

1 LIEFF, CABRASER, HEIMANN  
& BERNSTEIN, LLP  
2 ROBERT J. NELSON, (CSB #132979)  
RICHARD M. FRANCO, (CSB #170970)  
3 275 Battery Street, 30th Floor  
San Francisco, California 94111-9333  
4 Telephone: (415) 956-1000  
5 MILBERG WEISS BERSHAD  
HYNES & LERACH, LLP  
6 WILLIAM S. LERACH, (CSB #68581)  
FRANK J. JANECEK, JR., (csb #156306)  
7 MICHAEL J. DOWD, (csb #135628)  
STEPHEN P. POLAPINK, (csb #177489)  
8 JONAH H. GOLDSTEIN, (csb #193777)  
600 West Broadway, suite 1800  
9 san Diego, California 92101  
Telephone: (619) 231-1058,  
and -  
10 PATRICK J. COUGHLIN, (CSB #111070)  
EX KANO S. SAMS, II. (CSB #192936)  
11 JASON T. BAKER (CSB #212380)  
100 Pine Street, Suite 2600  
12 San Francisco, California 94111  
13 Telephone: (415) 288-4545

14 Attorneys for Plaintiffs

15 (Additional Counsel Appear on Signature Page)

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
17 COUNTY OF SAN DIEGO  
18

19 COORDINATION PROCEEDINGS  
20 SPECIAL TITLE (RULE 1550(b)),

21 FIREARMS CASES

22 Including Actions:

23 PEOPLE, et al. v. ARCADIA  
MACHINE & TOOL, et al.; San Francisco  
24 Superior Court No. 303753

25 PEOPLE, et al. v. ARCADIA  
MACHINE & TOOL, et al.; Los Angeles  
26 Superior Court No. BC 210894

27 ---[caption continues on next page]---

JUDICIAL COUNCIL  
COORDINATION PROCEEDING NO. 4095

**PLAINTIFFS' MEMORANDUM IN  
OPPOSITION TO DEFENDANT ANDREWS'  
MOTION TO STRIKE PURSUANT TO CODE  
OF CIVIL PROCEDURE SECTION 425.16**

Date: To Be Determined  
Time: 8:30 a.m.  
Judge: Hon. Vincent P. DiFiglia  
Department: 65

4  
5 **I. INTRODUCTION**

6 This memorandum is filed in opposition to the motion of Andrews Sporting  
7 Goods, Inc. dba Turners Outdoorsman (“Andrews”) and S.G. Distributing, Inc. (“SGD”) (referred  
8 to jointly as “defendants”) to strike pursuant to the anti-Strategic Lawsuit Against Public  
9 Participation (“SLAPP”) statute, Code of Civil Procedure section 425.16. Defendants’ motion is  
10 fatally flawed. First, the anti-SLAPP statute does not even apply to the instant actions because  
11 city attorneys and county counsel, as opposed to individuals, are bringing their Business &  
12 Professions Code 17500 claims on behalf of the people of the State of California. Because Code  
13 of Civil Procedure section 425.16(d) expressly excludes such public enforcement actions from the  
14 anti-SLAPP provisions, there is simply no statutory basis for defendants’ motion.

15 Second, plaintiffs’ lawsuits are not designed to chill the valid exercise of the  
16 defendants’ first amendment rights. Rather, plaintiffs have filed a public enforcement action  
17 under section 17500 to enjoin commercial advertisements that are inherently misleading and  
18 deceptive. Commercial speech that is misleading or deceptive is not protected by the first  
19 amendment.

20 Third, if, as defendants allege, they do not advertise, or do not engage in the kind  
21 of commercial speech alleged in the complaints, then their speech, whether commercial or not,  
22 whether misleading or not, is not being impacted in any way by the section 17500 claim. As a  
23 result, they have failed to make the necessary *prima facie* showing that their first amendment  
24 rights are being chilled or impacted by this action. Defendants’ proper procedural remedy would  
25 have been to seek summary judgment on that issue, not a motion to strike per the anti-SLAPP  
26 statute.

27 Finally, even ignoring these fatal errors, the statutory provision upon which  
28 defendants seek to rely makes clear that the motion should be filed within 60 days of the filing of

1 the complaints, rather than three and a half years into the litigation, and just months before trial.  
2 Andrews offers no justification or excuse for its delay.

