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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

Coordination Proceeding Special Title (Rule 1550(b))	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4095
FIREARM CASE	
Including actions:	
People, et al. v. Arcadia Machine & Tool, Inc., et al.	San Francisco Superior Court No. 303753
People, et al. v. Arcadia Machine & Tool, Inc., et al.	Los Angeles Superior Court No. BC210894
People, et al. v. Arcadia Machine & Tool, Inc., et al.	Los Angeles Superior Court No. BC214794
	DATE: January 26, 2001
	TIME: 8:30 a.m.
	DEPT: 65
	Hon. Vincent P. DiFiglia

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' *EX PARTE* MOTION FOR ORDER COMPELLING PLAINTIFFS TO DISCLOSE (1) ACCIDENTAL DISCHARGE AND SUICIDE INCIDENTS AND (2) PLAINTIFFS' APPROVAL AND USE OF SPECIFIC FIREARMS

1/12/01

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I. INTRODUCTION

This type of public enforcement action brought on behalf of the public does not require the burdensome and unnecessary review of every accidental discharge and suicide "incident" in the state of California or even just in plaintiffs' communities.[1] To establish liability in this action, plaintiffs need to show that defendants' conduct is injurious to the health, safety or enjoyment of life or property of the residents of cities and counties across California and/or that defendants' conduct is unlawful, unfair or fraudulent. Significantly, the nature of these allegations is such that plaintiffs do not need to prove this case incident-by-incident; and likewise, defendants do not need to defend themselves incident-by-incident. Yet, defendants are determined to turn this lawsuit into a series of mini product liability trials even though this Court has already held that "***this is not a products liability action***." (Order Overruling Defendants' Demurrers and Granting in Part and Denying in Part Defendants' Motion to Strike ("10/4/00 Order")).

Further, plaintiffs have already provided witnesses, substantial data and other responsive documents. More specifically, plaintiffs have already provided defendants with specific firearm data regarding ***all*** the firearms seized in plaintiffs' jurisdictions between 1996-1999.[2] This is very comprehensive and specific data which identifies the make, model and serial number of the firearm involved – as well as data regarding the type of incident. This is sufficient to address defendants' discovery needs at this juncture. Further, plaintiffs have offered to provide additional data; this offer – rejected by defendants – sought to satisfy defendants' requests for more specific data on firearm suicides and accidental discharges and, at the same time, not to place an undue strain on plaintiffs'

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[1] The term "incident" itself is misleading. As defendants explain in their motion, this is a term that they themselves defined in their discovery requests as "each occurrence or episode in which a firearm allegedly was used and/or was discharged intentionally or accidentally and which the plaintiffs claim entitle them to the relief requested in their complaints." Memorandum of Points and Authorities In Support of *Ex Parte* Motion for Order Compelling Plaintiffs to Disclose (1) Accidental Discharge and Suicide Incidents and (2) Plaintiffs' Approval and Use of Specific Firearms ("Defs.' Mem.") at 2, n.1. Plaintiffs have always objected to this definition because it presupposes – incorrectly – that plaintiffs' claims for relief are premised on specific occurrences involving the use or discharge of a firearm.

[2] In some instances, the computerized property room records may not contain every firearm seized during the relevant time period depending on how the records are maintained and stored.

resources. To the extent plaintiffs are still objecting to providing certain discovery, it is either irrelevant, privileged or material which is unduly burdensome to produce.

Defendants' requests raise significant privilege concerns. These include confidential information about patients, juveniles, victims, arrestees and ongoing investigations. These issues must be addressed if plaintiffs are, in fact, ordered to produce any "incident" reports. In fact, as explained below, plaintiffs are not even permitted to disclose certain information unlessand until these issues are resolved. This includes juvenile information (which requires that defendants petition the juvenile court judges) and certain medical records contained on a database which is subject to a Use Agreement with the State of California.

