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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

Coordination Proceeding Special Title (Rule 1550 (b))	JUDICIAL COUNCIL COORDINATION PROCEEDING No. 4095
FIREARMS CASE	San Francisco Superior Court No. 303753
Including actions:	Los Angeles Superior Court No. BC210894 Los Angeles Superior Court No. BC214794
People, et. al. v. Arcadia Machine & Tool, Inc., et. al.	**DEFENDANTS' REPLY BRIEF RE MOTION TO COMPEL PLAINTIFFS TO DISCLOSE (1) ACCIDENTAL DISCHARGE AND SUICIDE INCIDENTS AND (2) PLAINTIFFS' APPROVAL AND USE OF SPECIFIC FIREARMS**
People, et. al. v. Arcadia Machine & Tool, Inc., et. al.	
People, et. al. v. Arcadia Machine & Tool, Inc., et. al.	
	Date: January 26, 2001 Time: 8:30 a.m. Hon. Vincent P. DiFiglia Dept: 65

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1-19-01

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I. Introduction.

At trial, this Court will be asked to decide whether each defendant is responsible for creating and maintaining a public nuisance in plaintiffs' communities. This Court will also determine whether each defendant's conduct in designing, distributing and marketing its lawful products is unlawful, unfair or fraudulent under California Business and Professions Code §§ 17200 and 17500. Defendants believe that plaintiffs' claims will fail upon examination of the information acquired by plaintiffs in their law enforcement capacities regarding specific firearm incidents. Data relating to firearms incidents providing, or leading to, information on the circumstances of a shooting or how a firearm was acquired by a shooter, among other facts, constitute the best and most direct evidence to determine the impact, if any, of defendants' alleged business practices in plaintiffs' communities and to substantiate or refute plaintiffs' claims in these cases.[1/]

II. Information In Plaintiffs' Possession Relating To The Occurrence Of Firearm Incidents In Their Communities Is Reasonably Calculated To Lead To The Discovery Of Admissible Evidence.

The scope of permissible discovery is any matter "relevant to the subject matter" involved in the case. CCP § 2017(a). Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Id. The information and documents sought from plaintiffs' own law enforcement files is plainly related to the subject matter of this litigation and is discoverable. See, e.g. Deyo v. Kilbourne, 84 Cal. App. 3d 771, 781 (1978). The purpose of discovery is to enable a party to obtain evidence under the control of his adversary. Id. at 793. Thus, the allegations of plaintiffs' complaints and defendants' defenses dictate the parameters of discovery, not plaintiffs' trial strategy. Plaintiffs' stated intention to disregard the specific incident evidence in their control and

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[1] Plaintiffs mischaracterize public nuisance law in their attempt to avoid production of information on specific firearms incidents. While public nuisance certainly involves injury to the public, proximate cause remains an element of a public nuisance claim. Martinez v. Pacific Bell, 225 Cal. App. 3d 1557, 1565-69 (1st Dist. 1990). Thus, at a minimum, specific firearms incidents and information flowing from these incidents are relevant to causation. Gallo v. Acuna, 14 Cal. 4th 1090 (1997), does not hold otherwise or even hold, as plaintiffs suggest, that "individualized proof" is unnecessary to prove a public nuisance claim against a defendant. (Pltfs.' Mem. at 3). The portion of the Gallo opinion cited by plaintiffs for this proposition discusses the permissible scope of the trial court's injunction, not the proof necessary to sustain a public nuisance claim. Gallo, 14 Cal. 4th at 1125. Indeed, as the opinion makes clear, the City did offer "individualized proof" that all but three of the named defendants committed specific acts "comprising specific elements of the [alleged] public nuisance." Id.

instead to rely on "statistical models and studies" is not a basis to withhold the requested information from discovery.

