth amendment rights.' The ninth amendment is not a source of rights as such; it is simply a rule about how to read the Constitution.")(emphasis in original).

Although the Supreme Court has yet to consider this question, the Fifth, Sixth, Seventh, Ninth and Tenth Circuits have explicitly rejected the theory that the Ninth Amendment encompasses a right to bear arms independent of the Second Amendment. *See* United States v. Broussard, 80 F.3d 1025, 1041 (5th Circ.) ("We are not persuaded to discover or declare a new constitutional right to possess weapons under the Ninth Amendment on the basis of Merritt's proffered 'authority' [a law review article]."), *cert. den.*, Merritt v. U.S., 519 U.S. 906 (1996); United States v. Warin, 530 F.2d 103, 108 (6th Circ.) (rejecting defendant's Ninth Amendment challenge because "we simply do not conceive of the possession of an

unregistered submachine gun as one of those 'additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments'" (quoting Griswold v. Connecticut, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring)), *cert. den.*, 426 U.S. 948 (1976); Quilici v. Village of Morton Grove, 695 F.2d 261, 271 (7th Circ. 1982) ("Appellants may believe the ninth amendment should be read to recognize an unwritten, fundamental, individual right to own or possess firearms; the fact remains that the Supreme Court has never embraced this theory."), *cert. den.*, 464 U.S. 863 (1983); San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1125, (9th Circ. 1996)("We join our sister circuits in holding that the Ninth Amendment does not encompass an unenumerated, fundamental, individual right to bear firearms. *See* William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 *Duke L.J.* 1236, 1248 n.43 (1994) ("Recourse to the same materials to fashion a Ninth Amendment ('unenumerated') right is not only largely replicative of the Second Amendment inquiry, but also singularly inappropriate under the circumstances - the right to bear arms is not left to the vagaries of Ninth Amendment disputes at all."); United States v. Baer, 235 F.3d 561, 564 (10th Circ. 2000)("We reject Mr. Baer's contention that the federal firearms statutes violate the Ninth Amendment").

Plaintiff asks this Court to hold that unenumerated liberty rights fall within the ambit of the Ninth Amendment and provide him with a “liberty interest” - the freedom to own and possess within his home, weapons the ownership of which has been unconstitutionally prohibited by Penal Law §§ 265.00 - 265.02. The Court should reject Plaintiff’s invitation to forge new paths in the interpretation of the Ninth Amendment, particularly in light of the holdings in sister circuits that the right to bear arms is encompassed in the Second Amendment, not the Ninth Amendment.

CONCLUSION

For the foregoing reasons, Plaintiff’s Motion For Summary Judgment should be denied and the Complaint dismissed.

Dated: October 13, 2004
Mineola, New York

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Attorney General of the State of New York

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APPENDIX A

1 DISTRICT COURT OF THE COUNTY OF NASSAU
FIRST DISTRICT PART: CRIMINAL 3

2 -----X

3 THE PEOPLE OF THE STATE OF NEW YORK, :

4 -against- :

5 JAMES MALONEY, :

6 DEFENDANT. :

-----X

Docket Number
2000NA017920

7 January 28, 2003
8 99 Main Street
Hempstead, New York 11550

9 B E F O R E:

10 HONORABLE THOMAS FEINMAN, Presiding

11

12 A P P E A R A N C E S:

13 DENIS DILLON, ESQ.
District Attorney - Nassau County
14 BY: ROBERT FORMICHELLI, ESQ.
Assistant District Attorney
15 For The People

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17 DENNIS M. LEMKE, ESQ.
114 Old Country Road
18 Mineola, New York 11501
Attorney for the defendant

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CHRISTINE ZALENSKI
Official Court Reporter

PROCEEDINGS

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1 COURT CLERK: For disposition, 31, James Maloney.

2 MR. LEMKE: For Mr. Maloney, your Honor, Dennis
3 Lemke, 114 Old Country Road, Mineola, New York.

4 MR. FORMICHELLI: Under docket 1792 of 2000. The
5 defendant is charged with six violations of the Penal
6 Law. With respect to the first count which charges a
7 violation of Penal Law Section 265.01 --

8 THE COURT: Which is count two.

9 MR. FORMICHELLI: Which is court count two, People
10 move to amend and reduce to a violation of Penal Law
11 Section 240.20(7). Move to dismiss in satisfaction all
12 remaining counts on the docket.

