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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

Judicial Council Coordination Proceeding
Special Title (Rule 1550(b))

FIREARM CASES

Coordinated actions:

THE PEOPLE OF THE STATE OF
CALIFORNIA, ex rel. the County of Los
Angeles, et. al.,

v.

ARCADIA MACHINE & TOOL, et. al.,

THE PEOPLE OF THE STATE OF
CALIFORNIA, by and through JAMES K.
HAHN, City Attorney of the City of Los
Angeles, et. al.,

v.

ARCADIA MACHINE & TOOL, et. al.,

THE PEOPLE OF THE STATE OF
CALIFORNIA, by and through San
Francisco City Attorney Louise H. Renne,
v.

ARCADIA MACHINE & TOOL, et. al.

JUDICIAL COUNCIL COORDINATION
PROCEEDINGS NO. 4095

Superior Court of California City & County of
San Francisco No. 303753

Superior Court of California County of Los
Angeles No. BC210894

Superior Court of California County of Los
Angeles No. BC214794

**DEFENDANTS ANDREWS SPORTING
GOODS' AND S.G. DISTRIBUTING'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
SPECIAL MOTION TO STRIKE
PURSUANT TO CAL. CODE OF CIVIL
PROCEDURE §425.16**

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Hon. Vincent. P. DiFiglia

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17
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25
26
27
28

TABLE OF CONTENTS

PAGE(S)

MEMORANDUM OF POINTS AND AUTHORITIES 1

I. INTRODUCTION 1

II. THE COURT CAN AND SHOULD EXERCISE ITS DISCRETION TO HEAR DEFENDANTS’ MOTION GIVEN THE CONSTITUTIONAL RIGHTS AT ISSUE 2

III. THE CALIFORNIA ANTI-SLAPP LAW WAS ENACTED TO PROTECT THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF FREE SPEECH AND IS TO BE CONSTRUED BROADLY 3

IV. SECTION 425.16 APPLIES BECAUSE THE ALLEGATIONS OF THE COMPLAINT ARISE FROM DEFENDANTS’ ALLEGED ACTS IN FURTHERANCE OF THEIR FIRST AMENDMENT RIGHTS 4

V. THE ALLEGED FALSE AND MISLEADING ADVERTISEMENTS AND PUBLIC STATEMENTS CONCERN PUBLIC ISSUES AND ARE PROTECTED FREE SPEECH 6

VI. PLAINTIFFS’ CANNOT DEMONSTRATE THE REQUISITE “LIKELIHOOD OF PUBLIC DECEPTION” REQUIRED UNDER SECTION 17500 9

 A. Elements of a Business and Professions Code Section 17500 Et. Seq. Cause of Action 9

 B. Plaintiffs’ Vague and General Allegations, Without Identifying A Specific Statement or Advertisement, Fail to State a Valid Section 17500 Claim. 10

 C. A Reasonable Consumer Could Not Be Misled by the Alleged Statements 11

 D. The Alleged False Statements are Non-Actionable Expressions of Opinion 12

 E. Defendants Have No Duty to Disclose Known Risks 13

CONCLUSION 14

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

Freeman v. Time, Inc. (9th Cal. 1995) 68 F.3d 285, 290	12
Haskell v. Time, Inc. (E.D. Cal. 1994) 857 F.Supp. 1392, 1399	10
Hoffman v. Capitol Cities/ABC, Inc. (9th Cir. 2001) 255 F.3d 1180, 1185-86	7
Mavilia v. Stoeger Industries (D. Mass. 1983) 574 F.Supp. 107, 111	12
Milkovich v. Lorain (1990) 497 U.S. 1, 20	13
Nordyke v County of Santa Clara (2000) 933 F.Supp. 903	7
Riley v. National Federation of the Blind (1988) 487 U.S. 781, 796	7

STATE CASES

Averil v. Superior Court (1996) 42 Cal.App.4th 1170, 1176	4
Bojorzque v. House of Toys, 62 Cal.App.3d 930, 934	12
Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal.4th 1106	4
Committee on Children's Television, Inc. v. General Foods Corp., (1983) 35 Cal.3d 197	10, 13
Dupont Merck Pharmaceutical Company v. The Superior Court of Orange County (2000) 78 Cal.App.4th 567	6, 9, 11
Fox Searchlight Pictures, Inc. v. Paladino (App. 2 Dist. 2001) 89 Cal.App.4th 294, 306	4
G.H.I.I. v. MTS, Inc. (1983) 147 Cal.App.3d 256, 270-275	10
Holmes v. J.C. Penny Co. (1982) 133 Cal.App.3d 216, 220	12
Khoury v. Maly's of California, Inc. (1993) 14 Cal.App.4th 612, 619	10, 11
Lam v. Ngo (App. 4 Dist. 2001) 91 Cal.App.4th 832	2
Lutz v. De Laurentiis (1989) 211 Cal.App.3d 1317, 1323-1324	10
Moyer v. Amador Valley Joint Union High School District (1990) 225 Cal.App.3d 720	13
People v. Stritzinger (1983) 34 Cal. 3d 505, 512	2
Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 929	10
Roseau v. Scherer (App. 3 Dist. 2001) 88 Cal.App.4th 260, 274	9
Simmons v. Allstate Ins. Co. (App. 3 Dist. 2001) 92 Cal.App.4th 1068, 1073	9

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TABLE OF AUTHORITIES, Cont.

