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17
18 SUPERIOR COURT OF THE STATE OF CALIFORNIA
19 FOR THE COUNTY OF SAN FRANCISCO

20 THE PEOPLE OF THE STATE OF
21 CALIFORNIA, et. al.,

22 Plaintiffs,

23 v.

24 ARCADIA MACHINE & TOOL, INC., et. al.,

25 Defendants.

) Case No.: J.C.C.P. NO. 4095;
) S.F. Sup. Ct. No. 303753
) L.A. Sup. Ct. No. BC 210894
) L.A. Sup. Ct. No. BC 214794

) **DEFENDANTS' REQUEST FOR**
) **JUDICIAL NOTICE**

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1 TO THE JUDICIAL COUNCIL, AND TO ALL PARTIES:

2 The undersigned defendants request that the Judicial Council take judicial notice of the
3 attached pleadings, pursuant to Evidence Code section 452(d). *Cantu v. Resolution Trust Corp.* (1992)
4 4 Cal.App.4th 857, 877-878 (court may take judicial notice of inconsistent statements in a prior
5 pleading); *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604 (court may
6 take judicial notice of inconsistent statements in a prior pleading); *Miller v. R.K.A. Management Corp.*
7 (1979) 99 Cal.App.3d 406, 463 n. 1 (court may take notice of Bankruptcy Court records where
8 relevant to issues raised in action).

9 Exhibit 1: *In re Davis Industries, Inc.*; United States Bankruptcy Court — Central District,
10 Riverside, Case No. RS99-19302 MJ ("Notice of Motion and Motion of the
11 City and County of San Francisco, Berkeley, Oakland, Sacramento, East Palo
12 Alto, San Mateo County and Alameda County and Joe Serna, Jr., as Mayor of
13 the City of Sacramento, for Determination that the Automatic Stay is
14 Inapplicable or, in the Alternative, for Relief from the Automatic Stay," Filed
15 September 9, 1999.)

16 Exhibit 2: *In re Davis Industries, Inc.*; United States Bankruptcy Court — Central District,
17 Riverside, Case No. RS99-19302 MJ ("Notice of Motion and Motion of the
18 Cities of Los Angeles, Compton, Inglewood, and West Hollywood, California
19 for Determination That The Automatic Stay is Inapplicable Or, In The
20 Alternative, For Relief From The Automatic Stay," Filed November 7, 1999.)

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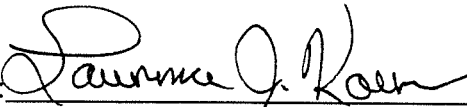
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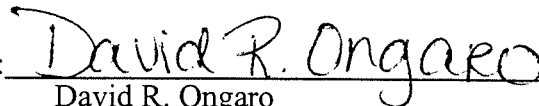
1 Exhibit 3: *In re Davis Industries, Inc.*; United States Bankruptcy Court — Central District,
2 Riverside, Case No. RS99-19302 MJ ("Notice of Motion and Motion of Lloyd
3 W. Pellman, Los Angeles County Counsel, For Determination That The
4 Automatic Stay Is Inapplicable Or, In The Alternative, For Relief From The
5 Automatic Stay," Filed November 7, 1999.)
6

7 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

8
9 By: 

10 Lawrence J. Kouins
11 Attorneys for Defendants
12 SMITH & WESSON CORP. and
13 STURM, RUGER & COMPANY, INC.

14 SCHNADER, HARRISON, SEGAL & LEWIS LLP

15 By: 

16 David R. Ongaro
17 Attorneys for Defendants
18 BERETTA U.S.A. CORP.

19 HOLLAND & KNIGHT LLP

20 By: 

21 Charles L. Coleman, III
22 Attorneys for Defendants
23 HECKLER & KOCH, INC.
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 11/17/99 11:30 FAX 317 810 3255 SIMON, WARNER & DOBY LLP

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[Full Addresses and Represented Creditors Listed After
 Signature Page]

12
 13
 14 UNITED STATES BANKRUPTCY COURT
 CENTRAL DISTRICT OF CALIFORNIA
 15 RIVERSIDE

16 In re

17 Davis Industries, Inc., a California
 18 corporation,

19 Debtor.

20 Employer Identification No. 95-3266661
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Case No. RS99-19302 MJ
 Chapter 11

RS No.

NOTICE OF MOTION AND MOTION OF
 THE CITY AND COUNTY OF SAN
 FRANCISCO, BERKELEY, OAKLAND,
 SACRAMENTO, EAST PALO ALTO, SAN
 MATEO COUNTY AND ALAMEDA
 COUNTY, AND JOE SERNA, JR., AS
 MAYOR OF THE CITY OF
 SACRAMENTO, FOR DETERMINATION
 THAT THE AUTOMATIC STAY IS
 INAPPLICABLE OR, IN THE
 ALTERNATIVE, FOR RELIEF FROM
 THE AUTOMATIC STAY

Date: October 6, 1999

Time: 11:00 a.m.

Place: Courtroom 302, 3420 Twelfth Street
 Riverside, California

1 TO ALL INTERESTED PARTIES:

2 PLEASE TAKE NOTICE that on October 6, 1999, at 11:00 a.m., or as soon
3 thereafter as counsel may be heard, a hearing will be held before the Honorable Meredith A.
4 Jury, on the motion of the City and County of San Francisco, Berkeley, Sacramento,
5 Oakland, East Palo Alto, San Mateo County, Alameda County, and Joe Serna, Jr., as Mayor
6 of the City of Sacramento (collectively the "Governmental Units") for an order determining
7 that, pursuant to 11 U.S.C. § 362(b)(4), the automatic stay does not apply to the action
8 entitled *People of the State of California, et al. v. Arcadia Machine & Tool, Inc., et al.*, Case
9 No. 303753, pending in the Superior Court of the State of California for the City and County
10 of San Francisco (the "Superior Court Action") because the Superior Court Action is an
11 exercise of the police and regulatory powers of the Governmental Units. Davis Industries,
12 Inc., (the "Debtor") is a defendant in the Superior Court Action. In the alternative, the
13 Governmental Units move for relief from the automatic stay pursuant to 11 U.S.C. § 362(d).

14 PLEASE TAKE FURTHER NOTICE that Bankruptcy Local Rule 9013-
15 1(g) of the United States Bankruptcy Court for the Central District of California prescribes
16 that any interested party opposing, joining, or responding to the Motion shall file and
17 serve a written statement in opposition or of non-opposition, not later than fourteen
18 (14) days before the date designated for a hearing on the Motion.

19 This Motion is based upon the Notice of Motion, the accompanying
20 Memorandum of Points and Authorities, the declaration of Randy Michelson, and such
21 arguments and evidence as may be presented at or before a hearing on this Motion.

22 WHEREFORE, the Governmental Units respectfully request that the Court
23 enter an order determining that the Superior Court Action is exempt from the automatic stay
24 as an exercise of the Governmental Units' police and regulatory powers or, in the alternative,
25 grant relief from the automatic stay to enable the Superior Court Action to proceed, and
26 grant such further relief as the Court may deem just and proper.
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1
2 DATED: September 9, 1999.

Respectfully submitted,

3 McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP
4

5
6 By: Randy Michelson

Randy Michelson

Attorneys for Creditor

The City and County of San Francisco

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8
9 SAN FRANCISCO CITY ATTORNEY
10

11
12 By: _____

D. Cameron Baker

Attorneys for Creditor

The City and County of San Francisco

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15 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
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18 By: _____

Pierce Gore

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The City and County of San Francisco, Sacramento,
Berkeley, Oakland, East Palo Alto, San Mateo County, and
Alameda County

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22 MILBERG, WEISS, BERSHAD, HYNES & LERACH, LLP
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25 By: _____

Ex Kimo S. Sams II

Attorneys for Creditors

The City and County of San Francisco, Sacramento,
Berkeley, Oakland, East Palo Alto, Alameda County,
and San Mateo County
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27
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1
2 DATED: September __, 1999. Respectfully submitted,

3 McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP
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5
6 By: _____

Randy Michelson
Attorneys for Creditor
The City and County of San Francisco

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9 SAN FRANCISCO CITY ATTORNEY

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12 By: _____

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1
2 DATED: September 9, 1999. Respectfully submitted,

3 McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP
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5
6 By: _____

Randy Michelson
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1
2 DATED: September __, 1999. Respectfully submitted,

3 McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP
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5
6 By: _____

Randy Michelson
Attorneys for Creditor
The City and County of San Francisco

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9 SAN FRANCISCO CITY ATTORNEY
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12 By: _____

D. Cameron Baker
Attorneys for Creditor
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18 By: Peter Gore

Peter Gore
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Alameda County

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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**
2 **FOR DETERMINATION THAT THE AUTOMATIC STAY IS INAPPLICABLE OR,**
3 **IN THE ALTERNATIVE, FOR RELIEF FROM THE AUTOMATIC STAY**

4 **I. INTRODUCTION**

5 On behalf of the People of the State of California and the general public, San
6 Francisco, Berkeley, Sacramento, Oakland, East Palo Alto, San Mateo County, Alameda
7 County, and Joe Serna, Jr., as Mayor of the City of Sacramento (collectively, the
8 "Governmental Units") have sued Davis Industries, Inc. (the "Debtor"), other manufacturers
9 and distributors of handguns and their trade associations in a lawsuit entitled *People of the*
10 *State of California, et al. v. Arcadia Machine & Tool, Inc., et al.*, Case No. 303753, filed in
11 the Superior Court of the State of California for the City and County of San Francisco (the
12 "Superior Court Action").¹ The Superior Court Action also names as defendants 36 firearms
13 manufacturers, distributors, and their trade associations. (Declaration of Randy Michelson
14 ("Michelson Decl.") ¶ 2.)

15 To protect the health, safety and welfare of the public, the Governmental
16 Units seek to exercise their police and regulatory powers in the Superior Court Action to
17 enjoin the Debtor's unlawful, unfair and fraudulent business practices in marketing,
18 distributing, promoting, designing and selling handguns, and to enforce laws designed to
19 prohibit such practices. (Michelson Decl. ¶ 3.)

20 By this motion, the Governmental Units seek an order determining that the
21 Superior Court Action is exempt from the automatic stay pursuant to 11 U.S.C. § 362(b)(4).
22 Alternatively, to the extent the Court deems the automatic stay applicable, the Governmental
23 Units seek relief from the stay pursuant to 11 U.S.C. § 362(d) for cause in order that the
24 Superior Court Action may proceed.

25
26 ¹ *First Amended Complaint* at ¶¶ 4-5. A copy of the *First Amended Complaint* filed by the
27 Governmental Units in the Superior Court Action is attached as Exhibit I to the Michelson
28 Declaration.

1 **II. STATEMENT OF FACTS**

2 On or about May 27, 1999, the Debtor filed a voluntary petition under
3 Chapter 11 of the United States Bankruptcy Code. The Debtor's schedules reveal no
4 financial difficulty. They list approximately \$203,000 in liabilities and \$614,000 in assets.
5 (*Debtor's Sch. B, D, E, F, docs. #16, 18, 19 20, filed June 11, 1999.*) The Debtor admits that
6 it filed this bankruptcy solely to halt the Superior Court Action and similar lawsuits filed by
7 other governmental units throughout the United States:

8 [The Debtor] has been embroiled in various lawsuits
9 throughout the country, what we typically will call
10 Municipality lawsuits. . . . The debtor determined that
11 although its business is a profitable business and can't [sic]
12 continue to be profitable, it can't be under the weight of the
13 pending Municipal lawsuits.

14 As a result, debtor sought relief under Title 11 in United States
15 Code to protect its viable business operations from the
16 significant lawsuits that were pending and anticipated
17 additional lawsuits that are going to be and have been filed
18 since the filing of the petition.

19 (Transcript of Debtor's § 341 Meeting of Creditors, at 6-8, Exhibit 2 to Michelann Decl.)

20 In the Superior Court Action, the Governmental Units allege causes of action
21 for public nuisances and for violations of California Business & Professions Code § 17200

22 2 The Debtor is also a defendant in at least 15 other actions filed by other governmental units
23 throughout the United States, including, but not limited to, Atlanta; Boston; Bridgeport;
24 Chicago; Cincinnati; Cleveland; Detroit; Wayne County; Los Angeles; Newark; New
25 Orleans; St. Louis; Miami-Dade County. (*Debtor's Sch. F, doc. # 20, filed June 11, 1999;*
26 *Debtor's Stmt of Financial Affairs, Section 4A, doc. #24, filed June 11, 1999; Michelson*
27 *Decl. ¶ 4.*)

28 3 "Anything which is injurious to health, including, but not limited to, the illegal sale of
controlled substances, or is indecent or offensive to the senses, or an obstruction to the free
use of property, so as to interfere with the comfortable enjoyment of life or property, or
unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake,
or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a
nuisance." Cal. Civil Code § 3479.

(Footnote Continued on Next Page.)

1 and § 17500.⁴ (Michelson Decl. ¶ 5.) Their claims against the Debtor involve, *inter alia*,
2 two aspects of its manufacture and sale of cheap, poorly-made handguns. First, the

3
4
5 (Footnote Continued from Previous Page.)

6 "A public nuisance is one which affects at the same time an entire community or
7 neighborhood, or any considerable number of persons, although the extent of the annoyance
8 or damage inflicted upon individuals may be unequal." Cal. Civil Code § 3480.