Finally, at the December 19, 2000 initial *ex parte* hearing on defendants' motion, this Court indicated that defendants would likely not be entitled to discovery regarding plaintiffs' approval and use of specific firearms. This is the appropriate ruling for several reasons. The information is irrelevant because defendants generally market different firearms to civilians than they market to law enforcement officers (and, moreover, law enforcement officers receive specialized training in the use of their firearms). It is information which defendants – as the principal suppliers of police guns – already have in their own possession. And, it is confidential information which plaintiffs – for the safety of their police officers and their citizens – have an interest in keeping confidential.

II. ARGUMENT

A. The Underlying Incident Reports Regarding Firearm Suicides and Accidental Discharges Are Irrelevant

In California, as explained below, individualized proof about specific incidents is not a requirement for plaintiffs' public nuisance allegations or their §§17200 and 17500 allegations – the statutes and case law are clear on this. As such, the requested reports are largely irrelevant; and since defendants have failed to demonstrate a compelling need for this level of specificity, this Court should deny defendants' request for the underlying "incident" reports, particularly inasmuch as plaintiffs' substantive responses are sufficient.

1. The Underlying Incident Reports Are Neither Relevant nor Reasonably Calculated to Lead to the Discovery of Admissible Evidence Regarding Plaintiffs' Public Nuisance Allegations

Defendants are liable for creating and maintaining a public nuisance if their conduct "is injurious to health ... or is indecent or offensive to the senses, or an obstruction of the free use of property, so as to interfere with the comfortable enjoyment of life or property...." Civ. Code §3479. A public nuisance is one which affects "an entire community or neighborhood, or any considerable number of persons." Civ. Code §3480. The California Supreme Court describes public nuisance as any unreasonable interference with the "five general categories of 'public rights ... the public health, the public safety, the public peace, the public comfort or the public convenience.'" *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1104 (1997) (*citing* the *Restatement (Second) of Torts* §821B) (1965).

Because the focus in this type of action is on the public or community harm, the issue is not whether, in one particular "incident," defendants are liable; indeed, "such individualized proof is not a condition to the entry of ... relief based on a showing that [defendants are] responsible for the conditions prevailing in [plaintiffs' communities]." *Ex rel. Gallo*, 14 Cal. 4th at 1125. Further, this is not an action for a private nuisance where "plaintiff must prove [a specific] injury ...." *Koll-Irvine Ctr. Prop. Owners Ass'n v. County of Orange*, 24 Cal. App. 4th 1036, 1041 (1994) (distinguishing between public nuisance and private nuisance). Similarly, this is not a case where a private party is alleging a public nuisance which would also require demonstration of a specific injury. *Id.* at 1040 (*citing* Civ. Code §3493). This degree of specificity is not required in an action, like this one, for a public nuisance brought by a public entity.

Moreover, because the goal of public nuisance jurisprudence is stopping the public injury, "it is immaterial whether the acts be considered willful or negligent; the essential fact is that, whatever be the cause, the result is a nuisance." *Snow v. Marian Realty Co.*, 212 Cal. 622, 625 (1931). Thus, defendants' claim that "[a]n accidental discharge can be the result of the product's intended function, unreasonable product use, product alteration or comparative fault" (Defs.' Mem. at 4) is irrelevant. Under California law, defendants are liable for any public nuisance to which they contribute or set in motion. Liability for a public nuisance extends to all who contribute to the

creation or maintenance of the nuisance.[3] Thus, defendants' attempts to turn this litigation into a series of mini product liability trials on each particular "incident" is unwarranted – especially since this Court has already held that "***this is not a products liability action***." (10/4/00 Order).

Finally, defendants' attempts to focus simply on specific "incidents" ignores that plaintiffs brought this lawsuit to remedy the illegal secondary market through which a substantial percentage of defendants' firearms are ultimately obtained by unauthorized persons, including juveniles and convicted felons. Instead, defendants seek to engage in a series of mini-trials regarding product liability issues and focus solely on guns actually seized by the prosecuting entities. Unfortunately, the nuisance and unfair trade practices alleged encompass much broader conduct. Focusing on specific "incidents" does not account for this broader problem because it ignores the firearms that are never seized or never result in an "incident." This broader problem created by the illegal secondary market has undermined the public health and safety in plaintiffs' communities.