PAGE(S)

STATUTES

California Business and Professions Code

§ 17500 *passim*

Cal. Code of Civil Proc.

§ 425.16 *passim*

§ 425.16(a) 3

§ 425.16(b)(1) 3, 4, 9, 14

§ 425.16(d) 2

§ 425.16(e)(3)(4) 5

§ 425.16(j) 4

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Eleven plaintiffs in this coordinated action brought false advertising claims, pursuant to
4 California Business and Professions Code §§ 17500 et seq. ("Section 17500"), against some or all
5 defendants herein seeking declaratory and injunctive relief, in addition to restitution and civil
6 penalties. Five Los Angeles County Suit plaintiffs named Andrews Sporting Goods, Inc. dba
7 Turners Outdoorsman ("ASG") and S.G. Distributing, Inc. ("SGD"), as defendants.¹ Plaintiffs'
8 claims are based on their general allegation that defendants falsely state or imply in "advertisements
9 and other statements" that ownership of firearms will improve home security.

10 Plaintiffs rely on several questionable studies in concluding that firearms possession
11 endangers home occupants rather than (or more than) protecting them, thus rendering defendants'
12 statements false. That is Plaintiffs' opinion. Defendants can cite competing studies (see Section 5,
13 below), and conclude that responsible use of firearms can enhance home security. That is
14 Defendants' opinion. The issue here, however, is not whether Defendants' opinion is supported by
15 criminologists or questioned by academics, or whether Defendants' opinion is a majority opinion or
16 a minority opinion. What matters is that it is a protected opinion—protected by the California and
17 United States Constitutions.

18 What Plaintiffs attempt to do here is repackage in the guise of a fraud claim their arguments
19 against the self-defense value of firearms. Further, they seek to gain an advantage in this ongoing
20 public debate by silencing opposing viewpoints and, in the process, infringe upon Defendants'
21 constitutional rights to freedom of speech. Specifically, Plaintiffs seek to impose civil penalties on
22 Defendants and enjoin future speech. Moreover, Plaintiffs' false advertising claims against SGD
23 are particularly offensive because SGD does not advertise. (See "Declaration of Shirley Andrews
24 in Support of Andrew's Sporting Goods, Inc.'s and SG Distributing, Inc.'s Special Motion to Strike
25

26 ¹ The San Francisco City Suit does not name ASG and SGD as defendants, but out of an
27 abundance of caution, and without waiving their rights to object to any attempt by the San
28 Francisco City plaintiffs to belatedly add defendants to their action, defendants include them in the
analysis under the instant motion.

Pursuant to Cal. Code of Civil Proc. § 425.16" filed herewith.)

Accordingly, Defendants bring this Special Motion to Strike ("anti-SLAPP" motion) pursuant to Code of Civil Procedure section 425.16 ("Section 425.16"), which was enacted by the legislature to prohibit such attacks on freedom of speech. Although certain Plaintiffs have immunity from such motions, i.e., public prosecutors bringing "enforcement actions" in the name of the "People of the State of California," that does not insulate the remaining Plaintiffs from proper application of the law. Where a statute is broadly construed, exceptions to it are to be narrowly construed. (*People v. Stritzinger* (1983) 34 Cal. 3d 505, 512.) Thus, the immunity provisions should be strictly limited to those parties named in Section 425.16(d).²

II. THE COURT CAN AND SHOULD EXERCISE ITS DISCRETION TO HEAR DEFENDANTS' MOTION GIVEN THE CONSTITUTIONAL RIGHTS AT ISSUE.

Under Section 425.16, an anti-SLAPP special motion to strike *may* be filed within 60 days of the service of the complaint. The court, however, has discretion to hear such motions at any later time upon terms it deems proper. (*Lam v. Ngo* (App. 4 Dist. 2001) 91 Cal.App.4th 832.) As the court in *Lam* noted, "[t]he nonjurisdictional nature of the time limit is also emphasized by the permissive 'may' in the setting forth of the time limit." (*Id.* at 840.) In addition, the court held that trial courts *must* hear anti-SLAPP motions if filed within 60 days of an amended complaint. (*Ibid.*) In the instant case, Defendants anticipate that some Plaintiffs will seek to amend their complaints shortly in an effort to satisfy statutory standing requirements. If Plaintiffs obtain this court's leave to amend their complaints, then the anti-SLAPP motion must and should be heard as to those Plaintiffs who do not have immunity under Section 425.16(d).