13 The offer is contingent on the defendant pleading
14 guilty I as outlined, waiving the right to prosecution by
15 way of information, waiving any defects in the accusatory
16 instrument, waiving the right to appeal, consenting to
17 the destruction of all the weapons which form the basis
18 of the four counts charging Penal Law Section 265.01.

19 MR. LEMKE: And the chuka sticks.

20 MR. FORMICHELLI: And the chuka sticks.

21 MR. LEMKE: We join in the People's application
22 with the understanding I think as a matter of law after
23 People's witness, Dr. Siegel, evaluated my client, there
24 was a finding, so those matters would have been dismissed
25 anyway.

PROCEEDINGS

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1 As to the other matters, we do join in the
2 People's application. We do submit to the destruction of
3 all unlicensed handguns and there were other items we
4 will be getting back.

5 COURT CLERK: Please raise your right hand.

6 (Whereupon, the defendant complies.)

7 COURT CLERK: Do you swear or affirm to tell the
8 truth, the whole truth and nothing but the truth?

9 THE DEFENDANT: I do.

10 COURT CLERK: Lower your hand. State your name,
11 spelling your last, and give your address in a loud,
12 clear voice for the court reporter.

13 THE DEFENDANT: James M. Maloney. M-A-L-O-N-E-Y.
14 33 Bayview Avenue, Port Washington, 11050.

15 THE COURT: Mr. Maloney, you understand what's
16 taking place here today, correct?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: You understand you're pleading guilty
19 to one count, disorderly conduct, pursuant to Section
20 240.20(7) of the Penal Law?

21 THE DEFENDANT: Yes.

22 THE COURT: You've also heard your attorney
23 consent to the destruction and forfeiture of all the
24 unlicensed handguns and the chuka sticks in this case.

25 THE DEFENDANT: Yes, sir.

PROCEEDINGS

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1 THE COURT: You also consent to that?

2 THE DEFENDANT: I do.

3 THE COURT: Do you acknowledge that on August 23,
4 2000 at 2:03 p.m. at 33 Bayview Avenue, Port Washington,
5 New York, Nassau County you did engage in conduct -- I'm
6 sorry.

7 Mr. Formichelli, you said the first count of the
8 weapons? The first count which is count two involves the
9 chuka sticks.

10 MR. FORMICHELLI: I'm sorry. I wanted one of the
11 firearms.

12 THE COURT: That's count three.

13 MR. FORMICHELLI: Then People's application is
14 amended to reflect count three.

15 MR. LEMKE: Again, no objection, Your Honor.

16 THE COURT: You acknowledge on that date, time and
17 place you did engage in disorderly conduct involving
18 yourself and a 38 caliber revolver?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: Count three was replaced by count
21 seven on a prior date. Then his application is to count
22 seven.

23 MR. FORMICHELLI: I believe we may be referring to
24 count seven through 12.

25 THE COURT: All I have is the original.

PROCEEDINGS

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1 COURT CLERK: The file is marked count three was
2 dismissed and replaced by count seven on a prior date.

3 THE COURT: Count seven is also the 38.

4 MR. FORMICHELLI: The People's application remains
5 the same except as to the extent count seven we're
6 anticipating a plea of guilty.

7 THE COURT: Now you're joining in that application
8 nunc pro tunc?

9 MR. LEMKE: Yes, your Honor.

10 THE COURT: The plea of guilty is acceptable.
11 Ready for sentencing?

12 MR. LEMKE: Yes, your Honor.

13 THE COURT: Waive any statutory delay?

14 MR. LEMKE: Yes.

15 THE COURT: Mr. Maloney, anything you want to say
16 prior to sentence?

17 THE DEFENDANT: No.

18 THE COURT: With the conditions of consent of
19 forfeiture and the destruction of the aforementioned
20 weapons, you're sentenced to pay a fine of \$250, \$50
21 surcharge, \$10 crime victim's fee. Conditional discharge
22 pursuant to 65.10 of the Penal Law.

23 THE CLERK: Let the record reflect the defendant
24 is being served the terms of the conditional discharge
25 and his rights after conviction and summons to appear in

PROCEEDINGS

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arraignment A if surcharge is not paid.

THE COURT: All fines surcharges due are payable today by 4:00 p.m. or 15 days Nassau County Correctional Center.

MR. LEMKE: Thank you, your Honor.