2. The Underlying Incident Reports Are Neither Relevant nor Reasonably Calculated to Lead to the Discovery of Admissible Evidence Regarding Plaintiffs' Section 17200 & Section 17500 Allegations

The underlying incident reports are not necessary to prove or disprove plaintiffs' allegations that defendants' conduct violates the Unfair Competition Act (Bus. & Prof. Code §§17200 *et seq.* and 17500 *et seq.*) ("UCA"). The focus of the UCA is entirely on defendants' conduct. To establish liability, plaintiffs need to demonstrate that defendants' conduct is either "unlawful," "unfair" or

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[3] *See Hardin v. Sin Claire*, 115 Cal. 460, 463 (1896); *Shurpin v. Elmhirst*, 148 Cal. App. 3d 94, 101 (1983); *Boston v. Smith & Wesson Corp.*, Slip Op., No. 1999-02590(Mass. Sup. Ct. July 13, 2000) Amended Declaration of Jennie Lee Anderson in Support of Plaintiffs' Opposition to Demurrer and Motion to Strike, Ex. A. at 31; *Restatement (Second) of Torts* §834. This is so even where a nuisance is exacerbated by the negligent or criminal acts of another. *See Sunset Amusement Co. v. Bd. of Police Comm'rs*, 7 Cal. 3d 64, 84-85 (1972) (criminal acts encouraged or assisted by defendants' methods of operation "may be said to lie within their reasonable control"); *Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc.*, 221 Cal. App. 3d 1601, 1624 (1990) (rejecting manufacturers' argument that nuisance is inapplicable because illegal behavior of product is superseding cause of harm beyond manufacturer's control); *People v. Montoya*, 137 Cal. App. Supp. 784 (1933) (dismissing alcohol seller's claim that nuisance cannot apply because customers' illegal and disorderly acts occurred outside business premises and beyond its control). As a California appeals court framed the inquiry: "If the defendant voluntarily raised the storm ... it is no excuse for him that he could not afterwards quell it." *Montoya*, 137 Cal. App. Supp. at 786 (*citing Cable v. State*, 8 Blackf. 531 (Ind. 1847)). What this means here, for example, is that allowing an irresponsible person to obtain control of a dangerous weapons is a not a basis for immunity, it is actually a basis for liability.

"fraudulent." This does not require an appraisal of every "incident" involving a firearm in plaintiffs' jurisdictions.

An "unlawful" business practice includes "'anything that can properly be called a business practice and that at the same time is forbidden by law.'" *People v. McKale*, 25 Cal. 3d 626, 634 (1979) (*quoting Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 113 (1972)); *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999); *State Farm Fire & Cas. Co. v. Superior Court,* 45 Cal. App. 4th 1093, 1103 (1996). Generally, whether or not a practice is unlawful is a legal issue; but, it can also be proven with expert testimony. *See Saunders v. Superior Court*, 27 Cal. App. 4th 832, 840 (1994) (holding that expert testimony at a trial could be used to prove whether the relevant statute is violated by the practice).

A business practice is "unfair" on public policy grounds if it "'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *State Farm*, 45 Cal. App. 4th at 1104 (*quoting People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 530 (1984)). A business practice is also "unfair" if the gravity of the harm suffered by the public outweighs its utility. *Day v. AT & T Corp.*, 63 Cal. App. 4th 325, 332 (1998); *State Farm*, 45 Cal. App. 4th at 1103-04. Proving a business practice is "unfair" may be made through expert testimony. *See Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 214 (1983).