Information and documents in plaintiffs' possession relating to specific firearm incidents in their communities will be examined in light of plaintiffs' allegations and defendants' defenses for facts or patterns material to those claims.[2] The information can also be used to undermine statistical studies offered by plaintiffs. A statistical analysis "is only as good as the data on which it rests." Kaye & Freedman, Reference Manual on Scientific Evidence 90 (Federal Judicial Center 2d ed. 2000). (Ex. 14 to Supplement Notice of Lodgement ("SNOL")). The reliability and validity of survey evidence depends in large part on the sampling frame – whether the sample approximates the relevant characteristics of the universe which the survey purports to describe. Shari S. Diamond, Reference Manual on Scientific Evidence 240-44. (Ex. 14 to SNOL). The specific firearm incidents in plaintiffs' communities and the data surrounding those incidents, are unquestionably relevant to plaintiffs' claims and any "aggregated" statistical analysis offered to support those claims.

Put simply, the firearms incidents in plaintiffs' communities may constitute the most probative evidence in these cases. In People v. Ochoa, 165 Cal. App. 3d 885 (1985), the court affirmed dismissal of criminal charges against prison inmates based on the People's refusal to comply with a discovery order requiring production of referral forms by which prison officials refer inmates to the district attorney for prosecution. The defendants requested the forms, which set forth an inmate's race, to support their claim of discriminatory enforcement. The People opposed the claim with a declaration stating that race had not been a factor in bringing the charges. Relying on Evidence Code § 412, the court held that the value of the declaration was properly discounted because "the People had access to stronger evidence in the referral forms." 165 Cal. App. 3d at 889. "The best evidence of

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[2] Contrary to plaintiffs' suggestion, defendants do not intend to try a "series of mini-product liability cases." Defendants fully understand that this case has not been plead as a traditional product liability action. Plaintiffs have, however, in their § 17200 claims alleged that defendants' products are defectively designed and that defendants' warnings are inadequate. Plaintiffs have specifically alleged as design defects the failure to implement "personalized handgun technology," "an effective loaded chamber indicator" and a "magazine disconnect safety." First Amended Complaint (Case No. 303753) ¶¶ 55 and 62. Thus, there are evidentiary issues in this case which are also present in a traditional product liability case on which discovery is entirely proper. See defendants' Opening Brief at pp. 2-5.

discriminatory prosecution would be a comparative breakdown by race of inmates who are referred to the district attorney for prosecution versus those who are actually prosecuted on weapons charges." Id. In this case, as in Ochoa, the stronger and more probative evidence must be produced if it is within a party's power to do so.[3]

Plaintiffs' steadfast refusal to produce information and documents in their possession and so fundamentally material to their claims is untenable. The information requested by defendants is clearly discoverable and plainly relevant, if not central, to these cases.

III. Plaintiffs Have Neither Produced Nor Offered Documents Or Information Sufficiently Responsive To Defendants' Discovery Requests.

Plaintiffs' representation that they have already complied with defendants' discovery requests is as misleading as it is self-serving. Plaintiffs have merely provided what they now admit is only a sampling of academic studies which are, for the most part, dated, incomplete and do not touch upon the specific issues this Court will address at trial.[4] Plaintiffs have also produced data from their law enforcement property rooms containing descriptions of the firearms recovered and booked into those rooms from 1996 to 1999.

Plaintiffs' characterization of those data as "comprehensive and specific" and containing information regarding the incident in which the firearm was recovered is again misleading. The data merely refer to a Penal Code or Health and Safety Code violation which presumably relates to the circumstance under which the firearm was recovered. Data produced by some plaintiffs make reference in the same column to recovery in an accident or suicide investigation. An example of the data (produced by East Palo Alto) setting forth information on firearms recovered which were manufactured or sold by defendants in this case is attached to the SNOL as Exhibit 1.

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[3] Cal. Evidence Code § 412 states "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

[4] Indeed, the "abstracts" produced by plaintiffs do not involve studies of firearms manufacturers and, with one dubious exception, do not provide any information bearing on defendants' conduct. The abstracts largely analyze old or extremely old data or involve irrelevant study populations.