9 ⁴ Section 17500 of the California Business & Professions Code provides:

10 It is unlawful for any person, firm, corporation or association,
11 or any employee thereof with intent directly or indirectly to
12 dispose of real or personal property or to perform services,
13 professional or otherwise, or anything of any nature
14 whatsoever or to induce the public to enter into any obligation
15 relating thereto, to make or disseminate or cause to be made or
16 disseminated before the public in this state, or to make or
17 disseminate or cause to be made or disseminated from this
18 state before the public in any state, in any newspaper or other
19 publication, or any advertising device, or by public outcry or
20 proclamation, or in any other manner or means whatever,
21 including over the Internet, any statement, concerning that real
22 or personal property or those services, professional or
23 otherwise, or concerning any circumstance or matter of fact
24 connected with the proposed performance or disposition
25 thereof, which is untrue or misleading, and which is known, or
26 which by the exercise of reasonable care should be known, to
27 be untrue or misleading, or for any person, firm, or corporation
28 to so make or disseminate or cause to be so made or
disseminated any such statement as part of a plan or scheme
with the intent not to sell that personal property or those
services, professional or otherwise, so advertised at the price
stated therein, or as so advertised. Any violation of the
provisions of this section is a misdemeanor punishable by
imprisonment in the county jail not exceeding six months, or
by a fine not exceeding two thousand five hundred dollars (\$
2,500), or by both that imprisonment and fine.

24 Section 17200 of the California Business and Professions Code provides:

25 As used in this chapter, unfair competition shall mean and
26 include any unlawful, unfair or fraudulent business act or
27 practice and unfair, deceptive, untrue or misleading
28 advertising and any act prohibited by Chapter 1 (commencing
with Section 17500) of Part 3 of Division 7 of the Business
and Professions Code.

(Footnote Continued on Next Page.)

1 Governmental Units allege that the Debtor has marketed and distributed its firearms in such
2 a manner as to promote and encourage their use in crime. Second, they contend that the
3 Debtor's firearms lack critical safety features and designs.

4 Year after year, the Debtor's firearms are identified by federal agencies,
5 including the Bureau of Alcohol, Tobacco and Firearms, as being amongst the top ten
6 firearms traced by that agency for law enforcement purposes. Indeed, the Davis .380 caliber
7 semiautomatic pistol has been listed continuously among the top ten crime guns traced in the
8 nation from 1991 to the present. (See, *ATF Top Firearms Traced in Calendar Years 1991-*
9 *1998*, Exhibit 1 to Request for Judicial Notice ("RJN").) This particular firearm also has
10 been among the top ten firearms traced in individual California cities. (See, *ATF Crime Gun*
11 *Trace Analysis Report: Los Angeles, California* at 32-33 February 1999, Exhibit 2 to RJN.)
12 Finally, and equally significantly, it has a low time-to-crime rate. This statistic, which
13 measures the "period of time between the first retail sale of a firearm [] and the time the
14 firearm is recovered by enforcement officials or requested for tracing", can be a strong
15 indicator of illegal gun trafficking. (*Id.* at 38.) In one instance, it took only 10 days from its
16 retail sale before one Davis .380 appeared in a crime in Los Angeles. (*Id.*, Table G Youth
17 (ages 18 through 24) at 38; see also, *Id.*, Table G Youth (ages 25 and over) at 38 (40 days for
18 1 firearm).

19
20
21 (Footnote Continued from Previous Page.)

22 "[S]ection 17200 borrows violations of other laws and treats them as unlawful practices
23 independently actionable under section 17200 *et seq.*" *Saunders v. Superior Court*, 27 Cal.
24 App. 4th 832, 839, 33 Cal. Rptr.2d 438 (1994) citing, *Farmers Ins. Exchange v. Superior*
Court, 2 Cal. 4th 377, 383, 6 Cal. Rptr.2d 487 (1992).

25 1 This report is included in a nationwide report by BATF as part of The Youth Crime
26 Interdiction Initiative, *Crime Gun Trace Analysis Reports: The Illegal Youth Firearms*
27 *Markets in 27 Communities* (February 1999). Because the entire report is voluminous, only
28 the Los Angeles section is provided as an exhibit. The larger report presents similar findings
respecting the prevalence of the Debtor's firearms among criminals nationwide.

1 The Governmental Units' allegations also concern the design and quality of
2 the Debtor's firearms. Because these are made primarily of "soft" metal alloys, they are
3 unreliable and therefore pose a danger to their users. For this reason, many municipalities in
4 California, including the Governmental Units, have banned the sale of these firearms as
5 "junk guns" or "Saturday Night Specials". See, e.g., Alameda County Code § 9.12.010-090
6 (Regulating the Sale of Firearms); San Francisco Police Code § 613 *et seq.* (same).
7 Additionally, the "soft" metals in the Debtor's firearms make it easier to deface their serial
8 numbers and therefore facilitate their use in crime.

9 The Debtor's business practices thus create an unreasonable jeopardy to the
10 public health, welfare and safety and a reasonable apprehension of danger to person and
11 property. (*First Amended Complaint*, ¶76, Exhibit I to Michelson Decl.) Pursuant to their
12 authority under California Code of Civil Procedure § 731 and , California Business and
13 Professions Code § § 17204, and § 17535, the Governmental Units, as representatives of the
14 People of the State of California and the general public, seek to abate this threat to the public
15 and to prevent future unlawful, unfair and/or fraudulent conduct and deceptive advertising
16 by Debtor. Further, they seek their statutory remedies under the Business and Professions
17 Code, including civil penalties, restitution and disgorgement. (Michelson Decl. ¶ 6.)

18 **III THE SUPERIOR COURT ACTION IS AN EXERCISE OF**
19 **POLICE AND REGULATORY POWER EXCEPTED FROM**
20 **THE AUTOMATIC STAY**

21 **A. Governmental Action to Abate a Public Nuisance and**
22 **Enforce Laws to Protect Public Health, Safety and Welfare**
23 **is an Exercise of Police and Regulatory Powers Except**
24 **From the Automatic Stay**

25 Section 362(b)(4) excepts from the automatic stay the "continuation of an
26 action or proceeding by a governmental unit . . . to exercise such governmental unit's police
27 and regulatory power, including the enforcement of a judgment other than a money
28 judgment, obtained in an action or proceeding by the governmental unit to enforce such
governmental unit's . . . police or regulatory power." 11 U.S.C. § 362(b)(4). A

1 "governmental unit" includes a municipality and "department, agency, or instrumentality" of
2 a state. 11 U.S.C. § 101(27); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 311 (1977).

3 "Police or regulatory power" refers to the enforcement of laws affecting
4 health, welfare, morals and safety. *Hill's Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997
5 F.2d 581, 591 (9th Cir. 1993); *Universal Life Church, Inc. v. United States (In re Universal*
6 *Life Church, Inc.)*, 128 F.3d 1294, 1297 (9th Cir. 1997). California law provides cities and
7 counties broad authority to exercise their police powers to regulate firearms sales. Cal.
8 Const. art. XI, § 7; *California Rifle & Pistol Assn. v. City of West Hollywood*, 66 Cal. App.
9 4th 1302, 1310, 78 Cal. Rptr. 2d 591 (1998), cert. denied, 1998 LEXIS 8550 (Cal. Dec. 22,
10 1998) (No. S074513).

11 "Where a governmental unit is suing a debtor to prevent or stop violation of
12 fraud, environmental protection, consumer protection, safety, or similar police or regulatory
13 laws, or attempting to fix damages for violation of such a law, the action or proceeding is not
14 stayed under the automatic stay." S. Rep. No. 95-989 at 52; H.R. Rep. No. 95-595 at 343
15 (1977) (underline added). "It is clear from the legislative history that one of the purposes of
16 this exception is to protect public health and safety." *Midlantic National Bank v. New Jersey*
17 *Dept. of Environmental Protection*, 474 U.S. 494, 503-04 (1986). The theory underlying the
18 exception is that because bankruptcy should not be "a haven for wrongdoers," the automatic
19 stay should not bar governmental police or regulatory actions from proceeding. *In re*
20 *Universal Life Church, Inc.*, 128 F.3d at 1297; see, *Commodity Futures Trading*
21 *Commission v. Co Petro Marketing Group, Inc.*, 700 F.2d 1279, 1283 (9th Cir. 1983).

22 Two tests exist for determining whether government actions fit within the
23 "police or regulatory power" exception: (1) the "pecuniary purpose" test and (2) the "public
24 policy" test. *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 833 (9th Cir. 1991);
25 *Universal Life Church*, 128 F.3d at 1297.

26 Under the pecuniary purpose test, the court determines whether the
27 government action relates primarily to matters of public safety, health, and welfare, or
28 primarily to protection of the government's pecuniary interest in the debtor's property.

1 932 F.2d at 833; 128 F.3d at 1297. If the government action primarily concerns matters of
2 public health, safety and welfare, the stay does not apply. *Universal Life Church*, 128 F.3d
3 at 1297-99; *Thomassen*, 15 B.R. at 909. If, on the other hand, the government action is
4 pursued solely to advance a pecuniary interest of the governmental unit, the stay applies.
5 *Universal Life Church*, 128 F.3d at 1299 ("Only if the action is pursued 'solely to advance a
6 pecuniary interest of the governmental unit will the automatic stay bar it.'") (emphasis
7 added) quoting *Thomassen v. Division of Med. Quality Assurance (In re Thomassen)*, 15
8 B.R. 907, 909 (9th Cir. BAP 1981).

9 Under the public policy test, the focus is to distinguish "between government
10 actions that effectuate public policy, and those that adjudicate private rights." The former
11 are excepted from the automatic stay. *Continental Hagen Corp.*, 932 F.2d at 833; *In re*
12 *Universal Life Church, Inc.*, 128 F.3d at 1297; *NLRB v. Edward Cooper Painting, Inc.*, 804
13 F.2d 934, 942 (6th Cir. 1996).

14 Courts have recognized the "police or regulatory power" exception in a
15 variety of contexts, including government action to abate a public nuisance, detect and
16 pursue legal remedies for fraudulent business activities, and enforcing consumer protection
17 laws. See, *In re Universal Life Church, Inc.*, 128 F.3d at 1297-99 (revocation of tax-exempt
18 status excepted from stay under both pecuniary purpose and public policy tests, revocation
19 served public welfare purpose of detecting fraud and protecting potential donors against
20 misuse of charitable donations); *In re Porter*, 42 B.R. 61 (Bankr. S.D. Tex. 1984)
21 (padlocking building and enjoining persons connected with premises from maintaining
22 public nuisance excepted from automatic stay); *Javens v. City of Hazel Park (In re Javens)*,
23 107 F.3d 359 (6th Cir. 1997) (order to demolish buildings predicated upon danger to public
24 health, safety and welfare a "classic exercise of the police power" excepted from automatic
25 stay); *Smith-Goodson v. Clitfed Mortgage Corp. (In re Smith-Goodson)*, 144 B.R. 72
26 (Bankr. S.D. Ohio 1992) (same); *SEC v. Towers Financial Corp.*, 205 B.R. 27 (S.D.N.Y.
27 1997) (action arising from debtor's Ponzi scheme protected public from fraud and was
28 excepted from stay); *U.S. Dept. of Housing and Urban Dev. v. CCMV*, 64 F.3d 920 (4th Cir.

1 1995) (suit for non-compliance with federal hand sale statute excepted from stay as consumer
2 protection); *State of Ohio v. Hughes (In re Hughes)*, 87 B.R. 49 (Bankr. S.D. Ohio 1988)
3 (suit for odometer tampering excepted from automatic stay, even though civil penalties
4 sought in addition to injunction as action primarily relates to enforcement of consumer
5 protection law).

6 The Governmental Units' exercise of police and regulatory power to protect
7 public health, safety and welfare in prosecuting the Superior Court Action is excepted from
8 the automatic stay.

9 **B. The Superior Court Action is Excepted from the Stay Under**
10 **Both the Pecuniary Purpose and Public Policy Tests**

11 The Governmental Units assert a cause of action to abate a public nuisance
12 caused by the Debtor's distribution and marketing practices that promote illegal firearms
13 trafficking. The public nuisance cause of action seeks to enjoin these practices and thereby
14 protect the public from the violent, deadly and criminal results attributable to the Debtor's
15 business practices. Accordingly, the public nuisance claim meets the pecuniary purpose test
16 in that it primarily concerns matters of public health, safety and welfare.

17 Moreover, in the public nuisance cause of action the Governmental Units are
18 not advancing or adjudicating any private rights, but rather are only effectuating the public
19 policy of upholding a primary government function to protect the public from the use of
20 handguns wrongfully designed, manufactured, supplied, promoted, marketed and sold by the
21 Debtor. As such, the public nuisance cause of action meets the public policy test.

22 The Governmental Units also state causes of action for violations of § 17200
23 of the California Business & Professions Code, for unfair or fraudulent business practices,
24 and § 17500, for unfair, deceptive, untrue or misleading statements and advertising.

25 Fraud detection and prevention are consistent with the "police or regulatory"
26 exception to the automatic stay. *In re Universal Life Church*, 128 F.3d at 1298. "Section
27 17200 expresses California public policy against unfair competition and 'prohibits wrongful
28 business conduct in whatever context such activity might occur. . . . be it civil or criminal,

1 federal, state or municipal, statutory, regulatory, or court-made." *Application Group, Inc. v.*
2 *Hunter Group, Inc.*, 61 Cal. App. 4th 881, 907, 72 Cal. Rptr. 2d 73 (1998), quoting *Steiber*
3 *v. Honeychuck*, 101 Cal. App. 3d 903, 927 (1980) and *Saunders*, 27 Cal. App. 4th at 838-39.
4 Section 17200 "demonstrates a clear design to protect consumers." *Steiber*, 101 Cal. App.
5 3d at 927. A violation of § 17500 is similarly a public welfare offense, because it is "purely
6 regulatory in nature and involves widespread injury to the public." *People v. Coria*, 66 Cal.
7 App. 4th 1385, 1393, 78 Cal. Rptr. 2d 620 (1998); *People v. Martin*, 211 Cal. App. 3d 699,
8 259 Cal. Rptr. 770 (1989); *People v. Chevron Chemical Co.*, 143 Cal. App. 3d 50, 191 Cal.
9 Rptr. 537 (1983).