A business practice is "fraudulent" if it is "likely to deceive" the public. *State Farm*, 45 Cal. App. 4th at 1105 (*citing Comm. on Children's Television*, 35 Cal. 3d at 211).[4] Proving that a conduct is deceptive or fraudulent can be done in a number of ways: through actual consumer testimonials (*E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1292 (1992)); through the testimony of other industry members (*Joe Conte Toyota v. Louisiana Motor Vehicle Comm'n*, 24 F.3d 754

[4] Significantly,"[a]llegations of actual deception, reasonable reliance, and damage are unnecessary" under the UCA. *Comm. on Children's Television*, 35 Cal. 3d at 211. Further, what is "'likely to be deceived' has no relationship to the concept of common law fraud, which ... must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim under section 17200 or 17500." *Day*, 63 Cal. App. 4th at 332 (citation omitted).

(1994)); through expert testimony (*Comm. on Children's Television*, 35 Cal. 3d at 214); or through citizen polls/consumer surveys (*Moore v. State Bd. of Accountancy*, 2 Cal. 4th 999 (1992)).

Indeed, as the California Supreme Court has declared regarding the UCA, "the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity. As a result, to state a claim under the act one need not plead and prove the elements of a tort." *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1266-67 (1992). Moreover, as numerous cases interpreting the UCA have held, "an actual injury to the consuming public or competitors was not required to be proven as an element of the offenses for which defendants were charged." *People ex rel. Van de Kamp v. Cappuccio, Inc.*, 204 Cal. App. 3d 750, 760 (1988). Here, plaintiffs are not required to present evidence on every "incident" involving a firearm in California; requiring such specificity would virtually eliminate UCA lawsuits as a practical remedy to redress the types of harm contemplated under the UCA and would immunize defendants from statutory remedies designed to protect the public. *Comm. on Children's Television*, 35 Cal. 3d at 222-23. The discovery, sought, therefore is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence (C.C.P. §2017(a)) and should be denied.

B. The Data and Materials Already Provided (Along with the Additional Data Plaintiffs Offered) Are Sufficient Responses and a Practicable Means to Aggregate Data in This Case

In addition to the studies and other documents produced, plaintiffs have also provided defendants with specific firearm data regarding ***all*** the firearms seized in plaintiffs' jurisdictions between 1996-1999. This is very comprehensive and specific data which identifies the make, model and serial number of the firearm involved – as well as data regarding the type of incident. As such, this data does contain information pertaining to firearm suicides and accidental discharges. Some county plaintiffs have also provided relevant data from the coroner's office to the extent such data was electronically maintained and relatively easy to retrieve. In fact, plaintiffs offered to provide defendants with similar electronic data from other jurisdictions – to the extent such data already exists in a retrievable format without having to write a special program to segregate the data. (*See* Declaration of Stephen P. Polapink In Support of Plaintiffs' Opposition to Motion to Compel ("Polapink Decl."); *see also, e.g.*, Declaration of Mervat Farag In Support of Plaintiffs' Opposition

to Motion to Compel, ¶2). Defendants rejected this offer, and insisted on the production of the actual "incident" reports. (*See* Polapink Decl.). Plaintiffs also provided the San Francisco Medical Examiner Reports from 1991-1999; and finally, plaintiffs have provided substantial information regarding accidental shootings and suicides which have occurred in California.[5]

These materials (including the data and relevant sample studies) are sufficient responses to defendants' requests, and provide a practicable means to aggregate data in this case. Indeed, as explained above, plaintiffs do not have to present details on each and every "incident" involving a firearm. The use of a sampling poll to avoid the burden of having to poll the entire population presents an appropriate solution to a situation (like here) where the presentation of specific voluminous data would be impracticable:

> The use of acceptable sampling techniques, in lieu of discovery and presentation of voluminous data from the entire population, may produce substantial savings in time and expense. In some cases, sampling techniques may provide the only practicable means to collect and present relevant data ....