As the Court can see, this information does not speak to the myriad factual issues material to an analysis of the true impact of defendants' alleged conduct in plaintiffs' communities. Left unanswered are matters presumably investigated by plaintiffs' law enforcement agencies and thereafter documented, including how the firearm was acquired by the criminal, accident or suicide victim. Material information yet to be produced should reflect whether any conduct of a defendant manufacturer in the distribution and marketing of the firearms recovered played any role in the firearms' unlawful or improper acquisition and use. Investigative material in plaintiffs' possession should also reveal facts from which this Court can determine whether firearms accidents and suicides are caused by the absence of specific designs advanced by plaintiffs, or by other factors. This and the other information sought by defendants on specific firearms incidents cannot be withheld from defendants in discovery or from this Court at trial.[5/]

IV. It Is Not Unduly Burdensome For Plaintiffs To Disclose Information And Produce Documents In Their Possession Regarding Specific Firearm Incidents In Their Communities From 1996 To 1999.

The arguments advanced by plaintiffs in support of their undue burden objection carefully avoid disclosing the full story regarding plaintiffs' recordkeeping and record management procedures. Plaintiffs' arguments also ignore the fact that the burdens both sides have in discovery are brought on by the sweeping and unprecedented allegations made by plaintiffs in the first instance. Most importantly, plaintiffs' arguments ignore the practical and most efficient methods which exist within each plaintiff's law enforcement agency to locate and reproduce documents containing information responsive to defendants' discovery.

Defendants recently completed depositions of 15 witnesses designated by plaintiffs as the most qualified to testify regarding the manner in which each plaintiff entity keeps and maintains records of

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[5] Plaintiffs' professed confusion over "the type of reports" sought by defendants regarding the specific incidents of criminal firearms acquisition and use, accidents and suicides in their communities is disingenuous (Opp. Brief at 8:6). Plaintiffs are in a far better position than defendants to ascertain the types of documents in their possession that relate to the subject matters described in defendants' Special Interrogatories and Requests for Production. At minimum, however, defendants expect to see initial police incident reports and follow up investigative materials relating to each firearm identified in the data bases already assembled and produced by plaintiffs. If additional documents exist which reflect the requested information, defendants expect production of those as well. Defendants do not through this discovery seek production of medical records or in any way seek to invade the physician/patient privilege.

firearm incidents in their communities. In summary, defendants learned that each plaintiff entity has the ability to efficiently identify, locate and reproduce police incident reports involving recovered firearms. Some jurisdictions have more sophisticated record maintenance and retrieval ability than others, but each jurisdiction has the ability to identify recovered firearms logged into police department property rooms. As noted above, plaintiffs have already produced databases identifying those firearms. Firearms logged into police property rooms are universally accompanied by a common-identifying number, most typically referred to as an "incident report" number or a "crime report" number.[6/] With a list of incident report numbers in hand, some plaintiffs have the ability to electronically retrieve and reproduce incident reports and related documents which have been optically scanned.[7/] Other plaintiffs have the ability to electronically retrieve and reproduce incident reports through computerized Record Management Systems.[8/] Still others can use incident report numbers to retrieve incident reports from microfilm libraries.[9/] Others may have to retrieve some records manually, the way in which the defendants have searched for and compiled records responsive to plaintiffs' discovery requests.[10/] So, in essence, plaintiffs have already created the roadmap - the databases already produced - by which electronic or manual assembly of incident reports can be readily accomplished.

Defendants do not seek police incident reports and other investigative material on every firearm recovered by each plaintiff from 1996 to 1999, but only with respect to those manufactured or sold by defendant manufacturers appearing in this case. Defendants' initial review of the databases

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[6] Excerpts from these depositions are attached to the SNOL as Exs. 2 through 12. See Ex. 2 (Berkeley), p. 64; Ex. 3 (East Palo Alto), pp. 20-21; Ex. 4 (Oakland), pp. 48-50; Ex. 5 (San Mateo County), pp. 25-26 and PLTF0006175; Ex. 6 (Los Angeles County), pp. 53-54; Ex. 7A (Sacramento), pp. 18-19; Ex. 8 (Inglewood), pp. 22-23; Ex. 9 (Los Angeles City), p. 14; Ex. 10 (San Francisco), pp. 68-69; Ex. 11 (Alameda County), pp. 35-36.