10 The inclusion of a damages component as a means of enforcing laws
11 designed to detect fraud and protect the public "does not abrogate the police or regulatory
12 power function" or render the exception inapplicable. "Only if the action is pursued 'solely
13 to advance a pecuniary interest of the governmental unit will the automatic stay bar it.'" *In*
14 *re Universal Life Church*, 128 F.3d at 1299 (emphasis added), quoting *In re Thomassen*, 15
15 B.R. at 909; see, 11 U.S.C. § 362(b)(4) (plaintiff permitted to obtain but not enforce a
16 money judgment); *Continental Hogen Corp.*, 932 F.2d at 832 (governmental units allowed
17 to fix amount of penalties, up to and including entry of money judgment); S. Rep. No. 95-
18 989 at 52; H.R. Rep. No. 95-595 at 343 ("Where a governmental unit is suing a debtor to
19 prevent or stop violation of fraud, environmental protection, consumer protection, safety, or
20 similar police or regulatory laws, or attempting to fix damages for violation of such a law,
21 the action or proceeding is not stayed under the automatic stay." (underline added); see also,
22 *City of New York v. Exxon Corp.*, 932 F. 2d 1020, 1024 (2nd Cir. 1991); *NLRB v. P*F*E*
23 *Nationwide, Inc.*, 923 F. 2d 506, 511-512 (7th Cir. 1991); *Eddleman v. U.S. Dept. of Labor*,
24 923 F. 2d 782, 790-791 (10th Cir. 1991); *In re Commonwealth Companies, Inc.*, 913 F. 2d
25 518, 522-523 (8th Cir. 1990); *U.S. v. Nicolet, Inc.*, 857 F. 2d 202, 207-209 (3rd Cir. 1988);
26 *In re Commerce Oil Co.*, 847 F. 2d 291, 295 (6th Cir. 1988); *EEOC v. McLean Trucking*
27 *Co.*, 834 F. 2d 398, 400-402 (4th Cir. 1987) (same).

1 Although the § 17200 and § 17500 claims have a damages component with
2 respect to civil penalties, restitution and disgorgement, each is asserted as a means to
3 protect the public by detecting and halting the Debtor's unlawful, unfair, fraudulent and/or
4 deceptive business activities. Both causes of action are alleged to protect the health, safety
5 and welfare of the public, and to effectuate the public policy of averting injury to the public.
6 Neither is maintained solely for pecuniary gain or to adjudicate private rights.

7 Additionally, the damages sought under both § 17200 and § 17500 will not
8 conflict with this Court's control of the Debtor's property. Rather, the Governmental Units
9 seek only to obtain a judgment in order to fix the amount of their unsecured claims against
10 the Debtor. The Governmental Units' lawsuit "would not convert the government into a
11 secured creditor, force the payment of a prepetition debt, or otherwise give the government a
12 pecuniary advantage over other creditors." *United States v. Commonwealth Companies Inc.*
13 (*In re Commonwealth Companies, Inc.*), 913 F.2d 518, 524 (8th Cir. 1990). Accordingly,
14 the § 17200 and § 17500 causes of action meet both the pecuniary purpose and public policy
15 tests.

16 Under either the pecuniary purpose or public policy tests, the Superior Court
17 Action is an exercise of police and regulatory power excepted from the automatic stay.

18 **IV. THE GOVERNMENTAL UNITS ARE ENTITLED TO RELIEF**
19 **FROM THE AUTOMATIC STAY FOR CAUSE**

20 In the event the Court determines that the "police or regulatory power"
21 exception is inapplicable and the automatic stay bars continuation of the Superior Court
22 Action, cause exists to lift the automatic stay.

23 **A. Cause to Lift the Stay is Within the Court's Discretion**

24 Bankruptcy Code § 362(d)(1) provides that the Court shall grant relief from
25 the automatic stay for "cause." 11 U.S.C. § 362(d)(1); *Benedor Corp. v. Conejo Enters.,*
26 *Inc. (In re Conejo Enters., Inc.)*, 96 F.3d 346, 352 (9th Cir. 1996). "Because there is no
27 clear definition of what constitutes "cause" discretionary relief from the stay must be
28 determined on a case by case basis." *McDonald v. McDonald (In re McDonald)*, 755 F.2d

1 715, 717 (9th Cir. 1985); *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*,
2 912 F.2d 1162, 1166 (9th Cir. 1990).

3 Pertinent examples of "cause" sufficient to grant stay relief include
4 considering the judicial economy achieved from lifting the automatic stay to allow a trial to
5 proceed in another forum, particularly in litigation involving multiple parties. *Plombo Corp.*
6 *v. Castlerock Properties (In re Castlerock Properties)*, 781 F.2d 159, 163 (9th Cir. 1986).
7 "Cause" may also exist whenever the automatic stay harms a creditor, and lifting the stay
8 will not unjustly harm the debtor or other creditors. *United States v. Fisher*, No. CV 90-
9 1571-Kn, 1992 U.S. Dist. LEXIS 20075, at *1 (C.D. Cal. filed Dec. 4, 1992); *In re Priestley*,
10 93 Bankr. 253, 261 (Bankr. D. N.M. 1988).

11 B. Cause Exists to Lift the Automatic Stay to Continue the
12 Superior Court Action

13 In this case, the stay should be lifted in the interests of judicial economy. The
14 Superior Court Action involves multiple parties, including numerous non-debtor parties.
15 Moreover, the Debtor's on-going unlawful, unfair and fraudulent business practices, which
16 promote the illegal trafficking of firearms, constitute post-petition violations of California
17 law to which the automatic stay is inapplicable. Accordingly, if the automatic stay is not
18 lifted, the Governmental Units will be forced to litigate simultaneously in the Superior Court
19 for post-petition violations and in this Court for pre-petition violations. Judicial economy
20 dictates that the stay should be lifted.

21 Additionally, assuming *arguendo* that it applies, the automatic stay harms the
22 Governmental Units as it prohibits them from carrying out their responsibility to protect the
23 public from the Debtor's wrongful business practices. Conversely, lifting the automatic stay
24 to permit the Superior Court Action to proceed and conclude would not harm the Debtor or
25 creditors. It would not alter the right of any creditor to participate in a distribution from the
26 Debtor's bankruptcy case. As noted, the Debtor's schedules reveal no financial difficulty
27 since the Debtor lists \$614,000 in assets and \$203,000 in liabilities. (*Debtor's Schedules B, D, E,*
28 *F*, docs. #16, 18, 19, 20, filed June 11, 1999.) The Debtor has sufficient assets to pay its

1 listed, liquidated creditors. Therefore, stay relief would resolve the primary reason the
2 Debtor filed this bankruptcy - to forestall the Superior Court Action and similar lawsuits,
3 and thereby shield and preserve the Debtor's wrongful business practices.

4 Under the circumstances, "cause" exists to lift the automatic stay. The
5 Superior Court Action should proceed to its conclusion without further delay.

6 V. CONCLUSION

7 The Governmental Units respectfully request that the Court enter an order
8 determining that the Superior Court Action is an exercise of their police and regulatory
9 powers and therefore is exempt from the automatic stay. In the alternative, they seek relief
10 from the automatic stay to enable the Superior Court Action to proceed.

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021

1 DATED: September 9, 1999.

2 Respectfully submitted,

3 McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP

4
5
6 By: Randy Michelson

7 Randy Michelson
8 Attorneys for Creditor
9 The City and County of San Francisco

10 SAN FRANCISCO CITY ATTORNEY

11
12 By: _____

13 D. Cameron Baker
14 Attorneys for Creditor
15 The City and County of San Francisco

16 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

17
18 By: _____

19 Pierce Gore
20 Attorneys for Creditors
21 The City and County of San Francisco, Sacramento,
22 Berkeley, Oakland, East Palo Alto, San Mateo County, and
23 Alameda County

24 MILBERG, WEISS, BERSHAD, HYNES & LERACH, LLP

25
26 By: _____

27 Ex Karen S. Sams II
28 Attorneys for Creditors
The City and County of San Francisco, Sacramento,
Berkeley, Oakland, East Palo Alto, Alameda County,
and San Mateo County

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11/17/99 11:36 FAX 817 810 5258 SIMON, WARNER & DOBY LLP

0022

1 DATED: September 1999.

2 Respectfully submitted,

3 McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP

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5
6 By: _____

Randy Michelson
Attorneys for Creditor
The City and County of San Francisco

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9 SAN FRANCISCO CITY ATTORNEY

10
11
12 By: _____

D. Cameron Baker
Attorneys for Creditor
The City and County of San Francisco

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15 LIEFF, CARRASER, HEDMANN & BERNSTEIN, LLP

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17
18 By: _____

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Berkeley, Oakland, East Palo Alto, and Alameda County

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and San Mateo County

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0023

1 DATED: September __, 1999.

2 Respectfully submitted,

3 McCUTCHEEN, DOYLE, BROWN & ENERSEN, LLP

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5
6 By: _____

Randy Michelson

Attorneys for Creditors

The City and County of San Francisco

7
8
9 SAN FRANCISCO CITY ATTORNEY

10
11
12 By: _____

D. Cameron Baker

Attorneys for Creditors

The City and County of San Francisco

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14
15 LIEFF, CARRASER, HELLMANN & BERNSTEIN, LLP

16
17
18 By: Pine G _____

Patricia Gore

Attorneys for Creditors

The City and County of San Francisco, Sacramento,
Berkeley, Oakland, East Palo Alto, San Mateo County, and
Alameda County

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20
21
22 MILBERG, WEISS, BERSHAD, HYNES & LERACH, LLP

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0024

1 DATED: September 9, 1999.

2 Respectfully submitted,

3 McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP

4
5
6 By: _____

7 Randy Michelson
8 Attorneys for Creditor
9 The City and County of San Francisco

10 SAN FRANCISCO CITY ATTORNEY

11
12 By: _____

13 D. Cameron Baker
14 Attorneys for Creditor
15 The City and County of San Francisco

16 LIEFF, CARRASHER, HEIMANN & BERNSTEIN, LLP

17
18 By: _____

19 Pierce Gore
20 Attorneys for Creditors
21 The City and County of San Francisco, Sacramento,
22 Berkeley, Oakland, East Palo Alto, and Alameda County

23 MILBERG, WEISS, BERSHAD, HYNES & LERACH, LLP

24
25 By:  _____

26 Eric S. Smith II
27 Attorneys for Creditors
28 The City and County of San Francisco, Sacramento,
Berkeley, Oakland, East Palo Alto, Alameda County,
and San Mateo County

Declaration of Randy Michelson

I, Randy Michelson, declare as follows:

1. I am a member of the law firm of McCutchen, Doyle, Brown & Enersen, LLP, counsel for The City and County of San Francisco ("San Francisco") in the above captioned case. I make this Declaration in support of the motion of the City and County of San Francisco, Berkeley, Sacramento, Oakland, East Palo Alto, San Mateo County, Alameda County, and Joe Serna, Jr., as Mayor of the City of Sacramento (collectively the "Governmental Units") for an order exempting the Governmental Unit's exercise of police and regulatory powers from the automatic stay, or in the alternative for relief from the automatic stay. Except as otherwise stated, the following facts are within my personal knowledge and, if required, I could testify competently to the facts set forth herein.

2. The Governmental Units have sued Davis Industries, Inc. (the "Debtor"), other manufacturers and distributors of handguns and their trade associations in a lawsuit entitled *People of the State of California, et al. v. Arcadia Machine & Tool, Inc., et al.*, Case No. 303753, filed in the Superior Court of the State of California for the City and County of San Francisco (the "Superior Court Action"). The Superior Court Action also names as defendants 36 firearms manufacturers, distributors, and their trade associations. (A true and correct copy of the First Amended Complaint filed in the Superior Court Action is attached as Exhibit 1.)

3. To protect the health, safety and welfare of the public, the Governmental Units seek to exercise their police and regulatory powers in the Superior Court Action to enjoin the Debtor's unlawful, unfair and fraudulent business practices in marketing, distributing, promoting, designing and selling handguns, and to enforce laws designed to prohibit such practices.

4. I am informed and believe that the Debtor is also a defendant in at least 15 other actions filed by other governmental units throughout the United States, including, but not limited to, Atlanta; Boston; Bridgeport; Chicago; Cincinnati; Cleveland;

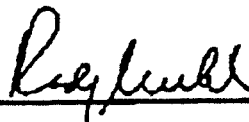
1 Detroit; Wayne County; Los Angeles; Newark; New Orleans; St. Louis; and Miami-Dade
2 County.

3 5. In the Superior Court Action, the Governmental Units allege causes of
4 action for public nuisance and for violations of California Business & Professions Code
5 § 17200 and § 17500.

6 6. As representatives of the public, the Governmental Units seek to abate
7 the threat to the public resulting from the Debtor's wrongful conduct, and to prevent future
8 unlawful, unfair and/or fraudulent conduct and deceptive advertising by Debtor. Further,
9 under the Business and Professions Code, the Governmental Units seek their statutory
10 remedies including civil penalties, restitution and disgorgement.

11 7. A true and correct copy of the cited portions of the Transcript of
12 Debtor's § 341 Meeting of Creditors is attached as Exhibit 2.

13
14 I declare under penalty of perjury under the laws of the United States that the
15 foregoing is true and correct. Executed this 9th day of September 1999, in San Francisco,
16 California.