* * * * *

CERTIFIED TO BE A TRUE AND ACCURATE
TRANSCRIPT OF THE STENOGRAPHIC MINUTES
TAKEN HEREIN:

Christine Zaleski

CHRISTINE ZALENSKI
OFFICIAL COURT REPORTER

APPENDIX B

ATTORNEY GENERAL OF THE STATE OF NEW YORK
BUREAU OF CONSUMER FRAUDS AND PROTECTION
ROCHESTER REGIONAL OFFICE

-----X
In the Matter of

BUD K WORLDWIDE, INC., and
CLINT H. KADEL, Individually and as President,

Respondents.

-----X
ASSURANCE OF DISCONTINUANCE
PURSUANT TO EXECUTIVE LAW
SECTION 63, SUBDIVISION 15

I. INTRODUCTION AND BACKGROUND

Pursuant to the provisions of Article 22-a, §§ 349 and 350, of the New York General Business Law ("GBL") and Article 5 of the New York Executive Law, ELIOT SPITZER, Attorney General of the State of New York, caused an inquiry to be made into the advertising and business practices of BUD K WORLDWIDE, INC. ("BUD K") and its compliance with Article 265 of the New York Penal Law. Based upon that inquiry, the ATTORNEY GENERAL makes the following findings:

II. ATTORNEY GENERAL'S FINDINGS

1. BUD K is a Georgia corporation. Its principal place of business is located at 475 US Highway 3195, Moultrie, Georgia 31768.
2. CLINT H. KADEL is the President, Chief Executive Officer, and founder of BUD K. CLINT H. KADEL resides in the state of Georgia. As President, CLINT H. KADEL manages

the day to day operations of BUD K, and was personally involved with and had actual knowledge of the advertising and business practices set forth herein. BUD K and CLINT H. KADEL are hereinafter collectively referred to as "Respondents."

3. Respondents operate a wholesale and retail specialty knife and "self-defense" products business that offers a variety of weapons and dangerous instruments for sale to consumers in New York State through its Internet web site and mail order catalog.

**A. Unlawful Sale of Weapons and Dangerous Instruments
Violations of New York Penal Law § 265.10(4)**

4. Between September 1999 and May 2002, Respondents repeatedly and persistently sold, as merchandise in New York State, thousands of unlawful weapons and dangerous instruments whose possession is prohibited by New York Penal Law § 265.01(1)¹.

5. New York Penal Law § 265.10(4) provides in pertinent part that "any person who disposes² of any of the weapons, instruments or appliances specified in subdivision one of section 265.01, except a firearm, is guilty of a class A misdemeanor." (Footnote added.) Respondents violated New York Penal Law § 265.10(4) by selling these unlawful weapons and dangerous instruments to consumers in New York State.

6. Respondents' violations of Penal Law § 265.10(4) constitute repeated and persistent illegality in violation of Executive Law § 63(12).

¹ New York Penal Law §265.01(1) provides: "A person is guilty of criminal possession of a weapon in the fourth degree when: He possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sand bag, sand club, wrist-brace type slingshot or slungshot, shiriken or 'Kung Fu Star.'"

² "Dispose" is defined under New York Penal Law 265.00(4) as "to dispose of, give, give away, lease-loan, keep for sale, offer, offer for sale, sell, transfer and otherwise dispose of."

**B. Unlawful Transportation of Weapons and Dangerous Instruments
Violations of New York Penal Law § 265.10(2)**

7. Between September 1999 and May 2002, Respondents repeatedly and persistently transported and shipped in New York State, as merchandise, thousands of unlawful weapons and dangerous instruments prohibited by New York Penal Law § 265.01.

8. New York Penal Law § 265.10(2) provides in pertinent part: “Any person who transports or ships as merchandise any firearm, other than an assault weapon, switchblade knife, gravity knife, pilum ballistic knife, billy, blackjack, bludgeon, metal knuckles, Kung Fu star, chuka stick, sandbag or slingshot is guilty of a class A misdemeanor.” Respondents violated New York Penal Law § 265.10(2) by transporting and shipping these items in New York State as merchandise.

9. Respondents’ violations of Penal Law § 265.10(2) constitute repeated and persistent illegality in violation of Executive Law § 63(12).