[7] Ex. 2 (Berkeley), pp. 54-55; Ex. 5 (San Mateo County), pp. 34-36; Ex. 9 (Los Angeles City), pp. 64-65; Ex. 11 (Alameda County), pp. 65, 80-82.

[8] Ex. 3 (East Palo Alto), pp. 12, 29-33, 48; Ex. 10 (San Francisco), pp. 12, 24-26, 37, 110.

[9] Ex. 9 (Los Angeles City), pp. 9-11, 17-18, 35-38, 54-55; Ex. 8 (Inglewood), pp. 21-23, 25-29, 34-41.

[10] Ex. 4 (Oakland), pp. 55-57, 80-81, 86-87; Ex. 8 (Inglewood), pp. 21-23, 25-29, 34-41; Ex. 7B (Sacramento), pp. 16, 63-65, 71, 76; Ex. 11 (Alameda County), pp. 65, 80-82.

already produced by plaintiffs has revealed that a substantial percentage of the property listed (a portion of which is ammunition in some jurisdictions) was not manufactured or sold by defendants. For example, East Palo Alto has identified 39 firearms manufactured or sold by defendants. (See Exhibit 1). East Palo Alto can readily retrieve those crime reports and related investigative documents from its Record Management System. (See Exhibit 3). Alameda County can retrieve incident reports and related documents on the 42 defendant firearms in part through its CD-ROM system and in part manually. (See Exhibits 11 and 12). Berkeley will use its optical scanning system to retrieve requested information on 90 recovered firearms. (See Exhibits 2 and 13).

To the extent that plaintiffs still feel burdened by an obligation to segregate reports of accidental discharge and firearm suicide incidents (the issue which plaintiffs' declarations address), defendants offer their assistance. The specific occurrence of all firearm incidents in plaintiffs' communities are discoverable and relevant, most notably those incidnts of criminal acquisition, possession, sale and use of defendants' firearms. Defendants have requested information on all incidents in discovery and, in the interest of efficiency, plaintiffs should produce that information promptly. ***Upon plaintiffs' production of all police incident reports and related investigative material relating to firearms recovered by plaintiffs from 1996 to 1999 and manufactured or sold by a defendant manufacturer appearing in this case, defendants will undertake their own review to identify accidental discharge and suicide incidents.*** Although plaintiffs were served with defendants' discovery seeking this fundamental information well over a year ago and profess to have "a lot of lawyers and manpower ready to get to work and anxious to get to work" on discovery, defendants will sort and organize the documents produced so that both sides can move forward in discovery. (See Exhibit 15 to SNOL).

V. Plaintiffs' Privilege Claims Can Be Addressed Through Compromise And Other Measures Which Permit Discovery To Move Forward.

Defendants offered a solution to plaintiffs' objection to production of police records containing information about juveniles. At the *ex parte* hearing concerning this motion, defense counsel proposed that juvenile names and identifying information be redacted from the documents produced

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without waiver of defendants' right to seek disclosure of the information in the appropriate juvenile court. This approach is practical, economical and preserves the asserted privilege.[11/]

Plaintiffs' assertion of an "ongoing investigation" privilege under Cal. Evidence Code §1040(b)(2) can be addressed at this stage in a similar fashion. Section 1040 of the Evidence Code "represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy." Shepherd v. Superior Court, 17 Cal. 3d 107, 122 (1976) (citing Pitchess v. Superior Court, 11 Cal. 3d 531, 540 (1974)). Evidence Code §1040(b)(2) sets forth a conditional privilege whereby the court is to weigh the alleged need for secrecy against the need for disclosure in the interest of justice. Shepherd, 17 Cal. 3d at 126. Implicit in the assessment is a consideration of the consequences to the litigant of nondisclosure. Id. The burden is on the party asserting the privilege to show the effect of disclosure on the "integrity of publicprocesses and procedures." Id. at 125;see also Torres v. Superior Court, 80 Cal. App. 4th 867, 873 (2000).[12/]