² Plaintiffs Gloria Molina, Zev Yaroslavsky, and Yvonne Brathwaite-Burke on behalf of the general public; the County of Los Angeles on behalf of the State, itself and the general public; and San Mateo and Alameda counties on behalf of the People of the State of California are not exempt from this Special Motion to Strike since they are not among the parties provided immunity pursuant to Section 425.16(d), which states: "[t]his section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor."

1 In either event, the motion warrants consideration due to the First Amendment
2 implications; Plaintiffs are, after all, seeking a declaration that statements of opinion by Defendants
3 about the potential benefits of gun ownership are illegal. Thus, Plaintiffs seek to do more than
4 “chill” certain speech based on its content. They seek to outlaw it, as seen in their request for
5 relief:

6 159. Plaintiffs seek an order of this Court: (1) enjoining defendants from continuing to issue
7 unfair, deceptive, untrue or misleading statements and advertising; (2) ordering defendants
8 to undertake a corrective advertising campaign warning consumers of the dangers
9 associated with owning a gun in the home and instruct hand gun owners of the proper way
10 to store handguns in the home; (3) ordering restitution to the public for all funds unfairly
11 obtained by defendants as a result of their violation of Business and Professions Code §§
12 17500 *et seq.*; (4) ordering defendants to disgorge all revenues and profits acquired as a
13 result of their violation of Business and Professions Code §§ 17500 *et seq.*; and (5) ordering
14 Defendants to pay civil penalties as a result of their violation of Business and Professions
15 Code §§ 17500 *et seq.*

16 (See LA County Complaint ¶ 159)

17 Such relief goes far beyond “chilling” Defendants’ right to speak. They want to fine them,
18 take their profits, and silence them—except for the mandatory “anti-gun” campaign Plaintiffs seek to
19 impose on Defendants. In short, the Section 17500 causes of action are aimed squarely at
20 Defendants’ opinions and the expression thereof, i.e., the Defendants’ constitutional right to
21 freedom of speech. Consequently, a review of Plaintiffs’ claims under Section 425.16 is warranted.

22 **III. THE CALIFORNIA ANTI-SLAPP LAW WAS ENACTED TO PROTECT THE**
23 **FUNDAMENTAL CONSTITUTIONAL RIGHTS OF FREE SPEECH AND IS TO**
24 **BE CONSTRUED BROADLY.**

25 California Code of Civil Procedure section 425.16(a) provides that:

26 “The legislature finds and declares that there has been a disturbing increase in
27 lawsuits brought *primarily to chill the valid exercise* of the constitutional rights of
28 freedom of speech and petition for the redress of grievances. The legislature finds
and declares that it is in the public interest to encourage continued participation in
matters of public significance, and that this participation should not be chilled
through *abuse of the judicial process*.” To this end, this section shall be *construed*
broadly. (Emphasis added.)

29 The legislature has provided an expedited procedure to counteract the “disturbing increase”
30 of these types of lawsuits. Specifically, the defendant can file a “special motion to strike” which
31 “shall” be granted unless the plaintiff can demonstrate that “there is a probability that the plaintiff

1 will prevail on the claim.” (C.C.P. § 425.16(b)(1).)

2 This statute was drafted by the legislature *very broadly* so as to include “any act of [a]
3 person in furtherance of the person’s right of petition or free speech under the United States or
4 California Constitution in connection with a public issue.” (C.C.P. § 425.16(b)(1); see *Averil v.*
5 *Superior Court* (1996) 42 Cal.App.4th 1170, 1176 [the court held that given the “stated purpose
6 of the statute....the legislature intended the statute to have broad application.”].) Indeed, though
7 some cases narrowly construed the statute, the legislature specifically amended Section 425.16 in
8 1997 to make clear and ensure that the statute “shall be construed broadly.”³ Moreover, in *Briggs*
9 *v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, the California Supreme Court
10 noted that the 1997 amendment to Section 425.16 was not “surprising since the ‘stated purpose of
11 the [anti-SLAPP] statute...includes protection of not only the Constitutional right to petition for
12 the redress of grievance, but the broader Constitutional right of freedom of speech.’” (*Id.* at 1119.)

13 In sum, under Section 425.16, Defendants must show that the acts challenged by Plaintiffs’
14 false advertising claims were in furtherance of their right of free speech in connection with a public
15 issue. The burden then shifts to Plaintiffs to demonstrate that there is a probability they will prevail
16 on their claims.

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18 **IV. SECTION 425.16 APPLIES BECAUSE THE ALLEGATIONS OF THE**
19 **COMPLAINT ARISE FROM DEFENDANTS’ ALLEGED ACTS IN**
FURTHERANCE OF THEIR FIRST AMENDMENT RIGHTS.

20 As noted above, all that is required to invoke the protection of California’s SLAPP statute
21 is that the challenged lawsuit or claim arose from an act on the part of Defendants in furtherance of
22 their right of petition or free speech. (C.C.P. § 425.16 (b)(1); *Fox Searchlight Pictures, Inc. v.*
23 *Paladino* (App. 2 Dist. 2001) 89 Cal.App.4th 294, 306.) An act in furtherance of a person’s right
24 of petition or free speech under the United States or California Constitution in connection with a
25 public issue includes:

26 . . . any written or oral statement or writing made in a place open to the public or a public

27
28 ³ The legislature placed such importance on this motion that it made the *denial* of a special
motion to strike an appealable order. (See C.C.P., §425.16 (j).)