**C. Violations of New York General Business Law §349
Deceptive Acts and Practices**

10. Between September 1999 and December 2001, Respondents took more than one hundred thousand dollars from New York State consumers for merchandise that was illegal for BUD K to sell or ship into New State and illegal for consumers to possess in New York. Any person in New York State who possesses a weapon or dangerous instrument prohibited by New York Penal Law §265.01 must voluntarily surrender it to the appropriate law enforcement authority to avoid prosecution.³

³ New York Penal Law §265.20 provides an exemption from prosecution for “any person voluntarily surrendering such weapon, instrument, appliance or substance, provided that such surrender shall be made to the superintendent of the division of state police or a member thereof designated by such superintendent, or to the sheriff of the county in which such person

11. New York GBL §349 prohibits deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in New York State. Respondents engaged in deceptive business practices in violation of New York GBL §349 by repeatedly and persistently selling unlawful weapons and dangerous instruments to consumers in New York who were required by law to surrender the merchandise, thus rendering the merchandise purchased from Respondents valueless to them.

12. Respondents' violations of GBL § 349 constitute repeated and persistent illegality in violation of Executive Law § 63(12).

**D. Violations of New York General Business Law §350
False Advertising**

13. Between September 1999 and December 2001, Respondents placed notices in its catalog and on its web site indicating stun guns, electronic dart guns, gravity knives, bellies, blackjacks, bludgeons, metal knuckles, Kung Fu stars, slug shots and chuka sticks could not be shipped to California and Massachusetts. Respondents failed to provide similar notices for New York consumers. Consequently, consumers in New York were falsely led to believe that these items could be legally purchased and shipped to New York State.

14. New York GBL § 350 prohibits false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in New York State. Respondents engaged in false advertising in violation of New York GBL § 350 by advertising in New York weapons and dangerous instruments prohibited by New York Penal Law § 265.01 for sale to New York consumers without indicating that it was illegal for consumers to possess these items in New York.

resides, or the commissioner of police or a member of the police department thereof designated by such commissioner.”

15. Respondents' violations of GBL § 350 constitute repeated and persistent illegality in violation of Executive Law § 63(12).

III. RESPONDENT'S POSITION

16. Respondents contend that (a) they did not mislead nor intend to mislead consumers through any act or omission related to the sale or transportation of their products to New York; (b) Bud K's order forms notified consumers to check local laws before ordering items; and (c) when consumers purchased Respondents' products, they released Bud K from any claims they may have had arising out of the purchase and use of its products.

IV. AGREEMENT

17. It now appears that, without admitting that it has violated any state or local law or regulation, Respondents are willing to enter into this Assurance of Discontinuance ("Assurance") and, pursuant to Executive Law § 63(15), the Attorney General is willing to accept it in lieu of continuing further the current legal action. This Assurance resolves the Attorney General's claims related to Bud K's sales and transportation of any of its products into New York through the date of the execution of this Assurance.

A. Prohibited Practices

18. IT IS AGREED that Respondents shall not engage in any illegal business acts or practices including transporting, shipping, and selling unlawful weapons in New York in violation of New York Penal Law §265.10(2) and (4) and New York GBL §349 or advertising that it will sell or ship merchandise that is prohibited by law to consumers in New York violation of New York GBL §350.

B. Remedial Relief

19. IT IS FURTHER AGREED that Respondents will place a notice in its catalogs, on its website and any other media through which its products are displayed or sold, stating that certain items are not available to consumers in New York State. The notice must be prominently displayed in close proximity to any picture, likeness or description of any item that is unlawful to possess in New York. Respondents shall furnish a written copy of the notice to the New York Attorney General upon execution of this Assurance.

20. IT IS FURTHER AGREED that Respondents will establish and implement procedures to prevent it from selling and transporting illegal weapons to New York consumers and furnish a written copy of the procedures to the New York Attorney General upon execution of this Assurance.

21. IT IS FURTHER AGREED that Respondents will deliver, by regular mail, a consumer notice, in the form of Exhibit 1 attached hereto, to all identifiable New York consumers to whom Respondent sold, on or after September, 1999, any weapon, dangerous instrument or appliance in violation of New York Penal Law § 265.10(2) and (4). The consumer notices shall be postmarked by no later than November 30, 2002.

22. IT IS FURTHER AGREED that Respondents will deliver to the Attorney General no later than October 31, 2002, a complete list of consumers located in New York State who purchased any prohibited weapon or dangerous instrument or appliance in violation of New York Penal Law § 265.10(2) and (4) from Respondents on or after September, 1999.

23. IT IS FURTHER AGREED that the Office of the Attorney General will monitor Respondents' compliance with this Assurance and may commence any authorized legal action and/or proceeding in event of a breach.

C. Civil Penalties and Costs

24. IT IS FURTHER AGREED that Respondents will pay a civil penalty assessment upon execution of this Assurance in the amount of \$198,000.00 and costs of the Attorney General's investigation in the amount of \$2,000.00.