3 For all these reasons, defendants' motion is utterly without merit. Plaintiffs  
4 respectfully request that the Court deny defendants' motion.

5 **II. ARGUMENT**

6 **A. The Anti-SLAPP Provisions Do Not Apply to Actions Brought on Behalf of**  
7 **the People of the State of California.**

8 Plaintiffs' claim pursuant to Business & Professions Code section 17500 is  
9 brought exclusively by city attorneys and county counsel who have express statutory authority to  
10 bring such actions on behalf of the people of the State of California. *See* Bus. & Prof. Code  
11 section 17535. These offices can seek injunctive relief, disgorgement of profits, and statutory  
12 penalties on behalf of the people of California. The individual persons/officials who are  
13 prosecuting these cases on behalf of the general public pursuant to the section 17200 cause of  
14 action, e.g., mayors and Board of Supervisor members, are not bringing claims pursuant to  
15 section 17500 on behalf of the general public, as their county counsel and city attorneys have  
16 express statutory authority to bring such actions on behalf of the people. Because county counsel  
17 and city attorneys have express statutory authority to bring claims on behalf of the people, they,  
18 unlike private individuals and/or officers, may seek statutory penalties pursuant to section 17536.

19 The point is that the section 17500 claim is brought exclusively on behalf of the  
20 people of the State of California. The anti-SLAPP statute, Code of Civil Procedure section  
21 425.16, expressly provides that it "shall not apply to any enforcement action brought in the name  
22 of the people of the State of California..." Code of Civ. Proc. § 425.16(d). This exclusion has  
23 been upheld. *See, e.g., People v. Health Laboratories of North America* (2001) 87 Cal. App. 4th,  
24 442. Because this enforcement action is brought in the name of the people of the State of  
25 California, the anti-SLAPP provisions plainly do not apply. As a result, defendants' motion is  
26 fatally flawed and must be denied.

27 ///

28 ///

1           **B. Plaintiffs' Suits are Aimed at Deceptive Advertising, Not Protected Speech.**

2           Plaintiffs' claim pursuant to Business & Professions Code section 17500 is limited  
3           to allegedly deceptive advertising conducted by defendants. This claim is about nothing more,  
4           having nothing to do with what defendants tell public officials or each other. It is a public  
5           enforcement action to protect consumers. According to the court of appeals in People v. Health  
6           Labs., supra,

7                     SLAPP suits are typically characterized as suits brought not to  
8                     vindicate a legal right but to interfere with the defendant's ability to  
9                     pursue his or her interest. (Church of Scientology v. Wollersheim  
10                    (1996) 42 Cal. App. 4th 628, 645 [49 Cal. Rptr. 2d 620].) SLAPP  
11                    plaintiffs do not care so much about winning their lawsuits as they  
12                    care about delaying and distracting the defendant from his or her  
13                    objective, which is generally economically adverse to those of the  
14                    SLAPP plaintiff. SLAPP plaintiffs achieve their goal if their suits  
15                    deplete the defendant's resources and energy. (Ibid., Dixon v.  
16                    Superior Court (1994) 30 Cal. App. 4th 733, 741 [36 Cal. Rptr. 2d  
17                    687].) The legislative history of section 425.16 plainly implies that  
18                    its purpose was to prevent the harm caused by such plaintiffs.

19                   By contrast, a public prosecutor's enforcement action is not  
20                    motivated by a retaliatory attempt to gain a personal advantage over  
21                    a defendant who has challenged his or her economic ambition. The  
22                    prosecutor's motive derives from the constitutional mandate to  
23                    assure that the laws of the state are uniformly enforced and to  
24                    prosecute any violation of these laws, so that order is preserved and  
25                    the public interest protected. (Cal. Const., art. V, 13; D'Amico v.  
26                    Board of Medical Examiners (1974) 11 Cal. 3d 1, 14-15 [112 Cal.  
27                    Rptr. 786, 520 P.2d 10].)