1 forum in connection with an issue of public interest; or any other conduct in furtherance of
2 the exercise of the constitutional right of petition or the constitutional right of free speech
3 in connection with a public issue or an issue of public interest. (C.C.P. § 425.16 (e)(3)-
(4).)

4 A defendant moving to strike a Strategic Lawsuit Against Public Participation is not required to
5 show the plaintiff intended to chill the defendant's exercise of First Amendment rights or that the
6 suit had such an effect. (*Id.* at 307.)

7 Here, Plaintiffs have alleged, without *any* supporting evidence, that Defendants made false
8 and/or misleading statements in connection with the distribution and sale of firearms. Specifically,
9 Plaintiffs claim that:

10 Defendants . . . have made unfair, deceptive, untrue or misleading statements and
11 advertisements in connection with the marketing and sale of firearms... includ[ing]...
12 engaging in a campaign of deception and misrepresentation concerning the dangers of their
13 firearms by disseminating *advertisements and other statements* which falsely state or imply
that ownership of guns will increase home safety or security. (San Francisco et. al. First
Amended Complaint ¶84; Los Angeles County et. al. Complaint ¶159.)(emphasis added)

14 To support these allegations, Plaintiffs state:

15 To increase sales and profits, Defendants have falsely deceptively claimed through
16 advertising and promotion of their firearms that the ownership and possession of firearms in
17 the home increases one's security. For example handgun manufacturers have promoted
18 firearms with slogans such as "homeowner's insurance," "tip the odds in your favor," and
19 "your safest choice for personal protection." Research demonstrates that, to the contrary,
possession of firearms actually increases the risk and incidence of homicide, and suicide and
20 intentional and unintentional injuries to gun owners and their families and friends . . .
21 Defendants' advertising and promotion deceptively conveys the message that possession of
a firearm and that the enhanced lethality of particular features and guns will increase the
22 personal safety of the owner and owner's household....Defendants fail to include any
information or warning about the relative risk of keeping a firearm in the home...[and] is
23 therefore likely to mislead the public. (San Francisco et al. First Amended Complaint ¶68)
(See also, Los Angeles County et. al. Complaint ¶126-131)

24 These alleged false and misleading advertisements and statements, and the "proof" thereof,
25 are the subject of an ongoing national public debate regarding firearm safety and gun control, thus
26 bringing Plaintiffs' claims within the purview of Section 425.16 (e)(3)-(4). Firearm safety and gun
27 control are "public issues." Defendants have a right to speak about them in their "advertisements
28 and other statements" to which Plaintiffs object, without the threat of fines, disgorgement of profits
or expensive and protracted litigation.

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3 **V. THE ALLEGED FALSE AND MISLEADING ADVERTISEMENTS AND PUBLIC**
4 **STATEMENTS CONCERN PUBLIC ISSUES AND ARE PROTECTED FREE**
5 **SPEECH.**

6 California courts have found that alleged false and misleading advertisements and public
7 statements concerning important public issues constitute protected free speech, subject to analysis
8 under Section 425.16. For example, in *Dupont Merck Pharmaceutical Company v. The Superior*
9 *Court of Orange County* (2000) 78 Cal.App.4th 562, the plaintiff through a Section 17500 cause
10 of action claimed that a pharmaceutical company's allegedly "false, deceptive, and misleading
11 statements are not protected by the right of free speech." (*Id.* at 566) However, the Court held:

12 "This may be true, at least as far as false advertising is concerned. However, in
13 making this argument, plaintiffs are placing the cart before the horse. The
14 allegation in the unverified complaint that the statements were false may or may not
15 be true. Whether or not they were true should be considered in the second part of
16 the [Section 425.16] analysis; whether there is a probability plaintiffs will prevail.
17 In determining whether the alleged conduct is constitutionally protected it is
18 sufficient to determine the conduct constituted speech protected by the First
19 Amendment." (*Ibid.*)

20 The court there found that the pharmaceutical company's advertising and promotions were
21 of public interest and constitutionally protected, given the seriousness of the issue and the number
22 of people affected. (*Id.* at 567 ["Both the number of persons allegedly affected and the
23 seriousness of the conditions treated establish the issue as one of public interest."].) Accordingly,
24 the court held that defendant had met the threshold burden under its anti-SLAPP motion, i.e., that
25 the allegedly false advertisements and promotions constituted acts in furtherance of its right of
26 petition or free speech under the United States or California Constitution in connection with a
27 public issue. It was then incumbent upon plaintiffs to establish that there was a probability they
28 would prevail on their claims. (*Ibid.*)

29 Similarly, in this case, Plaintiffs alleged generally that Defendants made false and misleading
30 statements in their advertisements and other communications. As in *Dupont*, such statements
31 concern serious issues (gun control and self-defense rights, in this case) that are of public interest.
32 Thus, such statements should also come under the protection of California's SLAPP legislation.