17
18 

19 Randy Michelson
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11/23/99 18:28 FAX 817 810 5255

SIMON, WARNER & DOBY LLP

002

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number Richard M. Heilmann (SBN 063807) Robert J. Nelson (SBN 132797) Pierce Gore (SBN 128516) LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP 276 Battery Street, Suite 3000 Embarcadero Center West San Francisco, CA 94111-3339 Telephone: 415/956-1000 Fax: 415/956-1008 James K. Hahn, City Attorney (SBN 66073) Carmel Salas, Special Assistant City Attorney (SBN 162653) Don Kass, Deputy City Attorney (SBN 103807) 200 N. Main Street, 1600 City Hall East Los Angeles, CA 90012 Telephone: 213/485-4515 Fax: 213/847-3014 (Additional Counsel, Full Addresses and Represented Creditors Listed After Signature Page) <input type="checkbox"/> Individual appearing without counsel <input checked="" type="checkbox"/> Attorney for Creditor The City of Los Angeles		FOR COURT USE ONLY
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA		
In re: Davis Industries, Inc., a California corporation, Debtor(s).	CHAPTER: 11 CASE NO.: R599-19302 MJ DATE: December 2, 1999 TIME: 2:30 p.m. PLACE: Courtroom 302, 3420 Twelfth Street Riverside, CA	

**NOTICE OF MOTION AND MOTION FOR RELIEF FROM THE AUTOMATIC STAY
 UNDER 11 U.S.C. § 362 (with supporting declarations)**

**(MOVANTS: James K. Hahn, City Attorney of the City of Los Angeles)
 (Police/Regulatory Action in Non-bankruptcy Forum)**

- NOTICE IS HEREBY GIVEN to the Debtor(s) and Trustee (if any) ("Responding parties"), their attorneys (if any), and other interested parties that on the above date and time and in the indicated courtroom, Movant in the above-captioned matter will move this Court for an Order granting relief from the automatic stay as to Debtor and Debtor's bankruptcy estate on the grounds set forth in the attached Motion.
- Hearing Location:

<input type="checkbox"/> 255 East Temple Street, Los Angeles	<input type="checkbox"/> 411 West Fourth Street, Santa Ana
<input type="checkbox"/> 21041 Burbank Boulevard, Woodland Hills	<input type="checkbox"/> 1415 State Street, Santa Barbara
<input checked="" type="checkbox"/> 3420 Twelfth Street, Riverside	
- ☒ This Motion is being heard on REGULAR NOTICE pursuant to Local Bankruptcy Rule 9013-1. If you wish to oppose this Motion, you must file a written response to this Motion with the Bankruptcy Court and serve a copy of it upon the Movant's attorney (or upon Movant, if the motion was filed by an unrepresented individual) at the address set forth above no less than 14 days before the above hearing and must appear at the hearing of this Motion.
 - ☐ This Motion is being heard on SHORTENED TIME. If you wish to oppose this Motion, you must appear at the hearing. Any written response or evidence must be filed and served: ☐ at the hearing ☐ at least _____ court days before the hearing.
 - ☐ An Application for Order Shortening Time was not required (according to the calendaring procedures of the assigned judge).
 - ☐ An Application for Order Shortening Time was filed per Local Bankruptcy Rule 9075-1(2) and was granted by the Court.
 - ☐ An Application for Order Shortening Time has been filed and remains pending.
- You may contact the Bankruptcy Clerk's office to obtain a copy of an approved court form for use in preparing your response (Optional Court Form 390), or you may prepare your response using the format required by Local Bankruptcy Rule 1002-1.

This form is mandatory by Order of the United States Bankruptcy Court for the Central District of California.

DLK/CJS

Revised December 1998 (DCA-SA)

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003


Motion for Relief from Stay (Non-bankruptcy Action) - Page 2 of 11	
In re Davis Industries, Inc. Debtor(s).	CHAPTER: 11 CASE NO.: RS99-19302 MJ

5. If you fail to file a written response to the Motion or fail to appear at the hearing, the Court may treat such failure as a waiver of your right to oppose the Motion and may grant the requested relief.

Dated: November 7, 1999

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
Print Law Firm Name (if applicable)

Pierce Gore
Print Name of Individual Movant or Attorney for Movant


Signature of Individual Movant or Attorney for Movant

MOTION FOR RELIEF FROM THE AUTOMATIC STAY (MOVANTS: The City of Los Angeles)

1. The Non-bankruptcy Action: Movant moves for relief from the automatic stay as to Debtor and Debtor's bankruptcy estate with respect to the following pending lawsuit or administrative proceeding in a non-bankruptcy forum:

Case name: *People of the State of California, et al. v. Arcadia Machine & Tool, Inc., et al.*
Docket number: Case No. BC 210894

Court or agency where pending: Superior Court of the State of California for the County of Los Angeles

2. Case History:

- a. ☒ A Voluntary ☐ An Involuntary Petition under Chapter ☐ 7 ☒ 11 ☐ 12 ☐ 13 was filed on: 5/27/99
b. ☐ An Order of Conversion to Chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was entered on:
c. ☐ (Optional) Other bankruptcy cases affecting this action have been pending within the past two years.
d. (If applicable) Plan was confirmed on (specify date):

e. For additional case history, see attached continuation page.

3. Grounds for Relief from Stay: Pursuant to 11 U.S.C. § 362(d)(1), cause exists to grant Movant relief from stay to proceed with the Non-bankruptcy Action to final judgment in the non-bankruptcy forum for the following reasons:

- a. ☒ The bankruptcy case was filed in bad faith specifically to delay, hinder or interfere with prosecution of the Non-bankruptcy Action.
b. ☐ The claim is insured. Movant seeks recovery only from applicable insurance, if any, and waives any deficiency or other claim against the Debtor(s) or estate property.
c. ☐ Movant seeks recovery primarily from third parties and agrees that the stay will remain in effect as to enforcement of any resulting judgment against the Debtor or estate, except that Movant will retain the right to file a proof of claim under 11 U.S.C. § 501 and/or an adversary complaint under 11 U.S.C. § 523 or § 727 in this bankruptcy case.
d. ☐ Mandatory abstention applies under 28 U.S.C. § 1334(c)(2), and Movant agrees that the stay will remain in effect as to enforcement of any resulting judgment against the Debtor or estate, except that Movant will retain the right to file a proof of claim under 11 U.S.C. § 501 and/or an adversary complaint under 11 U.S.C. § 523 or § 727 in this bankruptcy case.
e. ☐ The claims are non-dischargeable in nature and can be most expeditiously resolved in the non-bankruptcy forum.
f. ☒ The claims at issue arise under non-bankruptcy law and can be most expeditiously resolved in the non-bankruptcy forum.
g. ☒ Other reasons to allow the non-bankruptcy action to proceed are set forth in an attached Declaration.

4. ☐ Movant also seeks annulment of the stay to validate post-petition acts, as specified in the attached Declaration(s).

DQA-GUC

This form is mandatory by Order of the United States Bankruptcy Court for the Central District of California.

Revised December 1998 (DQA-SA)

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004

Motion for Relief from Stay (Non-bankruptcy Action) - Page 3 of 11

In re Davis Industries, Inc.	CHAPTER: 11
Debtor(s).	CASE NO.: RS99-19302 MJ

5. Evidence in Support of Motion: (Important Note: Declaration(s) in support of the Motion MUST be attached hereto.)
- ☒ Movant submits the attached Declaration(s) to provide evidence in support of the Stay Motion pursuant to Local Bankruptcy Rules.
 - ☐ Movant requests that the Court consider as admissions the statements made by Debtor(s) under penalty of perjury concerning Movant's claims set forth in Debtor(s)'s Schedules. Authenticated copies of the relevant portions of the Schedules are attached as Exhibit _____.
 - ☒ Other evidence (specify): Declaration and Exhibits attached to Movant's Notice Of Motion And Motion For Determination That The Automatic Stay Is Inapplicable Or, In The Alternative, For Relief From The Automatic Stay.
6. ☒ (Optional) A Memorandum of Points and Authorities is attached to Movant's Notice Of Motion And Motion For Determination That The Automatic Stay Is Inapplicable Or, In The Alternative, For Relief From The Automatic Stay..

WHEREFORE, Movant prays that this Court issue an Order granting the following:

- Relief from the stay to Movant (and its successors and assigns, if any) (check boxes re all applicable relief requested):
 - ☒ Terminating the stay as to Debtor and Debtor's bankruptcy estate.
 - ☐ Annulling the stay as to the acts set forth in the attached declaration(s).
 - ☐ Modifying or conditioning the stay as set forth in the attached continuation page:
- ☒ Allowing Movant to proceed under applicable non-bankruptcy law to enforce its remedies to proceed to final judgment in the non-bankruptcy forum, provided that the stay remains in effect with respect to enforcement of any judgment against Debtor(s) or estate property.
- ☒ Additional provisions requested:
 - ☒ That the Order be binding and effective despite any conversion of this bankruptcy case to a case under any other chapter of Title 11 of the United States Code.
 - ☒ That the Order be binding and effective in any bankruptcy case commenced by or against the above-named Debtor(s) for a period of 180 days, so that no further automatic stay shall arise in that case as to the Property.
 - ☐ See Extraordinary Relief Attachment (Attach Optional Court Form 350ER).
 - ☐ For other relief requested, see attached continuation page.
- If relief from stay is not granted, Movant respectfully requests the Court to order adequate protection.

Dated: November 7, 1999

Respectfully submitted,

James K. Hahn, City Attorney for the City of Los Angeles
Movant Name

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
Firm Name of Attorney for Movant (if applicable)

By: Pierce Gore
Signature

Name: Pierce Gore
Typed Name of Individual Movant or Attorney for Movant

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005

Motion for Relief from Stay (Non-bankruptcy Action) - Page 4 of 11	
In re Davis Industries, Inc.	CHAPTER: 11
Debtor(s).	CASE NO.: RS89-19302 MJ

DECLARATION RE ACTION IN NON-BANKRUPTCY FORUM
(MOVANTS: James K. Hahn, City Attorney for the City of Los Angeles)

I, Pierce Gore, declare as follows:

1. I have personal knowledge of the matters set forth in this declaration and, if called upon to testify, I could and would competently testify thereto. I am over 18 years of age. I have knowledge regarding the state court lawsuit, administrative proceeding, or other action in a non-bankruptcy forum ("Non-bankruptcy Action") that is the subject of this Motion because:
 - a. ☐ I am the Movant,
 - b. ☒ I am the Movant's attorney of record in the Non-bankruptcy Action.
 - c. ☒ Other (specify): I am the Movant's attorney of record in the Bankruptcy Case herein.
2. I am not a custodian of the books, records or files of Movants.
3. The Non-bankruptcy Action at issue is currently pending as:

Case Name: *People of the State of California, et al. v. Arcadia Machine & Tool, Inc., et al.*
 Docket Number: Case No. BC210894
 Court or agency where pending: Superior Court of the State of California, County of Los Angeles
4. Procedural Status
 - a. The causes of action pleaded in the non-bankruptcy forum are (list): Public Nuisance, violations of California Business & Professions Code § 17200
 - True and correct copies of the pleadings filed before the non-bankruptcy forum are attached as Exhibit 1 to the Declaration of Pierce Gore, attached to Movant's Notice of Motion and Motion for Determination That The Automatic Stay Is Inapplicable Or, In The Alternative, For Relief From The Automatic Stay.
 - b. The Non-bankruptcy Action was filed on (specify date): May 25, 1999
 - c. Trial began/is scheduled to begin on (specify date): not scheduled.
 - d. The trial is estimated to require the following number of court days for trial, if trial were held in bankruptcy court (specify): unknown
 - e. Other defendants to the Non-bankruptcy Action are (specify): 41 firearms manufacturers, distributors, dealers and their trade associations listed on the attached sheet.
5. Grounds for relief from stay:
 - a. ☐ The claim is insured. The insurance carrier and policy number are (specify):

(Continued on next page)

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Motion for Relief from Stay (Non-bankruptcy Action) - Page 5 of 11

In re Davis Industries, Inc.	CHAPTER: 11
Debtor(s).	CASE NO.: RS99-19302 MJ

- b. ☒ The matter can be tried more expeditiously in the non-bankruptcy forum.
- (1) ☐ It is currently set for trial on:
- (2) ☐ It is in advance stages of discovery and Movant believes that it will be set for trial by (specify date):
The basis for this belief is (specify):
- (3) ☒ The matter involves non-debtor parties who are not subject to suit in the bankruptcy court. A single trial in the non-bankruptcy forum is the most efficient use of judicial resources.
- c. ☒ The bankruptcy case was filed in bad faith specifically to delay or interfere with the prosecution of the Non-bankruptcy Action.
- (1) ☐ Movant is the only creditor (or the only substantial creditor) scheduled by the Debtor.
- (2) ☒ The timing of the petition filing shows that it was intended to delay or interfere with the Non-bankruptcy Action based upon the following facts (specify): Testimony of Debtor's representative, attached as Exhibit 2 to the Declaration of Pierce Gore, attached to Movant's Notice of Motion and Motion for Determination that the Automatic Stay is Inapplicable or, in the Alternative, for Relief from the Automatic Stay.
- (3) ☐ Debtor does not have a reasonable likelihood of reorganizing in this Chapter ☐ 11 ☐ 13 bankruptcy case based upon the following facts (specify):
- d. ☒ For other facts justifying relief from stay, see Movant's Notice of Motion and Motion for Determination that the Automatic Stay is Inapplicable or, in the Alternative, for Relief from the Automatic Stay.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed on November 7, 1999 at San Francisco, California (city, state).

Pierce Gore
Print Declarant's Name


Signature of Declarant

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007

Motion for Relief from Stay (Non-bankruptcy Action) - Page 6 of 11

In re	Davis Industries, Inc.	CHAPTER: 11
	Debtor(s).	CASE NO.: RS99-19302 MJ

Declaration attachment

4e.

Other defendants to the Non-bankruptcy Action

Arcadia Machine & Tool, Inc.
 Ellett Brothers
 B.L. Jennings
 Bryco Arms, Inc.
 Lordin Engineering Co., Inc.
 Beretta U.S.A. Corp.
 Pietro Beretta S.P.A.
 Browning Arms Co.
 H&R 1871, Inc.
 Charter Arms, Inc.
 Colt's Manufacturing Co., Inc.
 MKS Supply, Inc. d/b/a Hi-Point Firearms
 Kel-Tec CNC Industries
 Excel Industries, Inc. a/k/a Apou-Tek
 Forjas Taurus, S.A.
 China North Industries a/k/a Norinco
 Taurus International Manufacturing, Inc.
 Glock, Inc.
 Glock GmbH
 Heckler & Koch, Inc.
 Norin American Arms, Inc.