28           People v. Health Labs., supra, at 450.

                  This case involves only commercial speech. Commercial speech may be and in  
fact is regulated to prevent consumer deception. Business & Professions Code section 17500  
represents one of the mechanisms by which the Legislature sought to address false and  
misleading advertising. Certainly, the Legislature did not intend that every false advertising case  
would prompt an anti-SLAPP motion. Defendants' motion ignores that the plaintiffs'  
section 17500 claim is a public enforcement action focused exclusively on commercial speech,  
and nothing else. As such, the anti-SLAPP statute is an improper mechanism to challenge these  
cases.

1           **C. Defendants Have Not Made a *Prima Facie* Showing that the anti-SLAPP**  
2           **Provision Should Apply**

3           If defendants are correct that they do not advertise, or do not advertise in the  
4           manner alleged in the complaint, then their rights have plainly not been abridged as a result of the  
5           false advertising claims. As a result, they have not satisfied their burden that they make a *prima*  
6           *facie* case. To require a substantive response from plaintiffs under the anti-SLAPP statute,  
7           defendants must demonstrate that the defendants' acts/statements underlying the plaintiffs' cause  
8           of action "must itself have been an act in furtherance of the right of petition or free speech."  
9           Gallimore v. State Farm (2002) 102 Cal. App. 1388, 1396). If defendants did not make the  
10          alleged statements, they cannot avail themselves of the anti-SLAPP provisions.<sup>1</sup>

11           **D. Defendants' Motion is Untimely.**

12          Finally, section 425.16(f) provides that the motion to strike pursuant to this  
13          provision be filed within 60 days of the service of the complaint. One goal of the statute was "to  
14          eliminate meritless or retaliatory litigation *at an early stage in the proceedings.*" See, e.g.,  
15          Gallimore v. State Farm (2002) 102 Cal. App. 4th 1388, 1396 (emphasis supplied). There is no  
16          right to file an anti-SLAPP motion beyond the 60-day deadline. Lam v. Ngo (2001) 91 Cal. App.  
17          4th 832. While the Court has discretion to determine whether additional time to file an anti-  
18          SLAPP suit is warranted, defendants have not offered any reasonable explanation for their delay  
19          of *well over a thousand days* to bring this motion. If defendants' first amendment rights or rights  
20          to petition were in fact being suppressed or chilled as a result of this lawsuit, defendants would  
21          have brought this motion in a timely manner. In fact, SLAPP motions are typically accompanied  
22          by requests for a stay of discovery because of the need to resolve the first amendment issues  
23          expeditiously. Here, however, defendants have elected to file the motion only after years of  
24          discovery, and just four months prior to trial of the action. Defendants have offered no legitimate  
25          basis for their delay. As a result, the Court should, within its discretion, find that the motion is  
26          time-barred.

27          \_\_\_\_\_  
28          <sup>1</sup> If the Court disagrees and concludes that defendants have made a *prima facie* case, plaintiffs respectfully request  
that they be given the opportunity to demonstrate their likelihood of success regarding this claim.

1     **III.     CONCLUSION**

2                     For all the foregoing reasons, plaintiffs respectfully request that the Court deny  
3 defendants' motion to strike.

4                                     Respectfully submitted,

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6     DATED: January 29, 2003

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP  
ROBERT J. NELSON  
RICHARD M. FRANCO  
      */s/ Robert J. Nelson*

By: \_\_\_\_\_  
      Robert J. Nelson

275 Battery Street, 30th Floor  
San Francisco, CA 94111-9333  
Telephone: 415/956-1000  
415/956-1008 (fax)

DENNIS HERRERA  
San Francisco City Attorney  
OWEN J. CLEMENTS  
Chief of Special Litigation  
KRISTINE A. POPLAWSKI  
INGRID M. EVANS  
Deputy City Attorneys  
1390 Market Street, 6th Floor  
San Francisco, CA 94102-5408  
Telephone: 415/554-3800  
415/554-3837 (fax)

ROCKY DELGADILLO  
City Attorney  
DON KASS  
Deputy City Attorney  
MARK FRANCIS BURTON  
Deputy City Attorney  
200 N. Main Street  
1600 City Hall East  
Los Angeles, CA 90012  
Telephone: 213/485-4515  
213/847-3014 (fax)