1 In *Nordyke v. County of Santa Clara* (2000) 933 F.Supp. 903, the County of Santa Clara
2 attempted to prohibit gun shows on county property. Plaintiffs sought a preliminary injunction
3 against the enforcement of the restriction by the County, in part, on the grounds that it violated
4 their right of free speech regarding firearms. In granting plaintiffs' preliminary injunction, the court
5 found that gun shows "permit a forum for the exchange and debate of ideas regarding guns
6 and gun control and offer an opportunity for candidates for political office to express their views
7 on these *important social issues*." (*Id.* at 906) (emphasis added.) The court further held that "the
8 speech which occurs at plaintiffs' gun show sales constitutes [protected] commercial speech." (*Id.*
9 at 907.)

10 Here, Plaintiffs would be hard pressed to argue that the communications *attendant* to the
11 sale of firearms at gun shows deserve any more protection than *direct* communications from
12 Defendants to consumers. The advertisements and statements at issue in this case, to the extent
13 that they refer to the self-defense benefits of firearms, are at the center of the "exchange and debate
14 of ideas regarding gun control." Thus, as in *Nordyke*, Defendants' advertisements and other
15 statements constitute, at the very least, expressions of protected commercial speech.

16 Unlike the defendants in *Nordyke*, however, Plaintiffs here seek to penalize and enjoin any
17 "advertisements or other statements" addressing the value of firearm ownership as it relates to self-
18 defense and home security. Such speech is "inextricably intertwined" in the gun control debate
19 which is core political speech and, as such, should not to be tested as commercial speech but rather
20 as fully protected core speech. (*Hoffman v. Capitol Cities/ABC, Inc.* (9th Cir. 2001) 255 F.3d
21 1180, 1185-86.) Plaintiffs seek to suppress political ideas which, even when expressed in
22 commercial advertising, have lost their "commercial character [by being] inextricably intertwined
23 with otherwise fully protected speech." (*Riley v. National Federation of the Blind* (1988) 487 U.S.
24 781, 796.)

25 Plaintiffs actually make this point in their request for relief. Plaintiffs seek an order that
26 would force defendants to "undertake a corrective advertising campaign warning consumers of the
27 dangers associated with owning a gun in the home and instruct hand gun owners of the proper way
28 to store handguns in the home." (See LA County Complaint ¶ 159) Such a "corrective" campaign

1 regarding the danger of firearms would be clearly and inextricably intertwined with core political
2 speech—as are Defendants’ advertisements and statements regarding the value of firearms
3 ownership. In short, by requesting such relief, Plaintiffs acknowledge that they are engaged in a
4 public and political debate about firearms ownership. Plaintiffs’ attempt, under the guise of their
5 false advertising claim, to silence one side of that debate reveals the true nature of the political
6 battle that underlies all Plaintiffs’ claims.

7 Finally, Plaintiffs allege that statements such as “homeowner’s insurance,” “tip the odds in
8 your favor,” and “your safest choice for personal protection” are misleading because they convey
9 the message that a firearm will increase one’s personal safety. Again, whether one’s safety is
10 increased by the use or possession of firearms is a matter of national public debate. For example,
11 Plaintiffs challenge Defendants’ alleged statements on the basis of studies that supposedly
12 “demonstrate that the presence of handguns in the home increase [sic] the risk of harm to firearm
13 owners and their families,” and that “Studies that control for the relevant variables have
14 demonstrated that the homicide of a household member is almost three times more likely in homes
15 with guns than in homes without them.” (See e.g., LA County, ¶¶ 127-129, 158; LA City, ¶¶ 136-
16 138, 162; SF, ¶¶ 69-71, 84.)

17 This **court may take judicial notice of the** fact that this issue has been the subject of
18 extensive public debate in which several researchers have expressed a different view of the utility of
19 firearms, particularly possession of a firearm for lawful self-defense purposes. (See, e.g. John R.
20 Lott, Jr., *More Guns Less Crime; Understanding Crime and Gun Control* (Univ. Chicago Press,
21 May 1998); Gary Kleck, *Targeting Guns: Firearms and Their Control* (Aldine de Gruyter,
22 December 1997).)

23 In sum, the “advertisements and other statements” about firearms that Plaintiffs seek to
24 penalize and enjoin clearly involve the exercise of Defendants’ free speech “in conjunction with a
25 public issue” that is hotly debated, thereby bringing Plaintiffs false advertising claims within the
26 purview of Section 425.16. Thus, the burden shifts to Plaintiffs to establish that there is a
27 probability they will prevail on their false advertising claims, something they cannot do.