Lordin Engineering, Inc.
 Phoenix Arms
 Sundance Industries, Inc.
 Navegar, Inc. d/b/a Intratec U.S.A., Inc.
 Sig Arms, Inc.
 Smith and Wesson Corp.
 Sturm Ruger & Company, Inc.
 American Shooting Sports Coalition, Inc.
 National Shooting Sports Foundation, Inc.
 Sporting Arms and Ammunition Manufacturers' Institute, Inc.
 B.L. Jennings, Inc.
 International Armaments Corp. d/b/a Interarms Industries, Inc.
 S.W. Daniel Inc. a/k/a Cobray Firearms, Inc.
 RSR Wholesale Guns, Inc.
 Southern Ohio Gun Distributors
 B&B Group, Inc.
 Andrews Sporting Goods, Inc.
 National Gun Sales, Inc.
 S.G. Distributing, Inc.
 Hawthorne Distributors, Inc.

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008

LIEFF. CABRASER, HEIMANN & BERNSTEIN, LLP
RICHARD M. HEIMANN (SBN 63607)
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DON KASS, DEPUTY CITY ATTORNEY (SBN 103607)
200 N. Main Street, 1600 City Hall East
Los Angeles, California 90012

[Full Addresses and Represented Creditors Listed
After Signature Page]

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE

In re

Davis Industries, Inc., a California
corporation,

Debtor.

Employer Identification No. 95-3266661

Case No. RS99-19302 MJ
Chapter 11

RS No.

NOTICE OF MOTION AND MOTION OF
THE CITIES OF LOS ANGELES,
COMPTON, INGLEWOOD, AND WEST
HOLLYWOOD, CALIFORNIA FOR
DETERMINATION THAT THE
AUTOMATIC STAY IS INAPPLICABLE OR,
IN THE ALTERNATIVE, FOR RELIEF
FROM THE AUTOMATIC STAY

Date: December 2, 1999

Time: 2:30 p.m.

Place: Courtroom 302, 3420 Twelfth Street
Riverside, California

TO ALL INTERESTED PARTIES:

PLEASE TAKE NOTICE that on December 2, 1999, at 2:30 P.M., or as soon
thereafter as counsel may be heard, a hearing will be held before the Honorable Meredith A. Jury,
on the motion of the Cities of Los Angeles, Compton, Inglewood, and West Hollywood,
California ("Governmental Units") for an order determining that, pursuant to 11 U.S.C.
§ 362(b)(4), the automatic stay does not apply to the action entitled *People of the State of
California, et al. v. Arcadia Machine & Tool, Inc., et al.*, Case No. BC210894, pending in the

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1 Superior Court of the State of California, County of Los Angeles (the "Superior Court Action")
2 because the Superior Court Action is an exercise of the police and regulatory powers of Los
3 Angeles. In the alternative, the Governmental Units move for relief from the automatic stay
4 pursuant to 11 U.S.C. § 362(d). Davis Industries, Inc. (the "Debtor") is a defendant in the Superior
5 Court Action.

6 PLEASE TAKE FURTHER NOTICE that Bankruptcy Local Rule 9013-1(g) of the
7 United States Bankruptcy Court for the Central District of California prescribes that any interested
8 party opposing, joining, or responding to the Motion shall file and serve a written statement in
9 opposition or of non-opposition, not later than fourteen (14) days before the date designated for a
10 hearing on the Motion.

11 This Motion is based upon the Notice of Motion, the accompanying Memorandum
12 of Points and Authorities, the declaration of Pierce Gore, and such arguments and evidence as may
13 be presented at or before a hearing on this Motion.

14 WHEREFORE, the Governmental Units respectfully request that the Court enter an
15 order determining that the Superior Court Action is exempt from the automatic stay as an exercise
16 of the Governmental Units' police and regulatory powers or, in the alternative, grant relief from the
17 automatic stay to enable the Superior Court Action to proceed, and grant such further relief as the
18 Court may deem just and proper.

19
20 DATED: November 8, 1999.

Respectfully submitted,

21
22 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

23
24 By: 

25 Pierce Gore
26 Attorneys for Creditor
27 The City of Los Angeles
28

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SIMON, WARNER & DOBY LLP

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1 Complete List of Counsel, with Full Addresses and Represented Creditors

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10 Attorneys for Creditors

The City of Los Angeles

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1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
2 FOR DETERMINATION THAT THE AUTOMATIC STAY IS INAPPLICABLE OR,
3 IN THE ALTERNATIVE, FOR RELIEF FROM THE AUTOMATIC STAY

4 I. INTRODUCTION

5 On behalf of the People of the State of California, James K. Hahn, City Attorney for
6 the City of Los Angeles, together with three other Southern California cities, Compton, Inglewood,
7 and West Hollywood (collectively, "Governmental Units") have sued Davis Industries, Inc. (the
8 "Debtor") in a lawsuit entitled *People of the State of California, et al. v. Arcadia Machine & Tool,*
9 *Inc., et al.*, Case No. BC210894, pending in the Superior Court of the State of California, County
10 of Los Angeles (the "Superior Court Action").¹ The Superior Court Action also names as
11 defendants 41 firearms manufacturers, retailers, dealers and their trade associations. (Declaration
12 of Pierce Gore ("Gore Decl."), Exhibit 1.)

13 To protect the health, safety and welfare of the public, the Governmental Units seek
14 to exercise its police and regulatory powers in the Superior Court Action to enjoin the Debtor's
15 unlawful, unfair and fraudulent business practices in marketing, distributing, promoting, designing
16 and selling handguns, and to enforce laws designed to prohibit such practices. (Gore Decl., ¶ 3.)

17 By this motion, the Governmental Units seek an order determining that the Superior
18 Court Action is exempt from the automatic stay pursuant to 11 U.S.C. § 362(b)(4). Alternatively,
19 to the extent the Court deems the automatic stay applicable, the Governmental Units seek relief
20 from the stay pursuant to 11 U.S.C. § 362(d) for cause in order that the Superior Court Action may
21 proceed against the Debtor.

22 This court has already granted three other Motions for Determination that the
23 Automatic Stay is Inapplicable or, in the Alternative, for Relief from Automatic Stay in this action.
24 These three motions were granted to parties which are similarly situated to the Governmental Units
25 as plaintiff in distinct suits that allege similar claims in different forums, in which the Debtor is a
26 party defendant. The motions were granted to Cook County, *et al.*, Wayne County, *et al.*, and the
27 City and County of San Francisco, *et al.* The court's ruling in the San Francisco case is of

28 ¹ A copy of the *First Amended Complaint* filed by Los Angeles in the Superior Court Action
is attached as Exhibit 1 to the Gore Declaration.

1 particular relevance given that the causes of action alleged in the Los Angeles suit are identical to
2 those alleged by San Francisco.²

3 **II. STATEMENT OF FACTS**

4 On or about May 27, 1999, the Debtor filed a voluntary petition under Chapter 11 of
5 the United States Bankruptcy Code. The Debtor's schedules reveal no financial difficulty. They
6 list approximately \$203,000 in liabilities and \$614,000 in assets. (Debtor's Sch. B, D, E, F, docs.
7 #16, 18, 19, 20, filed June 11, 1999.) The Debtor admits that it filed this bankruptcy solely to halt
8 the Superior Court Action and similar lawsuits filed by other governmental units throughout the
9 United States:

10 [The Debtor] has been embroiled in various lawsuits throughout the
11 country, what we typically will call Municipality lawsuits. . . . The
12 debtor determined that although its business is a profitable business
13 and can't [sic] continue to be profitable, it can't be under the weight
14 of the pending Municipal lawsuits.

15 As a result, debtor sought relief under Title 11 in United States Code
16 to protect its viable business operations from the significant lawsuits
17 that were pending and anticipated additional lawsuits that are going
18 to be and have been filed since the filing of the petition.

19 (Transcript of Debtor's § 341 Meeting of Creditors, at 6-8, Exhibit 2 to Gore Decl.)³

20 In the Superior Court Action, the Governmental Units allege, *inter alia*, causes of
21 action for public nuisance (statute)⁴, and for violations of California's Business & Professions
22 Code § 17200, which prohibits unfair, unlawful and fraudulent business practices. Plaintiffs'
23 claims against the Debtor involve, *inter alia*, two aspects of its manufacture and sale of cheap,
24 poorly-made handguns. The Governmental Units contend that the Debtor's firearms lack critical
25 safety features and designs as well as adequate warnings to users and other persons. Second, the

26 ²The San Francisco suit also alleges a cause of action for violation of Cal. Bus. & Prof. Code
27 § 17500.

28 ³The Debtor is also a defendant in at least 15 other actions filed by other governmental units
throughout the United States, including, but not limited to, Atlanta; Berkley; Boston; Chicago;
Cincinnati; Cleveland; Detroit; Wayne County; Los Angeles; Newark; New Orleans; Sacramento;
City and County of San Francisco; St. Louis; Miami-Dade County. (Debtor's Sch. F, doc. #20, filed
June 11, 1999; Debtor's Stmt of Financial Affairs. Section 4A, doc. #24, filed June 11, 1999.

⁴California Civil Code §§ 3480, 3490, *et seq.*; Code of Civil Procedure § 731.

1 Governmental Units allege that the Debtor has marketed and distributed its firearms in such a
2 manner as to promote and encourage their use in crime.

3 The dangers of guns in the home and the consequences of widespread availability
4 without restraints or limits were long ago, are today, and will continue to be specifically known to
5 the defendants. For example, more than 30 years ago a staff report of the U.S. Commission on the
6 Causes and Prevention of Violence, entitled "Handguns and Violence in American Life," noted in
7 1968 an increasing number of deaths and injuries and concluded:

8 [Americans] may seriously overrate the effectiveness of guns in
9 protection of their homes. In our urbanized society the gun is rarely
10 an effective means of protecting the home against either the burglar
11 or the robber. . . . [A gun in the home] provides a measure of comfort
12 to a great many Americans, but, for the homeowner, this comfort is
13 largely an illusion bought at the high price of increased accidents,
14 homicides, and more widespread illegal use of guns. . . . When the
15 number of handguns increases, gun violence increases. (Pages xiii,
16 139.)

17 A recent study reported that the Debtor's firearms are identified by federal agencies,
18 including the Bureau of Alcohol, Tobacco and Firearms, as being amongst the top ten firearms
19 traced by that agency for law enforcement purposes. Indeed, the Davis .380 caliber semiautomatic
20 pistol has been listed continuously among the top ten crime guns traced in the nation from 1991 to
21 the present. This particular firearm also has been among the top ten firearms traced in individual
22 California cities.² Finally, and equally significantly, it has a low time-to-crime rate which can be a
23 strong indicator of illegal gun trafficking.

24 The Governmental Units' allegations also concern the design and quality of the
25 Debtor's firearms. Because these are made primarily of "soft" metal alloys, they are unreliable and
26 therefore pose a danger to their users. For this reason, many municipalities in California, including
27 the Governmental Units, have banned the sale of these firearms as "junk guns" or "Saturday Night
28 Specials". See, e.g., Los Angeles Municipal Code § 103.314; Compton Municipal Code § 7-4.8;
Inglewood Municipal Code § 5-19.5; West Hollywood Municipal Code 4122. Additionally, the

² This report is included in a nationwide report by BATF as part of The Youth Crime
Interdiction Initiative, *Crime Gun Trace analysis Reports: The Illegal Youth Firearms Markets in
27 Communities* (February 1999). Because the entire report is voluminous, it is not attached herein,
but will be produced on demand.

1 "soft" metals in the Debtor's firearms make it easier to deface their serial numbers and therefore
2 facilitate their use in crime.

3 The Debtor's business practices thus create an unreasonable jeopardy to the public
4 health, welfare and safety and a reasonable apprehension of danger to person and property. (First
5 Amended Complaint, ¶ 150, Exhibit 1 to Gore Decl.) Pursuant to its authority under California's
6 Civil Code §§ 3480, 3490, *et seq.*, and Code of Civil Procedure § 731, the Governmental Units as
7 representatives of the People of the State of California, seek to abate this threat to the public and to
8 prevent future unlawful, unfair and/or fraudulent conduct by Debtor. Further, the Governmental
9 Units seek statutory remedies under Business & Professions Code § 17200, including civil
10 penalties, restitution and disgorgement. (Gore Decl. ¶ 6.)

11 **III. THE SUPERIOR COURT ACTION IS AN EXERCISE OF POLICE AND**
12 **REGULATORY POWER EXCEPTED FROM THE AUTOMATIC STAY**

13 **A. Governmental Action to Abate a Public Nuisance and Enforce Laws to**
14 **Protect Public Health, Safety and Welfare is an Exercise of Police and**
15 **Regulatory Powers Exempt From the Automatic Stay.**

16 Section 362(b)(4) excepts from the automatic stay the "continuation of an action or
17 proceeding by a governmental unit . . . to exercise such governmental unit's police and regulatory
18 power, including the enforcement of a judgment other than a money judgment, obtained in an
19 action or proceeding by the governmental unit to enforce such governmental unit's . . . police or
20 regulatory power." 11 U.S.C. § 362(b)(4). A "governmental unit" includes a municipality and
21 "department, agency, or instrumentality" of a state. 11 U.S.C. § 101(27); H.R. Rep. No. 95-595,
22 95th Cong., 1st Sess. 311 (1977). "Police or regulatory power" refers to the enforcement of laws
23 affecting health, welfare, morals and safety. Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n,
24 997 F.2d 581, 591 (9th Cir. 1993); Universal Life Church, Inc. v. United States (In re Universal
Life Church, Inc.), 128 F.3d 1294, 1297 (9th Cir. 1997).

25 "Where a governmental unit is suing a debtor to prevent or stop violation of fraud,
26 environmental protection, consumer protection, safety, or similar police or regulatory laws, or
27 attempting to fix damages for violation of such a law, the action or proceeding is not stayed under
28 the automatic stay." S.Rep. No. 95-989 at 52; H.R. Rep. No. 95-595 at 343 (1977) (underline

1 added). "It is clear from the legislative history that one of the purposes of this exception is to
2 protect public health and safety." Midlantic National Bank v. New Jersey Dept. of Environmental
3 Protection, 474 U.S. 494, 503-04 (1986). The theory underlying the exception is that because
4 bankruptcy should not be "a haven for wrongdoers," the automatic stay should not bar
5 governmental police or regulatory actions from proceeding. In re Universal Life Church, Inc.,
6 128 F.3d at 1297; see, Commodity Futures Trading Commission v. Co Petro Marketing Group,
7 Inc., 700 F. 2d 1279, 1283 (9th Cir. 1983).