25. Respondents shall pay the \$200,000.00 in penalty assessments and costs in three equal payments. The first payment shall be made no later than October 31, 2002, the second no later than November 30, 2002 and the third no later than December 31, 2002. Each payment must be made payable to the "State of New York" by certified check and delivered to the State of New York, c/o Benjamin A. Bruce, Assistant Attorney General, 144 Exchange Boulevard, Rochester, New York 14614. 26. Failure to tender timely full payment shall be construed as a breach of this Assurance.

D. Miscellaneous Provisions

27. Respondents shall submit to the Attorney General, no later than sixty (60) days following the execution of this Assurance, a sworn statement certifying that they have complied with the provisions of this Assurance, including, but not limited to, documents further setting forth the manner and extent of Respondents' compliance, said statement having appended to it such exhibits and supporting documentation as may be necessary to demonstrate compliance.

28. Respondents shall deliver all documents and reports required by this Assurance to New York State Attorney General Eliot Spitzer, in care of Benjamin A. Bruce, Assistant Attorney

General, Office of the Attorney General of the State of New York, 144 Exchange Boulevard, Rochester, New York 14614.

29. Nothing herein shall be construed to deprive any consumer or other person or entity of any private right under the law.

30. It is further understood and agreed that the acceptance of this Assurance by the Attorney General of the State of New York shall not be deemed or construed as an approval by the Attorney General of any of the activities of respondents, their successors, agents or assigns and none of them shall make any representation to the contrary.


31. Pursuant to Executive Law §63(15), evidence of a violation of this Assurance shall constitute *prima facie* proof of a violation of the applicable statutes in any civil action or proceeding commenced by the Attorney General.

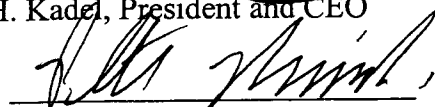
IN WITNESS WHEREOF, the undersigned subscribed their names hereto this 29 day of Oct., 2002.

BUD K WORLDWIDE, INC.

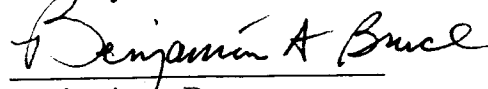
By: 
Clint H. Kadel, President and CEO

CLINT H. KADEL


Clint H. Kadel, Individually

As to form: 
Peter Nicandri, Esq.
Attorney for Respondents

Approved by
ELIOT SPITZER
Attorney General of the State of New York,

By: 
Benjamin A. Bruce
Assistant Attorney General

CORPORATE ACKNOWLEDGMENT

STATE OF GEORGIA)
 : ss
COUNTY OF COLQUITT)

On the 29 day of October, 2002, before me personally appeared CLINT H. KADEL, who duly acknowledged that he is the President and Chief Executive Officer of BUD K WORLDWIDE, INC., the respondent corporation described in and which executed the foregoing Assurance of Discontinuance; and he duly acknowledged to me that he signed his name thereto as the President and Chief Executive Officer and was duly authorized to execute the foregoing Assurance of Discontinuance by the Board of Directors of said corporation.

Sworn to before me this

29 day of October, 2002.

Debra Taylor
Notary Public



DRAFT

[DATE]

[CONSUMER NAME]
[CONSUMER ADDRESS]
[CITY],NY [ZIP CODE]

IMPORTANT CONSUMER NOTICE

Dear Consumer:

This notice is being sent to you pursuant to a civil settlement agreement between our company and the office of Eliot Spitzer, the Attorney General of New York State.

According to our records, you purchased [SPECIFY ITEMS] from us. In New York State, the item or items listed are considered to be weapons. The possession of the item or items is a violation of New York Penal Law 265.01, commonly known as criminal possession of a weapon in the fourth degree. A person could be arrested and prosecuted for possessing the weapon that you purchased.

However, the law allows a person to possess a weapon such as the items or items listed above for the purpose of voluntarily surrendering the weapon to the New York State Police, their county sheriff, or their local police. Law enforcement officials have been provided with a list of consumers who received prohibited items.

Therefore, if you are in possession of the item or items listed above you should immediately contact the New York State Police, your county sheriff, or your local police precinct and arrange to surrender the item or items listed above. If you have given the item or items to another person and the item is currently possessed in New York, you should advise that person to voluntarily surrender the item as described above.

Very Truly yours,

Clint H. Kadel
President, Bud K Worldwide, Inc.