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2 **VI. PLAINTIFFS' CANNOT DEMONSTRATE THE REQUISITE "LIKELIHOOD OF**
3 **PUBLIC DECEPTION" REQUIRED UNDER SECTION 17500.**

4 To survive a Special Motion to Strike pursuant to Section 425.16, it is the burden of the
5 plaintiffs to prove there is a probability that they will prevail. (*Dupont Merck Pharmaceutical*
6 *Company v. The Superior Court of Orange County* (2000) 78 Cal.App.4th 567.) Merely surviving
7 a demurrer does not satisfy the requirement that the plaintiff would prevail; instead, "a plaintiff
8 must provide the court with *sufficient evidence* to permit the court to determine whether there is a
9 probability that the plaintiff will prevail on the claim." (*Id.* at 568.)

10 It would defeat the obvious purposes of the anti-SLAPP statute if mere allegations in an
11 unverified complaint would be sufficient to avoid an order to strike the complaint.
12 Substantiation requires something more than that. Once the court determines the first prong
13 of the statute has been met, a plaintiff must provide the court with sufficient evidence to
14 permit the court to determine whether "there is a probability that the plaintiff will prevail on
15 the claim." (C.C.P. § 425.16(b)(1).)

16 To establish a "probability of prevailing on the claim," as required for a plaintiff to
17 withstand a special motion, the plaintiff must demonstrate that the complaint is both legally
18 sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment
19 if the evidence submitted by the plaintiff is credited. (*Roseau v. Scherer* (App. 3 Dist. 2001) 88
20 Cal.App.4th 260, 274 as modified.) Significantly, unlike demurrers or motions to strike, which are
21 designed to eliminate sham or facially meritless allegations at the pleading stage, a SLAPP motion,
22 like a summary judgment motion, pierces the pleadings and requires an evidentiary showing.
23 (*Simmons v. Allstate Ins. Co.* (App. 3 Dist. 2001) 92 Cal.App.4th 1068, 1073.)

24 Plaintiffs cannot prevail on a Section 17500 (false and misleading advertising) cause of
25 action against Defendants because they cannot demonstrate that a "reasonable consumer" is likely
26 to be deceived by their advertisements (as noted above, SGD does not advertise at all).

27 **A. Elements of a Business and Professions Code Section 17500 Et. Seq. Cause of**
28 **Action.**

Business and Professions Code section 17500 prohibits "untrue or misleading" advertising

1 or statements in connection with the sale of property or services. To state a Section 17500 claim,
2 plaintiffs must plead facts sufficient to show a “likelihood of public deception,” when considered
3 from the perspective of a “reasonable consumer.” Otherwise, an allegation of misleading
4 advertising may be dismissed. (See *Haskell v. Time, Inc.* (E.D. Cal. 1994) 857 F.Supp. 1392,
5 1399.)

6
7 **B. Plaintiffs’ Vague and General Allegations, Without Identifying A Specific**
8 **Statement or Advertisement, Fail to State a Valid Section 17500 Claim.**

9 As discussed above, in order to establish a claim for false or misleading advertising,
10 Plaintiffs must show a “likelihood of public deception.” To prove a likelihood of public deception,
11 Plaintiffs must first identify the advertising that is untrue or misleading. However, Plaintiffs have
12 not identified a single advertisement or statement produced by Defendants that they allege is false
13 or misleading. Instead, Plaintiffs responded to ASG’s Requests for Admissions, which stated that
14 “Plaintiffs do not know the content of any advertising attributable to this defendant which contains
15 fraudulent statements” by identifying catalogs by parties other than ASG that were in Defendants’
16 possession. (See Declaration of C. D. Michel in Support of Andrew's Sporting Goods, Inc.'s and
17 S.G. Distributing, Inc.'s Special Motion to Strike Pursuant to Cal. Code of Civil Proc. § 425, filed
18 herewith.)

19 Plaintiffs are required to provide *some* evidentiary basis that Defendants were in violation
20 of Section 17500 to bring such a claim. A plaintiff alleging unfair business practices under these
21 statutes must state with reasonable particularity the facts supporting the statutory elements of the
22 violation. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619; *Perdue v.*
23 *Crocker National Bank* (1985) 38 Cal.3d 913, 929; see *Committee on Children's Television, Inc.*
24 *v. General Foods Corp.*, (1983) 35 Cal.3d 197, 213-214; *G.H.I.I. v. MTS, Inc.* (1983) 147
25 Cal.App.3d 256, 270-275; *Lutz v. De Laurentiis* (1989) 211 Cal.App.3d 1317, 1323-1324.) The
26 court in *Khoury* sustained defendant’s demurrer “because the second amended complaint ...
27 fail[ed]... to describe with any reasonable particularity the facts supporting violation....the
28 complaint refers to an ‘effect’ of ‘misleading’ appellant's customers, but the facts clearly do not

1 involve deceptive advertising.” (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th at
2 619.)