8 Two tests exist for determining whether government actions fit within the "police or
9 regulatory power" exception: (1) the "pecuniary purpose" test and (2) the "public policy" test.
10 NLRB v. Continental Hagen Corp., 932 F.2d 828, 833 (9th Cir. 1991); Universal Life Church,
11 128 F.3d at 1297.

12 Under the pecuniary purpose test, the court determines whether the government
13 action relates primarily to matters of public safety, health, and welfare, or primarily to protection of
14 the government's pecuniary interest in the debtor's property. 932 F.2d at 833; 128 F.3d at 1297. If
15 the government action primarily concerns matters of public health, safety and welfare, the stay
16 does not apply. Universal Life Church, 128 F.3d at 1297-99; Thomassen, 15B.R. at 909. If, on the
17 other hand, the government action is pursued solely to advance a pecuniary interest of the
18 governmental unit, the stay applies. Universal Life Church, 128 F.3d at 1299 ("Only if the action
19 is pursued solely to advance a pecuniary interest of the governmental unit will the automatic stay
20 bar it.") (emphasis added) quoting Thomassen v. Division of Med. Quality Assurance, (In re
21 Thomassen), 15 B.R. 907, 909 (9th Cir. BAP 1981).

22 Under the public policy test, the focus is to distinguish "between government
23 actions that effectuate public policy, and those that adjudicate private rights." The former are
24 excepted from the automatic stay. Continental Hagen Corp., 932 F.2d at 833; In re Universal Life
25 Church, Inc., 128 F.3d at 1297; NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 942 (6th
26 Cir. 1996).

27 Courts have recognized the "police or regulatory power" exception in a variety of
28 contexts, including government action to abate a public nuisance, detect and pursue legal remedies

1 for fraudulent business activities, and enforcing consumer protection laws. See, In re Universal
2 Life Church, Inc., 128 F.3d at 1297-99 (revocation of tax-exempt status excepted from stay under
3 both pecuniary purpose and public policy tests, revocation served public welfare purpose of
4 detecting fraud and protecting potential donors against misuse of charitable donations); In re
5 Porter, 42 B.R. 61 (Bankr. S.D. Tex. 1984) (padlocking building and enjoining persons connected
6 with premises from maintaining public nuisance excepted from automatic stay); Javens v. City of
7 Hazel Park (In re Javens), 107 F.3d 359 (6th Cir. 1997) (order to demolish buildings predicated
8 upon danger to public health, safety and welfare a "classic exercise of the police power" excepted
9 from automatic stay); Smith-Goodson v. Citifed Mortgage Corp. (In re Smith-Goodson), 144 B.R.
10 72 (Bankr. S.D. Ohio 1992) (same); SEC v. Towers Financial Corp., 205 B.R. 27 (S.D.N.Y. 1997)
11 (action arising from debtor's Ponzi scheme protected public from fraud and was excepted from
12 stay); U.S. Dept. of Housing and Urban Dev. v. CCMV, 64 F.3d 920 (4th Cir. 1995) (suit for non-
13 compliance with federal land sale statute excepted from stay as consumer protection); State of
14 Ohio v. Hughes (In re Hughes), 87 B.R. 49 (Bankr. S.D. Ohio 1988) (suit for odometer tampering
15 excepted from automatic stay, even though civil penalties sought in addition to injunction as action
16 primarily relates to enforcement of consumer protection law).

17 The Governmental Units' exercise of police and regulatory power to protect public
18 health, safety and welfare in prosecuting the Superior Court Action is excepted from the automatic
19 stay.

20 B. The Superior Court Action is Exempt from the Stay Under Both the
21 Pecuniary Purpose and Public Policy Tests.

22 The Governmental Units assert a cause of action to abate a public nuisance caused
23 by the Debtor's distribution and marketing practices that promote illegal firearms trafficking. The
24 public nuisance cause of action seeks to enjoin these practices and thereby protect the public from
25 the higher level of crime, death and injuries to the citizens of the Governmental Units and in
26 addition to the higher levels of fear, discomfort and inconvenience resulting attributable to the
27 Debtor's business practices. Accordingly, the public nuisance claim meets the pecuniary purpose
28 test in that it primarily concerns matters of public health, safety and welfare.

1 Moreover, in the public nuisance cause of action the Governmental Units are not
2 advancing or adjudicating any private rights, but rather is only effectuating the public policy of
3 upholding a primary government function to protect the public from the use of handguns
4 wrongfully designed, manufactured, supplied, promoted, marketed and sold by the Debtor. As
5 such, the public nuisance cause of action meets the public policy test.

6 The Governmental Units also state a cause of action for violations of § 17200, *et*
7 *seq.*, of California's Business & Professions Code, for unfair, fraudulent and unlawful business
8 practices. The inclusion of a monetary penalty as a means of enforcing laws designed to detect
9 fraud and protect the public "does not abrogate the police or regulatory power function" or render
10 the exception inapplicable. "Only if the action is pursued 'solely to advance a pecuniary interest of
11 the governmental unit will the automatic stay bar it.'" In re Universal Life Church, 128 F.3d at
12 1299 (emphasis added), quoting In re Thomassen, 15 B.R. at 909; see, 11 U.S.C. § 362(b)(4)
13 (plaintiff permitted to obtain but not enforce a money judgment); Continental Hagen Corp.,
14 932 F.2d at 832 (governmental units allowed to fix amount of penalties, up to and including entry
15 of money judgment); S. Rep. No. 95-989 at 52; H.R. Rep. No. 95-595 at 343 ("Where a
16 governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection,
17 consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for
18 violation of such a law, the action or proceeding is not stayed under the automatic stay."
19 (underline added); see also, City of New York v. Exxon Corp., 932 F.2d 1020, 1024 (2d Cir.
20 1991); NLRB v. P*I*E Nationwide, Inc., 923 F. 2d 506, 511-512 (7th Cir. 1991); Eddleman v.
21 U.S. Dept. of Labor, 923 F.2d 782, 790-791 (10th Cir. 1991); In re Commonwealth Companies,
22 Inc., 913 F. 2d 518, 522-523 (8th Cir. 1990); U.S. v. Nicolet, Inc., 857 F. 2d 202, 207-209 (3d Cir.
23 1988); In re Commerce Oil Co., 847 F.2d 291, 295 (6th Cir. 1988); EEOC v. McLean Trucking
24 Co., 834 F. 2d 398, 400-402 (4th Cir. 1987) (same).

25 Although Business & Professions Code § 17200 provides remedies including civil
26 penalties, restitution and disgorgement, each is asserted by the Governmental Units as a means to
27 protect the public by detecting and halting the Debtor's unlawful, unfair, and fraudulent business
28 activities. Both causes of action are alleged to protect the health, safety and welfare of the public,

1 and to effectuate the public policy of averting injury to the public. Neither is maintained solely for
2 pecuniary gain or to adjudicate private rights.

3 Additionally, the monetary penalties sought under the Business & Professions Code
4 will not conflict with this Court's control of the Debtor's property. Rather, the Governmental
5 Units seek only to obtain a judgment in order to fix the amount of their unsecured claims against
6 the Debtor. The Governmental Units' lawsuit "would not convert the government into a secured
7 creditor, force the payment of a prepetition debt, or otherwise give the government a pecuniary
8 advantage over other creditors." United States v. Commonwealth Companies Inc. (In re
9 Commonwealth Companies, Inc.), 913 F.2d 518, 524 (8th Cir. 1990). Accordingly, the
10 Business & Professions Code cause of action meets both the pecuniary purpose and public policy
11 tests.

12 Under either the pecuniary purpose or public policy tests, the Superior Court Action
13 is an exercise of police and regulatory power excepted from the automatic stay.

14 IV. THE GOVERNMENTAL UNITS ARE ENTITLED TO RELIEF FROM THE
15 AUTOMATIC STAY FOR CAUSE

16 In the event the Court determines that the "police or regulatory power" exception is
17 inapplicable and the automatic stay bars continuation of the Superior Court Action, cause exists to
18 lift the automatic stay.

19 A. Cause to Lift the Stay Is Within the Court's Discretion.

20 Bankruptcy Code § 362(d)(1) provides that the Court shall grant relief from the
21 automatic stay for "cause." 11 U.S.C. § 362(d)(1); Benedor Corp. v. Consio Enters., Inc. (In re
22 Consio Enters., Inc.), 96 F.3d 346, 352 (9th Cir. 1996). "Because there is no clear definition of
23 what constitutes 'cause' discretionary relief from the stay must be determined on a case by case
24 basis." McDonald v. McDonald (In re McDonald), 755 F.2d 715, 717 (9th Cir. 1985);
25 Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162, 1166 (9th Cir.
26 1990).

27 Pertinent examples of "cause" sufficient to grant stay relief include considering the
28 judicial economy achieved from lifting the automatic stay to allow a trial to proceed in another

1 forum, particularly in litigation involving multiple parties. Piombo Corp. v. Castlerock Properties
2 (In re Castlerock Properties), 781 F.2d 159, 163 (9th Cir. 1986). "Cause" may also exist whenever
3 the automatic stay harms a creditor, and lifting the stay will not unjustly harm the debtor or other
4 creditors. United States v. Fisher, No. CV 90-1571-Kn, 1992 U.S. Dist. LEXIS 20075, at *1 (C.D.
5 Cal. filed Dec. 4, 1992); In re Priestley, 93 Bankr. 253, 261 (Bankr. D.N.M. 1988).

6
7 B. Cause Exists to Lift the Automatic Stay to Continue the Superior Court
8 Action.

9 In this case, the stay should be lifted in the interests of judicial economy. The
10 Superior Court Action involves multiple parties, including numerous non-debtor parties.
11 Moreover, the Debtor's on-going unlawful, unfair and fraudulent business practices, which
12 promote the illegal trafficking of firearms, constitute post-petition violations of California law to
13 which the automatic stay is inapplicable. Accordingly, if the automatic stay is not lifted, Los
14 Angeles will be forced to litigate simultaneously in the Superior Court for post-petition violations
15 and in this Court for pre-petition violations. Judicial economy dictates that the stay should be
16 lifted.

17 Additionally, assuming *arguendo* that it applies, the automatic stay harms the
18 Governmental Units as it prohibits them from carrying out its responsibility to protect the public
19 from the Debtor's wrongful business practices. Conversely, lifting the automatic stay to permit the
20 Superior Court Action to proceed and conclude would not harm the Debtor or creditors. It would
21 not alter the right of any creditor to participate in a distribution from the Debtor's bankruptcy case.
22 As noted, the Debtor's schedules reveal no financial difficulty since the Debtor lists \$614,000 in
23 assets and \$203,000 in liabilities. (Debtor's Sch. B, D, E, F, docs. #16, 18, 19, 20, filed June 11,
24 1999.) The Debtor has sufficient assets to pay its listed, liquidated creditors. Therefore, stay relief
25 would resolve the primary reason the Debtor filed this bankruptcy — to forestall the Superior
26 Court Action and similar lawsuits, and thereby shield and preserve the Debtor's wrongful business
27 practices.

28 Under the circumstances, "cause" exists to lift the automatic stay. The Superior
Court Action should proceed to its conclusion without further delay.

1 V. CONCLUSION

2 The Governmental Units respectfully request that the Court enter an order
3 determining that the Superior Court Action is an exercise of their police and regulatory powers and
4 therefore is exempt from the automatic stay. In the alternative, the Governmental Units seek relief
5 from the automatic stay to enable the Superior Court Action to proceed.
6

7 DATED: November 8, 1999.
8

9 Respectfully submitted,

10 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
11

12
13 By: Pierce Gore/pda

14 Pierce Gore
15 Attorneys for Creditor
16 The City of Los Angeles
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Declaration of Pierce Gore

I, Pierce Gore, declare as follows:

1. I am an associate in the law firm of Lieff, Cabraser, Heimann & Bernstein, LLP, counsel for the cities of Los Angeles, Compton, Inglewood and West Hollywood in the above captioned case. I make this Declaration in support of the motion by Los Angeles City Attorney James K. Hahn ("Los Angeles") for an order exempting Los Angeles' exercise of police and regulatory powers from the automatic stay, or in the alternative for relief from the automatic stay. Except as otherwise stated, the following facts are within my personal knowledge and, if required, I could testify competently to the facts set forth herein.

2. Los Angeles has sued Davis Industries, Inc. (the "Debtor"), other manufacturers and distributors of handguns and their trade associations in a lawsuit entitled *The People of the State of California, et al. v. Arcadia Machine & Tool, Inc., et al.*, Case No. BC210894, pending in the Superior Court of the State of California, County of Los Angeles (the "Superior Court Action"). The Superior Court Action also names as defendants 41 firearms manufacturers, distributors, and their trade associations. (A true and correct copy of the First Amended Complaint filed in the Superior Court Action is attached as Exhibit 1.)

3. To protect the health, safety and welfare of the public, Los Angeles seeks to exercise its police and regulatory powers in the Superior Court Action to enjoin the Debtor's unlawful, unfair and fraudulent business practices in marketing, distributing, promoting, designing and selling handguns, and to enforce laws designed to prohibit such practices.

4. I am informed and believe that the Debtor is also a defendant in at least 15 other actions filed by other governmental unites throughout the United States, including, but not limited to, Atlanta; Berkeley; Boston; Chicago; Cincinnati; Cleveland; Detroit; Wayne County; Los Angeles County; Newark; New Orleans; Sacramento; City and County of San Francisco; St. Louis; and Miami-Dade County.

5. As a representative of the public, Los Angeles seeks to abate the threat to the public resulting from the Debtor's wrongful conduct, and to prevent future unlawful, unfair and/or

1 fraudulent conduct by the Debtor. Further, under California's Business & Professions Code
2 § 17200, Los Angeles seeks statutory remedies including civil penalties, injunctive relief,
3 restitution and disgorgement.