Manual For Complex Litigation (Third) §21.493 (1995). Surely, defendants do not escape liability in this action if, for example, they demonstrate that in one particular "incident" involving an accidental discharge of a firearm, the cause was something that would not have been prevented with some type of safety feature. If this is the case, then plaintiffs, by this same logic, would only have

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[5] For instance, in an abstract of a study produced entitled "*Unintentional Firearm Deaths in California*," the authors studied 688 unintentional firearm deaths of California residents occurring between 1977 and 1983 and concluded that "[a]t least 40% of child deaths in this study appeared in part to be attributable to defects in firearm performance or current firearm design practices, suggesting that improvements should be sought and mandated." PLTF 0006952. Similarly, in another abstract of a study produced entitled "*When Children Shoot Children: 88 Unintended Deaths in California*," the authors concluded that "[e]asy accessibility to guns, the resemblance of guns to toys, and gun malfunctions were all contributing factors" to the deaths of 88 California children 14-years-old and younger who were unintentionally shot and killed. PLTF 0006953. Additionally, in an abstract of a study produced entitled "*The Choice of Weapons in Firearm Suicides*," the authors reported that there were "firearms used in 235 suicides in Sacramento County, California, during 1983-85." PLTF 0006949. Plaintiffs also produced an article entitled "*Mortality Among Recent Purchasers of Handguns*," where the authors compared mortality among 238,292 people who purchased a handgun in California in 1991 with that of the general adult population of the state and concluded that "[t]he purchase of a handgun is associated with a substantial increase in the risk of suicide by firearm and by any method." PLTF 0006950. Plaintiffs also produced abstracts of studies entitled "*Suicide in the Home in Relation to Gun Ownership*," "*The Presence and Accessibility of Firearms in the Homes of Adolescent Suicides: A Case-Control Study*," "*Risk Factors For Adolescent Suicide: A Comparison of Adolescent Suicide Victims with Suicidal Inpatients*" "*The Association Between the Purchase of a Handgun and Homicide or Suicide*," and "*Gun Ownership as a Risk Factor for Homicide in the Home.*" PLTF 0006941-6955.

to show one "incident" that could have been prevented with some type of safety feature to prevail in this case. For all practical purposes, this action will have to be presented and resolved based on statistical models and studies, not particular "incidents."[6]

C. The Underlying Incident Reports Are Unduly Burdensome to Produce and Contain Privileged Information

The reports sought by defendants are unduly burdensome to produce (C.C.P. §2017(c)) for several reasons. First, defendants have not been clear on the type of reports they are actually seeking by their motion. Information regarding accidental discharge and suicide incidents may be contained in police reports, coroner reports and/or medical records.[7] If plaintiffs are ordered to produce certain reports, defendants should be more specific regarding which "incident" reports they seek. Further, some plaintiffs have submitted declarations describing the specific burdens associated with locating and retrieving certain reports. (*See* Declarations of Patrick Adams, Chris Hadley, Troy Hart, Janie Ito, Paul Martinson, Bobby Miller, William Pedrini and Billie Weiss In Support of Plaintiffs' Opposition to Defendants' Motion to Compel). This Court should also be aware that the relative burden is different for the different plaintiffs – this fact alone provides reason enough for, at most, requiring production of only a representative sample of the "incident" reports for the various plaintiffs.

Moreover, though the actual number of reports regarding accidental discharges and suicides may be a relatively small subset of all firearm "incidents" in plaintiffs' communities, the procedure involved in identifying the relevant reports is a large part of the burden. In many of plaintiffs' jurisdictions, this would involve a manual review of all the police reports just to segregate the relevant reports. For example, the Assistant Sheriff of San Mateo County describes the procedure as follows:

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[6] *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986) (in a zoning case, the Supreme Court, noting that "[a] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect,'" held that plaintiff city was allowed to present representative studies from other cities "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.") (*quoting Young v. American Mini Theatres, Inc.*, 427 U.S. 51, 71 (1976)).

[7] This becomes more complicated because, for example, the coroner records are only maintained at the county level and will not, therefore, be obtainable from every plaintiff.