3 Similarly, Plaintiffs Section 17500 claims here fail. The complaints do not satisfy even the
4 most liberal interpretation of notice pleading. There are forty four defendants in this case, yet
5 Plaintiffs have alleged only three allegedly deceptive slogans. (See, e.g., LA County, ¶126; LA
6 City, ¶ 135; SF, ¶68.) Plaintiffs do not specify which, if any, of these statements were made by
7 ASG. Nor have Plaintiffs advised ASG when, where or to whom such statements were made.
8 Plaintiffs’ bare allegations are insufficient to meet their burden of proof regarding probability of
9 success at trial. Consequently, such allegations cannot survive this special motion to strike. (See
10 *Dupont Merck Pharmaceutical Company v. The Superior Court of Orange County* (2000) 78
11 Cal.App.4th 567.)

12 Moreover, Plaintiffs’ failure to identify a single specific advertisement or statement by
13 Defendants that is false or misleading is not a technical defect or oversight. ASG has produced
14 over 825 advertisements to Plaintiffs and directed them to a website containing ASG’s current
15 advertising. In addition, as part of the meet and confer process, ASG has repeatedly asked
16 Plaintiffs to identify the advertisements they challenge.

17 But Plaintiffs have failed to do so. ASG is still waiting to discover what it must defend
18 against at trial; ASG is still waiting to discover what it did wrong. (See Declaration of C. D.
19 Michel in Support of Andrew's Sporting Goods, Inc.'s and S.G. Distributing, Inc.'s Special Motion
20 to Strike Pursuant to Cal. Code of Civil Proc. § 425, filed herewith.) Consequently, Plaintiffs have
21 failed to state a valid Section 17500 cause of action.

22
23 **C. A Reasonable Consumer Could Not Be Misled by the Alleged Statements**

24 Plaintiffs allege only that unspecified firearm manufacturers have “promoted handguns with
25 slogans such as ‘homeowner’s insurance,’ ‘tip the odds in your favor,’ and ‘your safest choice for
26 personal protection.’” (See LA County Complaint ¶¶126; LA City Complaint ¶¶135; San
27 Francisco Complaint ¶¶68.) ASG has been unable to locate any such statements in its advertising
28 and contends that it never made such statements. SGD does not advertise. (See "Declaration of

1 Shirley Andrews in Support of Andrew's Sporting Goods, Inc.'s and S.G. Distributing, Inc.'s
2 Special Motion to Strike Pursuant to Cal. Code of Civil Proc. § 425.16," ¶¶ 1-5, filed herewith.)
3 In any event, even if Plaintiffs provided evidence that Defendants made such advertisements,
4 promotions or other statements, no reasonable consumer could conclude from these slogans that
5 guns pose no potential risk.

6 It is common knowledge that a gun has the potential to cause serious injury or death. The
7 general public is aware and understands that gun-related accidents and injuries from careless
8 handling and misuse can occur. (See, e.g., *Mavilia v. Stoeger Industries* (D. Mass. 1983) 574
9 F.Supp. 107, 111 ["common sense requires the Court to find that the risks involved in marketing
10 handguns for sale to the general public are not greater than reasonable consumers expect. Every
11 reasonable consumer that purchases a handgun knows that the product can be used as a murder
12 weapon [T]hat death may result from careless handling of firearms is known by all Americans
13 from an early age."]; *Holmes v. J.C. Penny Co.* (1982) 133 Cal.App.3d 216, 220 [holding dangers
14 of pellet gun powered by carbon dioxide cartridges generally known]; *Bojorzque v. House of Toys*,
15 62 Cal.App.3d 930, 934 ["ever since David slew Goliath young and old alike have known that
16 slingshots can be dangerous and deadly. (Citation omitted) There is no need to include [such] a
17 warning"]; see also 6 Within, SUMMARY OF CALIFORNIA LAW 301-02 [no duty to warn
18 of obvious dangers].)

19 The premise of Plaintiffs' Section 17500 claim – that the challenged advertising "slogans"
20 cause "reasonable" consumers to ignore specific warnings and forsake the basic understanding that
21 guns can be dangerous – is simply untenable. No reasonable consumer could conclude that such an
22 instrument, lethal to intruders by design, somehow poses no potential danger to its owner or other
23 household residents. Moreover, "any ambiguity that [plaintiff] would read into any particular
24 statement is dispelled by the promotion as a whole." (See *Freeman v. Time, Inc.* (9th Cal. 1995) 68
25 F.3d 285, 290.)

26
27 **D. The Alleged False Statements are Non-Actionable Expressions of Opinion.**

28 Further, the statements alleged in the Complaints to be "misleading" are "non-actionable

expressions of opinion.” (See *Committee on Children’s Television v. General Foods Corp.* *supra*, 35 Cal.3d 197, 213 n.15 [Plaintiffs’ Section 17500 claims fail for this reason alone. Such statements are statements of opinion that cannot be proven false because it is an expression of Defendant’s subjective judgment]; *Moyer v. Amador Valley Joint Union High School District* (1990) 225 Cal.App.3d 720, 725 [calling high school teacher a “babbler” and “the worst teacher at [school]” was protected statement of opinion]; *Milkovich v. Lorain* (1990) 497 U.S. 1, 20 [“opinions relating to matters of public concern which do not contain a probably false factual connotation will receive full constitutional protection” under the first amendment.”].) Also, as noted above, opinions about the self-defense value of certain firearms are supported by studies arguably based on better science than Plaintiffs’ studies. That is, far from being false, Defendants’ opinions have a sound factual basis; Plaintiffs simply disagree with them. Such opinions are non-actionable as a matter of law. *Milkovich v. Lorain* (1990) 497 U.S. 1, 20.