Certainly, not all investigations by plaintiffs into specific firearm incidents from 1996 to 1999 are ongoing. Moreover, not all information acquired in those investigations is covered by the

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[11] Plaintiffs' assertion of a privilege not to produce information plainly within their control and so material to the subject matter of their claims, raises the question of whether they can even proceed with their case. Privileges are designed to be shields, not swords. Plaintiffs cannot be permitted to put the defendants in an evidentiary strait jacket by alluding to the impact of defendants' conduct in their communities without producing the records in their possession which most closely and accurately reflect that impact. See People v. Ochoa, 165 Cal. App. 3d 885 (1985) (motion to dismiss granted based on People's refusal to comply with discovery order, following assertion of privilege, requiring production of stronger evidence relating to discriminatory prosecution practices). See also Newson v. City of Oakland, 37 Cal. App. 3d 1050, 1055 (1974) (party asserting privilege cannot "have their cake and eat it too").

[12] The court in Rubin v. City of Los Angeles, 190 Cal. App. 3d 560, 585-586 (1987), explained the procedure to be followed by the trial court when faced with the assertion of the privilege. First, the court should determine whether the moving papers are in compliance with the requirements of specificity, materiality and good cause set forth in Section 1985 of the Code of Civil Procedure. Second, with respect to each item, the court should determine whether the information was acquired in confidence. Third, the court should proceed to determine whether the items are covered by the conditional privilege because their disclosure is against the public interest. If the claim cannot be determined in open court without disclosure of the information, an *in camera* hearing should be held during which the party requesting the information may propose questions. Torres, 80 Cal. App. 4th at 873. "The *in camera* proceeding is to be only a preliminary inquiry into the question of disclosure. . . . The court should continue the inquiry in an adversary setting. . . . Only at the conclusion of an adversary inquiry is the court in a position to rule for or against the government's claim of privilege." Id. (citing People v. Superior Court, 19 Cal. App. 3d 522, 531 (1971)).

privilege. Statements of police officers have been found to be information not acquired in confidence. Shepherd, 17 Cal. 3d at 124. Voluntary statements of criminal suspects to investigating authorities are also not confidential. Id.

The appropriate and economical approach to plaintiffs' assertion of the Section 1040(b)(2) privilege is to require plaintiffs' production of a privilege log identifying: 1) the document containing the allegedly privileged information by Bates number; 2) the plaintiff; 3) the general nature of information withheld (e.g., identity of confidential informant); and 4) the make and serial number of the firearm involved. In addition, plaintiffs should produce copies of the investigative material with the allegedly privileged information redacted. Defendants can then appropriately assess the need to test the assertion of the privilege.[13/]

VI. Plaintiffs' Selection Of Firearms And Approval Of Firearm Design Characteristics Is Relevant To Plaintiffs' Design Claims And Is Discoverable.

If plaintiffs' law enforcement agencies have made informed decisions to purchase firearms and have specifically rejected for safety or utility reasons design features which have been advanced by plaintiffs in this case in support of their § 17200 claim, defendants are entitled to that evidence. Smith & Wesson Request for Production No. 2 (Exhibit 10 to Original Notice of Lodgment) specifically seeks documents reflecting plaintiffs' evaluation of safety features or mechanisms on firearms selected and approved for use. The defendants do not seek this information to demonstrate plaintiffs' conduct but as a possible admission that plaintiffs' design defect claims are not supported by the firearm experts in their own employ.