> There is no way to search electronically through the Property Unit records to locate incidents of suicides or accidental shootings. The Property Unit receives approximately 2500to 2600 cases per year. The Property Unit cannot, through a computer, distinguish which of these cases involve firearms. Each case would have to be reviewed and then a hand search of the evidence in the property bin would be necessary to see it if contained a firearm. If one person were to perform this task full time, it would take approximately 100 hours, if not more for each year of cases. As the Sheriff's Office does not have staffing for this, an employee would have to incorporate the review into the employee's daily assignments and overtime would be incurred. ***I estimate that such a review would take approximately five months to complete.***

See Pedrini Decl., ¶3. Obtaining the coroner reports from Alameda County presents a similar burden:

> Such a task for the time in question would entail the examination of approximately 6,000 files. This represents the approximate number of autopsies performed during the specified time (1996 through 2000). Each file search takes approximately 15 minutes to complete, once the file is physically at the Coroner's Bureau. This translates to approximately 40 work weeks, full time, or approximately ten (10) months of dedicated work. Based upon current resources, ***I estimate that such a review would take approximately four (4) years to complete***, if the clerk could dedicate approximately 20% of each work day to this task.

Adams Decl., ¶2.[8]

Adding to the burden of producing any "incident" reports is the fact that the police, coroner and medical records all contain privileged information. Generally, they contain highly private and sensitive information which is protected under the right to privacy under the California Constitution (Cal. Const. art. I, §1). More specifically, the medical records contain privileged information about patients. And, in fact, some of the information in plaintiffs' possession is subject to a Use Agreement – which prevents plaintiffs from disclosing it to anyone. Further, the police records contain privileged information about juveniles, victims, arrestees and ongoing investigations. These privilege concerns must be addressed if plaintiffs are, in fact, ordered to produce any "incident" reports.

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[8] Similar testimony was submitted from other plaintiffs. *See*, e.g., Hadley Decl., ¶2 (In Sacramento, "[t]he total number of property records involving firearms between 1996 and 1999 is approximately 6,000 per year. If one person were to review all of the pertinent property records, it would take approximately 120 hours, if not more. If such a review were conducted by an employee of the Property Section, the employee would have to incorporate the review into the employee's daily assignments. Based upon current resources, ***I estimate that such a review would take approximately six months to complete.***") *See also* Hart Decl., ¶¶2-3; Ito Decl., ¶3; Martinson Decl., ¶2; Miller Decl., ¶3; Weiss Decl., ¶8.

The medical records contain information which is privileged pursuant to the physician – patient privilege. *See* Cal. Evid. Code §990 *et seq.* Indeed, all "confidential communications" between patients and physicians, and any diagnosis made of advice given by the physician in the course of the physician-patient relationship are protected by this privilege. *See Jones v. Superior Court of Alameda County*, 119 Cal. App. 3d 534, 544 (1981).[9] Moreover, the comprehensive medical database in the possession of some plaintiffs is owned by the State of California, Office of Statewide Health Planning and Development. For example, in order for the County of Los Angeles to obtain access to the database containing patient-level information relating to accidental firearm injuries, the County of Los Angeles must sign a Use Agreement. The Use Agreement specifically requires the County to agree not to release or disclose the patient-level data on the database. (Decl. of Billie Weiss, ¶2). Thus, if defendants seek this information they should obtain it from its rightful owner, the State of California.[10]

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[9] As explained in *Binder v. Superior Court*, "[s]ince medical records are the type of information which is protected by the right of privacy, the first question is whether the private information sought to be discovered is directly relevant to the issues of the instant litigation ... It is not enough that the information may lead to relevant evidence" *Binder*, 196 Cal. App. 3d 893, 901 (1987) (citing *Bd. of Trustees v. Superior Court*, 119 Cal. App. 3d 516, 525 (1981)). This significantly raises the bar for what defendants may properly require plaintiffs to provide. As explained above, the information sought by defendants here is irrelevant to a cause of action for public nuisance or under the UCA and should be denied on that basis alone. But, even if this information meets the "directly relevant" test, the citizens' rights to privacy in these matters outweighs the defendants' need for the information especially since plaintiffs here have already provided sufficient responses. *See Santa Barbara v. Adamson*, 27 Cal. 3d 123, 130 (1980) (even when discovery of private information is found directly relevant to the issues of ongoing litigation, there must then be a "careful balancing" of the "compelling public need" for discovery against the "fundamental right of privacy.").