E. Defendants Have No Duty to Disclose Known Risks.

Plaintiffs’ non-disclosure theory also is fraught with problems. For example, although the general risk inherent in owning a firearm is well known, the individual risks involved are too highly variable to require disclosure. The risks of defensive firearms ownership vary in relation to the buyer’s circumstances. Writing at a time when data supporting the defense value of firearms was much less developed than it is now, an eminent criminologist began by noting that some homes are in high crime areas, others are not; some have children, others do not; etc. Professor Wright continued:

In owning a gun for protection (or for any other reason), a homeowner runs some risk that the weapon will be involved in an accident or will be involved in a “heat of the moment” shooting By the same token, in choosing not to own a weapon for protection, the homeowner runs some risk [of not being able to resist criminals] In general, both costs and benefits are too variable across households with varying characteristics to allow one to say in some general and all-embracing way whether families “should” or “should not” keep guns for protection in the home.⁴

We underscore the last sentence because it both refutes the entire non-disclosure argument

⁴ James D. Wright, “Firearms Ownership for Self-Defense” in + Kates (ed.), FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY (1984), p. 327.

1 and shows why the issues here need to be determined through free and open debate rather than by
2 suppressing one side in that debate.

3 4 CONCLUSION

5 Plaintiffs' Section 17500 claims are subject to Defendants' anti-SLAPP motion because
6 they seek to penalize and enjoin protected speech, and "chill" Defendants' constitutional rights to
7 speak on a matter of national public debate and concern. Defendants motion should be granted
8 because Plaintiffs cannot provide this court with sufficient evidence to permit the court to
9 determine whether "there is a probability that the plaintiff will prevail" on the false advertising
10 claim, as required under Section 425.16 (b)(1). Further, given that SGD does not advertise,
11 Plaintiffs claims against it should be stricken, summarily.

12 For the reasons stated above, this Court should strike the Business and Professions Code
13 section 17500 et seq. causes of actions for the following Plaintiffs:

- 14 1. Los Angeles County suing on behalf of itself and the general public.
15 2. Los Angeles County suing in the name of the People of the State of California.
16 3. Supervisor Gloria Molina suing on behalf of the general public.
17 4. Supervisor Zev Yaravslavsky suing on behalf of the general public.
18 5. Supervisor Yvonne Brathwaite Burke suing on behalf of the general public.
19 6. County Counsel for San Mateo suing in the name of the People of the State of
20 California.
21 7. County Counsel for Alameda suing in the name of the People of the State of California.

22 In addition, depending on whether the court grants, in whole or in part, Defendants'
23 Motion for Judgment on the Pleadings (addressing various Plaintiffs' lack of standing), filed
24 December 30, 2002, several Plaintiffs may no longer have any valid claims in these coordinated
25 Firearms Cases, and should be dismissed. Defendants have attached a "Combined Standing and
26 SLAPP Chart" for the court's convenience, illustrating which Plaintiffs remain in this action
27 depending on how the court rules on these two motions. (See Exhibit A.) If the court eliminates
28 those Plaintiffs who lack standing and/or whose claims should be stricken under Section 425.16,
the number of Plaintiffs in this coordinated case will have been reduced from 23 to 9.

Defendants urge this court to enforce the statutory restrictions raised by their "standing"
and "anti-SLAPP" motions and eliminate 14 Plaintiffs from these cases. As a practical matter, to

1 the extent that any claims survive summary judgment, the nine remaining Plaintiffs are capable of
2 fully litigating those claims. As a matter of law, the 14 Plaintiffs that would be eliminated, should
3 be. They had no legal basis for bringing their claims in the first instance.

4 Dated: January 3, 2003

TRUTANICH • MICHEL, LLP

6 /s/ C. D. Michel
7 C. D. Michel,
8 Attorney for Defendants
9 Andrews Sporting Goods, Inc.
10 dba Turners Outdoorsman,
11 and S.G. Distributing, Inc.
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PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Haydee Villegas, declare:

1. That I am employed in the City of San Pedro, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 407 North Harbor Boulevard, San Pedro, California 90731.

2. On January 13, 2003, I served the foregoing document(s) described as **DEFENDANTS ANDREWS SPORTING GOODS' AND S.G. DISTRIBUTING'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIAL MOTION TO STRIKE PURSUANT TO CAL. CODE OF CIVIL PROCEDURE §425.16** on the interested parties in this action by JusticeLink Electronic filing on all persons appearing on the Service List.

I declare under penalty that the foregoing is true and correct. Executed this January 13th day of January, 2003, at San Pedro, California.

Haydee Villegas

Haydee Villegas