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LLOYD W. PELLMAN  
Los Angeles County Counsel  
LAWRENCE LEE HAFETZ  
JUDY W. WHITEHURST  
Senior Deputy County Counsel  
500 West Temple Street, Suite 648  
Los Angeles, CA 90012  
Telephone: 213/974-1876  
213/626-2105 (fax)

SAMUEL L. JACKSON  
Sacramento City Attorney  
GLORIA ZARCO  
Deputy City Attorney  
980 9th Street, 10th Floor  
Sacramento, CA 95814  
Telephone: 916/264-5346  
916/264-7455 (fax)

MANUELA ALBUQUERQUE  
Berkeley City Attorney  
MATTHEW J. OREBIC  
Deputy City Attorney  
2180 Milvia Street  
Berkeley, CA 94704  
Telephone: 510/981-6950  
510/981-6960 (fax)

THOMAS F. CASEY, III  
San Mateo County Counsel  
BRENDA B. CARLSON  
Deputy County Counsel  
Office of the County Counsel  
400 County Center  
Redwood City, CA 94063  
Telephone: 650/363-4760  
650/363-4034 (fax)

JOHN A. RUSSO  
Oakland City Attorney  
RANDOLPH W. HALL  
Assistant City Attorney  
JOYCE M. HICKS  
R. MANUEL FORTES  
J. PATRICK TANG  
Deputy City Attorneys  
One Frank Ogawa Plaza, 6th Floor  
Oakland, CA 94612  
Telephone: 510/238-3601  
510/238-6500 (fax)

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THOMPSON, LAWSON LLP  
MICHAEL S. LAWSON  
East Palo Alto City Attorney  
1600 Broadway, Suite 250  
Oakland, CA 94612  
Telephone: 510/835-1600  
510/835-2077 (fax)

LEGRAND H. CLEGG II  
Compton City Attorney  
CELIA FRANCISCO  
Deputy City Attorney  
P.O. Box 5118  
205 South Willowbrook Avenue  
Compton, CA 90200  
Telephone: 310/605-5582  
310/763-0895 (fax)

CHARLES E. DICKERSON III  
Inglewood City Attorney  
One Manchester Blvd., Suite 860  
Inglewood, CA 90301  
Telephone: 310/412-5372  
310/412-8865 (fax)

MILBERG WEISS BERSHAD HYNES & LERACH LLP  
WILLIAM S. LERACH  
FRANK J. JANECEK, JR.  
MICHAEL J. DOWD  
STEPHEN P. POLAPINK  
JONAH H. GOLDSTEIN  
600 West Broadway, Suite 1800  
San Diego, CA 92101  
Telephone: 619/231-1058  
619/231-7423 (fax)

MILBERG WEISS BERSHAD  
HYNES & LERACH LLP  
PATRICK J. COUGHLIN  
EX KANO S. SAMS II  
JASON T. BAKER  
100 Pine Street, Suite 2600  
San Francisco, CA 94111  
Telephone: 415/288-4545  
415/288-4534 (fax)

EDUCATIONAL FUND TO STOP GUN VIOLENCE  
SAYRE WEAVER  
1023 15th Street N.W., Suite 600  
Washington, DC 20005  
Telephone: 562/266-1831  
202/408-0062 (fax)



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BRADY CENTER TO PREVENT GUN VIOLENCE  
DENNIS A. HENIGAN  
JONATHAN E. LOWY  
BRIAN J. SIEBEL  
RUCHI BHOWMIK  
Legal Action Project  
1250 Eye Street, N.W., Suite 802  
Washington, DC 20005  
Telephone: 202/289-7319  
202/898-0059 (fax)

BUSHNELL, CAPLAN & FIELDING, LLP  
ALAN M. CAPLAN  
PHILIP NEUMARK  
PAUL R. HOEBER  
221 Pine Street, Suite 600  
San Francisco, CA 94104-2715  
Telephone: 415/217-3800  
415/217-3820 (fax)

LAW OFFICES OF CHARLES T. McCUE  
CHARLES T. McCUE  
600 West Broadway, Suite 930  
San Diego, CA 92101  
Telephone: 619/260-0636  
619/260-0018 (fax)

DAVID KAIRYS, ESQ.  
1719 North Broad Street  
Philadelphia, PA 19122  
Telephone: 215/204-8959  
215/248-6282 (fax)

Attorneys for Plaintiffs