[10] Similarly, obtaining the coroner reports from Alameda County is subject to certain restrictions. *See* Adams Decl., ¶4 ("[P]ursuant to Alameda County Ordinance 2.56.120 the Coroner's Bureau is not authorized to provide copies of these documents absent a subpoena for the same. The party issuing the subpoena is also required to pay $23.00 per record for their production. Additionally, C.O. 2.56.120 requires a fee of $15.00 per case retrieved from archive storage and an 'Additional labor charge, for each 1/4 hour, for any extraordinary search for records when the requester does not have complete biographical information needed for a routine search.' This additional labor charge is $4.00 per each 1/4 hour.").

Additionally, the police reports contain information about juveniles which is protected pursuant to Section 827 of the Welfare & Institutions Code.[11] In fact, this Court cannot order production of these records unless and until defendants petition a judge of the juvenile court to obtain access to these records. §827(k); *In re Keisha T.*, 38 Cal. App. 4th 220 (1995). Defendants have not made such a petition or indicated that they intend to do so. Also, the police, medical and coroner records sought may contain information which raises the victims' rights to privacy (Cal. Const. art. I, §1) or the arrestees' rights to privacy (*Kilgore v. Younger*, 30 Cal. 3d 770, 794 (1982); *Denari v. Superior Court*, 215 Cal. App. 3d 1488, 1498 (1989)). Finally, disclosing this information may also interfere with ongoing investigations; and this disclosure would be "against the public interest." Evid. Code §1040(b)(2); *see County of Orange v. Superior Court*, 79 Cal. App. 4th 759, 764 (2000) ("Evidence gathered by police as part of an ongoing criminal investigation is by its nature confidential. This notion finds expression in both case and statutory law."). All this confidentiality must be maintained, and any steps that are necessary to do so must be considered in assessing the relative burden of producing any "incident" reports. *See,e.g.* , Hart Decl., ¶4.

D. Defendants Are Not Entitled to Discovery Regarding Plaintiffs' Approval and Use of Specific Firearms

At the initial hearing on this matter, this Court noted that it was inclined to deny defendants' discovery requests regarding plaintiffs' approval and use of specific firearms. This would be the appropriate ruling for many reasons. First, this information is irrelevant because defendants generally market different firearms to civilians than they market to law enforcement officers. Indeed, the recent settlement agreement between the Smith & Wesson Corp. and the City of Boston contains a specific exception "for firearms manufactured or imported for sale to a law enforcement agency or the military...." (Smith &Wesson Settlement Agreement, Dec. 11, 2000 at 2B (Polapink Decl., Ex. 1)); *see also, e.g.*, Martinson Decl., ¶3, Pedrini Decl., ¶5. Law enforcement officers also receive specialized training in the use of their firearms. *See, e.g.*, Martinson Decl., ¶3, Pedrini Decl., ¶5.

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[11] Cal. Welf. & Inst. Code §827 reflects California's strong public policy in favor of protecting the confidentiality of juvenile court records and proceedings. *See Foster v. Superior Court*, 107 Cal. App. 3d 218 (1980). That statute has been judicially construed to extend to protect records of juvenile arrests or detentions even where no court juvenile proceedings were pending. *Wescott v. County of Yuba*, 104 Cal. 3d 103 (1980).

Further, the sale or transfer of certain firearms to those other than law enforcement officers is prohibited by law. *See, e.g.*, 27 CFR §178.32. Thus, any complaints (or lack of complaints) by plaintiffs' law enforcement officers about their firearms are not relevant to the issues in this action. C.C.P. §2017(a).