4 6. A true and correct copy of the cited portions of the Transcript of Debtor's
5 § 341 Meeting of Creditors is attached as Exhibit 2.

6 I declare under penalty of perjury under the laws of the United States that the
7 foregoing is true and correct. Executed this 7th day of November 1999, in San Francisco,
8 California.

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11 Pierce Gore

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Motion for Relief from Stay (Non-bankruptcy Action) - Page 2 of 11

In re Davis Industries, Inc.	CHAPTER: 11
Debtor(s).	CASE NO.: RS99-19302 MJ

5. If you fail to file a written response to the Motion or fail to appear at the hearing, the Court may treat such failure as a waiver of your right to oppose the Motion and may grant the requested relief.

Dated: November 7, 1999

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
Print Law Firm Name (if applicable)Pierce Gore
Print Name of Individual Movant or Attorney for Movant
Signature of Individual Movant or Attorney for MovantMOTION FOR RELIEF FROM THE AUTOMATIC STAY.
(MOVANTS: Los Angeles County)

1. The Non-bankruptcy Action: Movant moves for relief from the automatic stay as to Debtor and Debtor's bankruptcy estate with respect to the following pending lawsuit or administrative proceeding in a non-bankruptcy forum:

Case name: *People of the State of California, et al. v. Arcadia Machine & Tool, Inc., et al.*
Docket number: Case No. BC214794

Court or agency where pending: Superior Court of the State of California for the County of Los Angeles

2. Case History:

- a. ☒ A Voluntary ☐ An Involuntary Petition under Chapter ☐ 7 ☒ 11 ☐ 12 ☐ 13 was filed on: 5/27/99
b. ☐ An Order of Conversion to Chapter ☐ 7 ☐ 11 ☐ 12 ☐ 13 was entered on:
c. ☐ (Optional) Other bankruptcy cases affecting this action have been pending within the past two years.
d. (If applicable) Plan was confirmed on (specify date):

e. For additional case history, see attached continuation page.

3. Grounds for Relief from Stay: Pursuant to 11 U.S.C. § 362(d)(1), cause exists to grant Movant relief from stay to proceed with the Non-bankruptcy Action to final judgment in the non-bankruptcy forum for the following reasons:

- a. ☒ The bankruptcy case was filed in bad faith specifically to delay, hinder or interfere with prosecution of the Non-bankruptcy Action.
b. ☐ The claim is insured. Movant seeks recovery only from applicable insurance, if any, and waives any deficiency or other claim against the Debtor(s) or estate property.
c. ☐ Movant seeks recovery primarily from third parties and agrees that the stay will remain in effect as to enforcement of any resulting judgment against the Debtor or estate, except that Movant will retain the right to file a proof of claim under 11 U.S.C. § 501 and/or an adversary complaint under 11 U.S.C. § 523 or § 727 in this bankruptcy case.
d. ☐ Mandatory abstention applies under 28 U.S.C. § 1334(c)(2), and Movant agrees that the stay will remain in effect as to enforcement of any resulting judgment against the Debtor or estate, except that Movant will retain the right to file a proof of claim under 11 U.S.C. § 501 and/or an adversary complaint under 11 U.S.C. § 523 or § 727 in this bankruptcy case.
e. ☐ The claims are non-dischargeable in nature and can be most expeditiously resolved in the non-bankruptcy forum.
f. ☒ The claims at issue arise under non-bankruptcy law and can be most expeditiously resolved in the non-bankruptcy forum.
g. ☒ Other reasons to allow the non-bankruptcy action to proceed are set forth in an attached Declaration.

4. ☐ Movant also seeks annulment of the stay to validate post-petition acts, as specified in the attached Declaration(s).

5. Evidence in Support of Motion: (Important Note: Declaration(s) in support of the Motion MUST be attached hereto.)

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Motion for Relief from Stay (Non-bankruptcy Action) - Page 3 of 11

In re Davis Industries, Inc.	CHAPTER: 11
Debtor(s).	CASE NO.: RS99-19302 MJ

- a. ☒ Movant submits the attached Declaration(s) to provide evidence in support of the Stay Motion pursuant to Local Bankruptcy Rules.
- b. ☐ Movant requests that the Court consider as admissions the statements made by Debtor(s) under penalty of perjury concerning Movant's claims set forth in Debtor(s)'s Schedules. Authenticated copies of the relevant portions of the Schedules are attached as Exhibit ____.
- c. ☒ Other evidence (specify): Declaration and Exhibits attached to Movant's Notice Of Motion And Motion For Determination That The Automatic Stay Is Inapplicable Or, In The Alternative, For Relief From The Automatic Stay.
6. ☒ (Optional) A Memorandum of Points and Authorities is attached to Movant's Notice Of Motion And Motion For Determination That The Automatic Stay Is Inapplicable Or, In The Alternative, For Relief From The Automatic Stay..

WHEREFORE, Movant prays that this Court issue an Order granting the following:

- Relief from the stay to Movant (and its successors and assigns, if any) (check boxes re all applicable relief requested):
 - ☒ Terminating the stay as to Debtor and Debtor's bankruptcy estate.
 - ☐ Annulling the stay as to the acts set forth in the attached declaration(s).
 - ☐ Modifying or conditioning the stay as set forth in the attached continuation page;
- ☒ Allowing Movant to proceed under applicable non-bankruptcy law to enforce its remedies to proceed to final judgment in the non-bankruptcy forum, provided that the stay remains in effect with respect to enforcement of any judgment against Debtor(s) or estate property.
- ☒ Additional provisions requested:
 - ☒ That the Order be binding and effective despite any conversion of this bankruptcy case to a case under any other chapter of Title 11 of the United States Code.
 - ☒ That the Order be binding and effective in any bankruptcy case commenced by or against the above-named Debtor(s) for a period of 180 days, so that no further automatic stay shall arise in that case as to the Property.
 - ☐ See Extraordinary Relief Attachment (Attach Optional Court Form 350ER).
 - ☐ For other relief requested, see attached continuation page.
- If relief from stay is not granted, Movant respectfully requests the Court to order adequate protection.

Dated: November 7, 1999

Respectfully submitted,

Lloyd W. Pellman, Los Angeles County Counsel
Movant Name

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
Firm Name of Attorney for Movant (if applicable)

By: Pierce Gore
Signature

Name: Pierce Gore
Typed Name of Individual Movant or Attorney for Movant

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Motion for Relief from Stay (Non-bankruptcy Action) - Page 4 of 11	
In re Davis Industries, Inc. Debtor(s).	CHAPTER: 11 CASE NO.: RS99-19302 MJ

DECLARATION RE ACTION IN NON-BANKRUPTCY FORUM

(MOVANTS: Lloyd W. Pellman, County Counsel to Los Angeles County)

I, Pierce Gore, declare as follows:

1. I have personal knowledge of the matters set forth in this declaration and, if called upon to testify, I could and would competently testify thereto. I am over 18 years of age. I have knowledge regarding the state court lawsuit, administrative proceeding, or other action in a non-bankruptcy forum ("Non-bankruptcy Action") that is the subject of this Motion because:
 - a. ☐ I am the Movant.
 - b. ☒ I am the Movant's attorney of record in the Non-bankruptcy Action.
 - c. ☒ Other (specify): I am the Movant's attorney of record in the Bankruptcy Case herein.
2. I am not a custodian of the books, records or files of Movants.
3. The Non-bankruptcy Action at issue is currently pending as:

Case Name: *People of the State of California v. Arcadia Machine & Tool, Inc.*
 Docket Number: BC214794
 Court or agency where pending: Superior Court of the State of California for the County of Los Angeles
4. Procedural Status
 - a. The causes of action pleaded in the non-bankruptcy forum are (list): Public Nuisance, violations of California Business & Professions Code §§ 17200 and 17500

True and correct copies of the pleadings filed before the non-bankruptcy forum are attached as Exhibit 1 to the Declaration of Pierce Gore, attached to Movant's Notice of Motion and Motion for Determination That The Automatic Stay Is Inapplicable Or, In The Alternative, For Relief From The Automatic Stay.
 - b. The Non-bankruptcy Action was filed on (specify date): August 6, 1999
 - c. Trial began/is scheduled to begin on (specify date): not scheduled.
 - d. The trial is estimated to require the following number of court days for trial, if trial were held in bankruptcy court (specify): unknown
 - e. Other defendants to the Non-bankruptcy Action are (specify): 41 firearms manufacturers, distributors, dealers and their trade associations listed on the attached sheet.
5. Grounds for relief from stay:
 - a. ☐ The claim is insured. The insurance carrier and policy number are (specify):

(Continued on next page)

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Motion for Relief from Stay (Non-bankruptcy Action) - Page 5 of 11

In re Davis Industries, Inc.	CHAPTER: 11
Debtor(s).	CASE NO.: RS99-18302 MJ

- b. ☒ The matter can be tried more expeditiously in the non-bankruptcy forum.
- (1) ☐ It is currently set for trial on:
- (2) ☐ It is in advance stages of discovery and Movant believes that it will be set for trial by (specify date):
The basis for this belief is (specify):
- (3) ☒ The matter involves non-debtor parties who are not subject to suit in the bankruptcy court. A single trial in the non-bankruptcy forum is the most efficient use of judicial resources.
- c. ☒ The bankruptcy case was filed in bad faith specifically to delay or interfere with the prosecution of the Non-bankruptcy Action.
- (1) ☐ Movant is the only creditor (or the only substantial creditor) scheduled by the Debtor.
- (2) ☒ The timing of the petition filing shows that it was intended to delay or interfere with the Non-bankruptcy Action based upon the following facts (specify): Testimony of Debtor's representative, attached as Exhibit 2 to the Declaration of Pierce Gore, attached to Movant's Notice of Motion and Motion for Determination that the Automatic Stay is Inapplicable or, in the Alternative, for Relief from the Automatic Stay.
- (3) ☐ Debtor does not have a reasonable likelihood of reorganizing in this Chapter ☐ 11 ☐ 13 bankruptcy case based upon the following facts (specify):
- d. ☐ For other facts justifying relief from stay, see Movant's Notice of Motion and Motion for Determination that the Automatic Stay is Inapplicable or, in the Alternative, for Relief from the Automatic Stay.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed on November 7, 1999 at San Francisco, California (city, state).

Pierce Gore
Print Declarant's Name


Signature of Declarant

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Motion for Relief from Stay (Non-bankruptcy Action) - Page 8 of 11

In re	Davis Industries, Inc.	CHAPTER: 11
	Debtor(s).	CASE NO.: RS99-19302 MJ

Declaration attachment

4e.

Other defendants to the Non-bankruptcy Action

Arcadia Machine & Tool, Inc.
 Elliott Brothers
 B.L. Jennings
 Bryco Arms, Inc.
 Lorcin Engineering Co., Inc.
 Beretta U.S.A. Corp.
 Pietro Beretta S.P.A.
 Browning Arms Co.
 H&R 1871, Inc.
 Charter Arms, Inc.
 Colt's Manufacturing Co., Inc.
 MKS Supply, Inc. d/b/a Hi-Point Firearms
 Kel-Tec CNC Industries
 Excel Industries, Inc. a/k/a Accu-Tek
 Forjas Taurus, S.A.
 China North Industries a/k/a Norinco
 Taurus International Manufacturing, Inc.
 Glock, Inc.
 Glock GmbH
 Heckler & Koch, Inc.
 North American Arms, Inc.

Lorcin Engineering, Inc.
 Phoenix Arms
 Sundance Industries, Inc.
 Navegar, Inc. d/b/a Intratec U.S.A., Inc.
 Sig Arms, Inc.
 Smith and Wesson Corp.
 Sturm Ruger & Company, Inc.
 American Shooting Sports Coalition, Inc.
 National Shooting Sports Foundation, Inc.
 Sporting Arms and Ammunition Manufacturers' Institute, Inc.
 B.L. Jennings, Inc.
 International Armaments Corp. d/b/a Interarms Industries, Inc.
 S.W. Daniel Inc. a/k/a Cobray Firearms, Inc.
 RSR Wholesale Guns, Inc.
 Southern Ohio Gun Distributors
 B&B Group, Inc.
 Andrews Sporting Goods, Inc.
 National Gun Sales, Inc.
 S.G. Distributing, Inc.
 Hawthorne Distributors, Inc.

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1 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
2 RICHARD M. HEIMANN (SBN 63607)
3 ROBERT J. NELSON (SBN 132797)
4 PIERCE GORE (SBN 128515)
275 Battery Street, Suite 3000
San Francisco, California 94111-3339

5 LLOYD W. PELLMAN, LOS ANGELES COUNTY COUNSEL
6 LAWRENCE B. LAUNER, ASSISTANT COUNTY COUNSEL (SBN 043495)
7 LAWRENCE LEE HAFETZ, SENIOR DEPUTY COUNTY COUNSEL (SBN 143326)
500 West Temple Street, Suite 648
Los Angeles, California 90012

[Full Addresses and Represented Creditors Listed
After Signature Page]

10 UNITED STATES BANKRUPTCY COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 RIVERSIDE

13 In re

14 The People of the State of California,

15 Debtor.

16 Employer Identification No. 95-3266661
17
18
19
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21

Case No. RS99-19302 MJ
Chapter 11

RS No.
NOTICE OF MOTION AND MOTION OF
LLOYD W. PELLMAN, LOS ANGELES
COUNTY COUNSEL, FOR
DETERMINATION THAT THE
AUTOMATIC STAY IS INAPPLICABLE OR,
IN THE ALTERNATIVE, FOR RELIEF
FROM THE AUTOMATIC STAY

Date: December 2, 1999
Time: 2:30 p.m.
Place: Courtroom 302, 3420 Twelfth Street
Riverside, California

22 TO ALL INTERESTED PARTIES:

23 PLEASE TAKE NOTICE that on December 2, 1999, at 2:30 P.M., or as soon
24 thereafter as counsel may be heard, a hearing will be held before the Honorable Meredith A. Jury,
25 on the motion of Lloyd W. Pellman, Los Angeles County Counsel ("L.A. County") for an order
26 determining that, pursuant to 11 U.S.C. § 362(b)(4), the automatic stay does not apply to the action
27 entitled *People of the State of California, et al. v. Arcadia Machine & Tool, Inc., et al.*, Case
28 No. BC214794, pending in the Superior Court of the State of California, County of Los Angeles
(the "Superior Court Action") because the Superior Court Action is an exercise of the police and

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1 regulatory powers of Los Angeles County. In the alternative, L.A. County moves for relief from
2 the automatic stay pursuant to 11 U.S.C. § 362(d). Davis Industries, Inc. (the "Debtor") is a
3 defendant in the Superior Court Action.