Plaintiffs' arguments addressing the relevance of this information are premature. The standard to be applied to defendants' discovery requests is whether they "appear reasonably calculated to lead to the discovery of admissible evidence." CCP § 2017. Moreover, plaintiffs' arguments go to the weight of the evidence rather than its admissibility. If plaintiffs' law enforcement agencies have rejected purported safety features because they feel their officers receive sufficient training and the

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[13] A factor to be considered in weighing the claim of privilege with defendants' need for discovery in this case is the existence of this Court's December 15, 2000 Protective Order essentially limiting dissemination of confidential information to persons intimately involved in this litigation.

features are not needed, plaintiffs are free to make that argument. However, the argument does not affect admissibility of the evidence and certainly does not impact its discoverability.[14/]

At the *ex parte* hearing regarding this motion, the Court expressed its inclination to deny defendants' motion relating to these discovery requests because it was concerned with privilege issues. Plaintiffs now assert as the public interest in support of a § 1040(b)(2) "official information" privilege that disclosure could put law enforcement officers at risk. Although defendants and all other law abiding citizens share this interest, the safety of law enforcement officers is in no way impacted by plaintiffs' disclosure of their approval or rejection of firearms and their safety features. First of all, the make and model of the firearms publicly carried by law enforcement officers is not confidential. Moreover, the safety features and mechanisms present on those firearms are widely known. Defendants do not seek information relating to firepower or function, only the reasons for approval or rejection of safety features and safety mechanisms. In the interest of compromise and to avoid protracted hearings under Evidence Code § 1040(b)(2), defendants 1) will limit their requests to information regarding those models or types of firearms which are authorized or used by plaintiffs or their law enforcement officers and which are lawfully sold in the civilian marketplace and 2) will accept plaintiffs' designation of requested documents and information on these subjects as confidential under this Court's Protective Order and will waive any right to challenge those designations.

VII. Conclusion.

Plaintiffs state they will prove their case through statistical models and summaries, presumably addressing the impact in their communities of each defendant's alleged conduct. Defendants have a right to test the accuracy of the conclusions derived by plaintiffs from those models and studies by presenting data which should most accurately describe that alleged impact, if any. Those data are reflected in information relating to the specific occurrence of firearm incidents in plaintiffs' communities; specifically, information relating to the unlawful or improper sale and acquisition of firearms and facts demonstrating the circumstances under which unintentional shootings and suicides

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[14] Plaintiffs are correct that certain firearms – notably fully automatic rifles – can only be sold to and possessed by law enforcement and military personnel. However, the overwhelming majority of service revolvers and pistols carried by law enforcement are identical in design and function to firearms that are also sold in the lawful civilian marketplace.

have occurred. Defendants have a right to use those data to support their defenses and establish that they have not created or maintained a public nuisance or acted unlawfully, unfairly or fraudulently under sections 17200 and 17500.

The issue today is discoverability, not admissibility at trial. The test is whether the requested information and documents are "related to the subject matter" of these cases. Clearly, plaintiffs' own investigations into the incidents which they claim are attributable to defendants' conduct and have harmed their communities meet that test.

Plaintiffs place significant emphasis on an alleged burden in segregating reports of accidental and suicidal shootings from the larger body of requested and discoverable documents collected by their law enforcement agencies. Plaintiffs' claimed burden no longer exists. Defendants will themselves identify those accident and suicide incidents upon plaintiffs' complete production of all requested information and documents in their possession relating to acquisition, possession, sale and use of firearms manufactured or sold by defendant manufacturers who have appeared in these cases which were recovered by plaintiffs from 1996 to 1999.

Finally, the approval or rejection of firearm design features by firearm experts in plaintiffs' employ which plaintiffs allege in these cases to be defective, is information related to the subject matter of these cases and should be produced.

Dated: January 19, 2001

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By: *Lawrence J. Kouns*
Lawrence J. Kouns
Attorneys for Defendant
Sturm, Ruger & Company, Inc.

DECLARATION OF SERVICE

In re Firearms Case
JCCP No. 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, Renee' M. Evans, declare:

1. I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action, and I am employed in the County of San Diego, State of California. My business address is Luce, Forward, Hamilton & Scripps LLP, 600 West Broadway, Suite 2600, San Diego, California 92101; telephone number (619) 236-1414; facsimile number (619) 645-5389.

2. On January 19, 2001, I served the following document(s): **DEFENDANTS' REPLY BRIEF RE MOTION TO COMPEL 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.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 19, 2001 in San Diego, California.

Renee' M. Evans
Renee' M. Evans