Furthermore, the information sought is within defendants' own possession. First, defendants want to know which of ***their*** firearms have been approved and are used by plaintiffs' law enforcement agencies. Defendants themselves must have access to this information – if, for example, one of plaintiffs' law enforcement agencies uses a firearm manufactured by the Smith & Wesson Corp., this would be reflected in sales contracts (or similar documents) which that defendant possesses. Next, defendants seek information regarding whether plaintiffs ever communicated any complaints or criticisms about those firearms to the manufacturers. Again, if such complaints were ever made, the manufacturers who received these complaints would certainly be aware of them, have access to them and be able to retrieve any specific details from their own files.[12] Accordingly, this Court should deny defendants' request for any discovery on plaintiffs' approval and use of specific firearms.

Finally, plaintiffs – for the safety of their police officers and their citizens – have an interest in keeping this information confidential. For obvious reasons, plaintiffs' law enforcement officers' interest in not publicizing the type of information sought here far outweighs defendants' unexplained reason for exposing it.[13] Accordingly, plaintiffs are entitled to preserve the confidentiality of this information. *See* Cal. Evid. Code §1040 (b) ("A public entity has a privilege to refuse to disclose

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[12] Defendants claim that such criticisms "may not have been shared with the firearms' manufacturers." Defs.' Mem. at 6. This is a curious statement since the complaints or criticisms that defendants' requests seek are those that were "communicated to the firearm's manufacturer." (Ex. 7 to Defendants' Notice of Lodgment at 4). Which complaints are those that were made to a firearm's manufacturer, yet not shared with that same firearm's manufacturer?

[13] Information about the types of firearms used by law enforcement officials gives potential wrongdoers an advantage and places the officers (and the citizens they protect) at risk. For example, in the widely publicized February 1997 North Hollywood shootout between Los Angeles police officers and bank robbers – which left eleven police officers and six civilians wounded – the police officers were outgunned by the bank robbers who were protected by body armor and heavily armed with automatic weapons. Michael Fleeman, "1 Year Anniversary of Bank Shootout," *AP Online*, Feb. 28, 1999 (Polapink Decl., Ex. 2). Plaintiffs should not be required to disclose information which could potentially place their law enforcement officers in a similarly lethal situation. This interest is far greater than any probative value this information would provide.

official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and (2) [d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice."); *see also, e.g.*, *Shepherd v. Superior Court of Alameda County*, 17 Cal. 3d 107 (1976); *Rubin v. City of Los Angeles*, 190 Cal. App. 3d 560 (1987).

III. CONCLUSION

For the foregoing reasons, plaintiffs request that this Court deny defendants' request for an order compelling plaintiffs to disclose (1) accidental discharge and suicide incidents and (2) plaintiffs' approval and use of specific firearms; or, in the alternative, plaintiffs request that this Court order production of only a fair, representative sample of the suicide and accidental discharge reports.

DATED: January 12, 2001

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DECLARATION OF SERVICE

In re Firearm Case
No. JCCP 4095

(*People, et al. v. Arcadia Machine & Tool, Inc., et al.*)
San Francisco Superior Court No. 303753
Los Angeles Superior Court No. BC210894
Los Angeles Superior Court No. BC214794

I, Veronica Rivera, declare:

1. That I am and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that my business address is 600 West Broadway, Suite 1800, San Diego, California 92101.

2. That on January 12, 2001, I served the **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' *EX PARTE* MOTION FOR ORDER COMPELLING PLAINTIFFS TO DISCLOSE (1) ACCIDENTAL DISCHARGE AND SUICIDE INCIDENTS AND (2) PLAINTIFFS' APPROVAL AND USE OF SPECIFIC FIREARMS** by JusticeLink Electronic filing on all persons appearing on the Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of January, 2001, at San Diego, California.

Veronica Rivera
VERONICA RIVERA