4 PLEASE TAKE FURTHER NOTICE that Bankruptcy Local Rule 9013-1(g) of the
5 United States Bankruptcy Court for the Central District of California prescribes that any interested
6 party opposing, joining, or responding to the Motion shall file and serve a written statement in
7 opposition or of non-opposition, not later than fourteen (14) days before the date designated for a
8 hearing on the Motion.

9 This Motion is based upon the Notice of Motion, the accompanying Memorandum
10 of Points and Authorities, the declaration of Pierce Gore, and such arguments and evidence as may
11 be presented at or before a hearing on this Motion.

12 WHEREFORE, L.A. County respectfully requests that the Court enter an order
13 determining that the Superior Court Action is exempt from the automatic stay as an exercise of
14 L.A. County's police and regulatory powers or, in the alternative, grant relief from the automatic
15 stay to enable the Superior Court Action to proceed, and grant such further relief as the Court may
16 deem just and proper.

17
18 DATED: November 7, 1999. Respectfully submitted,

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20 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

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By: 

Pierce Gore
Attorneys for Creditor
Los Angeles County

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1 Complete List of Counsel with Full Addresses and Represented Creditors

2 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

3 RICHARD M. HEIMANN (SBN 63607)

4 ROBERT J. NELSON (SBN 132797)

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Telephone: (415) 956-1000

6 LLOYD W. PELLMAN, LOS ANGELES COUNTY COUNSEL

7 LAWRENCE B. LAUNER, ASSISTANT COUNTY COUNSEL (SBN 043495)

8 LAWRENCE LEE HAFETZ, SENIOR DEPUTY COUNTY COUNSEL (SBN 143326)

500 West Temple Street, Suite 648

Los Angeles, California 90012

9 Telephone: (213) 974-1876

10 Attorneys for Creditor

Los Angeles County

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1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
2 FOR DETERMINATION THAT THE AUTOMATIC STAY IS INAPPLICABLE OR,
IN THE ALTERNATIVE, FOR RELIEF FROM THE AUTOMATIC STAY

3 I. INTRODUCTION

4 On behalf of the People of the State of California, Lloyd W. Pellman, Los Angeles
5 County Counsel ("L.A. County"), has sued Davis Industries, Inc. (the "Debtor"), other
6 manufacturers and distributors of handguns and their trade associations in a lawsuit entitled *People*
7 *of the State of California, et al. v. Arcadia Machine & Tool, Inc., et al.*, Case No. BC214794,
8 pending in the Superior Court of the State of California, County of Los Angeles (the "Superior
9 Court Action").^{1/} The Superior Court Action also names as defendants 41 firearms manufacturers,
10 retailers, dealers and their trade associations. (Declaration of Pierce Gore ("Gore Decl."),
11 Exhibit 1.)

12 To protect the health, safety and welfare of the public, L.A. County seeks to
13 exercise its police and regulatory powers in the Superior Court Action to enjoin the Debtor's
14 unlawful, unfair and fraudulent business practices in marketing, distributing, promoting, designing
15 and selling handguns, and to enforce laws designed to prohibit such practices. (Gore Decl. ¶ 3.)

16 By this motion, L.A. County seeks an order determining that the Superior Court
17 Action is exempt from the automatic stay pursuant to 11 U.S.C. § 362(b)(4). Alternatively, to the
18 extent the Court deems the automatic stay applicable, L.A. County seeks relief from the stay
19 pursuant to 11 U.S.C. § 362(d) for cause in order that the Superior Court Action may proceed
20 against the Debtor.

21 This court has already granted three other Motions for Determination that the
22 Automatic Stay is Inapplicable or, in the Alternative, for Relief from Automatic Stay in this action.
23 These three motions were granted to parties which are similarly situated to L.A. County as plaintiff
24 in distinct suits that allege similar claims in different forums, in which the Debtor is a party
25 defendant. The motions were granted to Cook County, *et al.*, Wayne County, *et al.*, and the City
26 and County of San Francisco, *et al.*

27
28 ^{1/}A copy of the *Complaint* filed by Los Angeles County in the Superior Court Action is
attached as Exhibit 1 to the Gore Declaration.

1 II. STATEMENT OF FACTS

2 On or about May 27, 1999, the Debtor filed a voluntary petition under Chapter 11 of
3 the United States Bankruptcy Code. The Debtor's schedules reveal no financial difficulty. They
4 list approximately \$203,000 in liabilities and \$614,000 in assets. (Debtor's Sch. B, D, E, F, docs.
5 #16, 18, 19 20, filed June 11, 1999.) The Debtor admits that it filed this bankruptcy solely to halt
6 the Superior Court Action and similar lawsuits filed by other governmental units throughout the
7 United States:

8 [The Debtor] has been embroiled in various lawsuits throughout the
9 country, what we typically will call Municipality lawsuits. . . . The
10 debtor determined that although its business is a profitable business
and can't [sic] continue to be profitable, it can't be under the weight
of the pending Municipal lawsuits.

11 As a result, debtor sought relief under Title 11 in United States Code
12 to protect its viable business operations from the significant lawsuits
that were pending and anticipated additional lawsuits that are going
13 to be and have been filed since the filing of the petition.

14 (Transcript of Debtor's § 341 Meeting of Creditors, at 6-8, Exhibit 2 to Gore Decl.)²

15 In the Superior Court Action, L.A. County alleges, *inter alia*, causes of action for
16 public nuisance (statute)³, and for violations of California's Business & Professions Code
17 §§ 17200 and 17500, which prohibits unfair, unlawful and fraudulent business practices and false
18 and deceptive advertising. Plaintiffs' claims against the Debtor involve, *inter alia*, two aspects of
19 its manufacture and sale of cheap, poorly-made handguns. L.A. County contends that the Debtor's
20 firearms lack critical safety features and designs as well as adequate warnings to users and other
21 persons. Second, L.A. County alleges that the Debtor has marketed and distributed its firearms
22 deceptively in such a manner as to promote and encourage their use in crime.

23 The dangers of guns in the home and the consequences of widespread availability
24 without restraints or limits were long ago, are today, and will continue to be specifically known to
25

26 ² The Debtor is also a defendant in at least 15 other actions filed by other governmental units
27 throughout the United States, including, but not limited to, Atlanta; Berkley; Boston; Chicago;
Cincinnati; Cleveland; Detroit; Wayne County; Los Angeles; Newark; New Orleans; Sacramento;
28 City and County of San Francisco; St. Louis; Miami-Dade County. (Debtor's Sch. F, doc. #20, filed
June 11, 1999; Debtor's Stmt of Financial Affairs, Section 4A, doc. #24, filed June 11, 1999.

³ California Civil Code §§ 3480, 3490, *et seq.*; Code of Civil Procedure § 731.

1 the defendants. For example, more than 30 years ago a staff report of the U.S. Commission on the
2 Causes and Prevention of Violence, entitled "Handguns and Violence in American Life," noted in
3 1968 an increasing number of deaths and injuries and concluded:

4 [Americans] may seriously overrate the effectiveness of guns in
5 protection of their homes. In our urbanized society the gun is rarely
6 an effective means of protecting the home against either the burglar
7 or the robber. . . . [A gun in the home] provides a measure of comfort
8 to a great many Americans, but, for the homeowner, this comfort is
largely an illusion bought at the high price of increased accidents,
homicides, and more widespread illegal use of guns. . . . When the
number of handguns increases, gun violence increases. (Pages xiii,
139.)

9 A recent national survey showed that 17% of adolescents have at one time carried a concealed
10 handgun. Approximately 29% of 10th grade boys have at one time carried a concealed handgun,
11 and 23% of 7th grade boys have at one time carried a concealed handgun. A recent national survey
12 showed that 70% of all prisoners felt that they could easily obtain a firearm upon their release.
13 Approximately 54% of the prisoners said they would obtain a firearm from the illegal street market
14 if they wanted one. The survey showed that 41% of high school students believe that they could
15 easily obtain a gun, and 37% of them would obtain a firearm from the illegal street market if they
16 wanted one. A recent survey showed that 45% of arrestees obtained their guns in the illegal
17 firearms market. The details, injuries and harm to the public safety and health caused by handguns
18 include, in addition to increased levels of street crime, other widely recognized consequences of
19 easily available guns. Many of the handguns made part of the illegal handgun market that are
20 recovered by L.A. County law enforcement have been used in the commission of crimes in Los
21 Angeles, causing deaths, injuries and a sense of fear among its residents. Handguns are especially
22 attractive to criminals because they can be easily obtained and readily concealed. Many handguns,
23 especially those used in homicides, are not recovered by law enforcement because the handgun is
24 either destroyed or hidden by the perpetrator. Handguns used illegally in L.A. County tend to be
25 purchased recently, locally and in relatively new condition.

26 The Debtor's business practices thus create an unreasonable jeopardy to the public
27 health, welfare and safety and a reasonable apprehension of danger to person and property.
28 (Complaint, ¶ 135, Exhibit 1 to Gore Decl.) Pursuant to its authority under California's Civil Code

1 §§ 3480, 3490, and Code of Civil Procedure § 731, L.A. County, as a representative of the People
2 of the State of California, seeks to abate this threat to the public and to prevent future unlawful,
3 unfair and/or fraudulent conduct by Debtor. Further, L.A. County seeks statutory remedies under
4 Business & Professions Code §§ 17200 and 17500, including civil penalties, restitution and
5 disgorgement. (Gore Decl. ¶ 6.)

6 **III. THE SUPERIOR COURT ACTION IS AN EXERCISE OF POLICE AND**
7 **REGULATORY POWER EXCEPTED FROM THE AUTOMATIC STAY**

8 **A. Governmental Action to Abate a Public Nuisance and Enforce Laws to**
9 **Protect Public Health, Safety and Welfare is an Exercise of Police and**
10 **Regulatory Powers Exempt From the Automatic Stay.**

11 Section 362(b)(4) excepts from the automatic stay the "continuation of an action or
12 proceeding by a governmental unit . . . to exercise such governmental unit's police and regulatory
13 power, including the enforcement of a judgment other than a money judgment, obtained in an
14 action or proceeding by the governmental unit to enforce such governmental unit's . . . police or
15 regulatory power." 11 U.S.C. § 362(b)(4). A "governmental unit" includes a municipality and
16 "department, agency, or instrumentality" of a state. 11 U.S.C. § 101(27); H.R. Rep. No. 95-595,
17 95th Cong., 1st Sess. 311 (1977). "Police or regulatory power" refers to the enforcement of laws
18 affecting health, welfare, morals and safety. Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n,
19 997 F.2d 581, 591 (9th Cir. 1993); Universal Life Church, Inc. v. United States (In re Universal
20 Life Church, Inc.), 128 F.3d 1294, 1297 (9th Cir. 1997).

21 "Where a governmental unit is suing a debtor to prevent or stop violation of fraud,
22 environmental protection, consumer protection, safety, or similar police or regulatory laws, or
23 attempting to fix damages for violation of such a law, the action or proceeding is not stayed under
24 the automatic stay." S.Rep. No. 95-989 at 52; H.R. Rep. No. 95-595 at 343 (1977) (underline
25 added). "It is clear from the legislative history that one of the purposes of this exception is to
26 protect public health and safety." Midlantic National Bank v. New Jersey Dept. of Environmental
27 Protection, 474 U.S. 494, 503-04 (1986). The theory underlying the exception is that because
28 bankruptcy should not be "a haven for wrongdoers," the automatic stay should not bar
governmental police or regulatory actions from proceeding. In re Universal Life Church, Inc.

1 128 F.3d at 1297; see, Commodity Futures Trading Commission v. Co Petro Marketing Group,
2 Inc., 700 F. 2d 1279, 1283 (9th Cir. 1983).

3 Two tests exist for determining whether government actions fit within the "police or
4 regulatory power" exception: (1) the "pecuniary purpose" test and (2) the "public policy" test.
5 NLRB v. Continental Hagen Corp., 932 F.2d 828, 833 (9th Cir. 1991); Universal Life Church,
6 128 F.3d at 1297.

7 Under the pecuniary purpose test, the court determines whether the government
8 action relates primarily to matters of public safety, health, and welfare, or primarily to protection of
9 the government's pecuniary interest in the debtor's property. 932 F.2d at 833; 128 F.3d at 1297. If
10 the government action primarily concerns matters of public health, safety and welfare, the stay
11 does not apply. Universal Life Church, 128 F.3d at 1297-99; Thomassen, 15B.R. at 909. If, on the
12 other hand, the government action is pursued solely to advance a pecuniary interest of the
13 governmental unit, the stay applies. Universal Life Church, 128 F.3d at 1299 ("Only if the action
14 is pursued 'solely to advance a pecuniary interest of the governmental unit will the automatic stay
15 bar it.'") (emphasis added) quoting Thomassen v. Division of Med. Quality Assurance (In re
16 Thomassen), 15 B.R. 907, 909 (9th Cir. BAP 1981).

17 Under the public policy test, the focus is to distinguish "between government
18 actions that effectuate public policy, and those that adjudicate private rights." The former are
19 excepted from the automatic stay. Continental Hagen Corp., 932 F.2d at 833; In re Universal Life
20 Church, Inc., 128 F.3d at 1297; NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 942 (6th
21 Cir. 1996).

22 Courts have recognized the "police or regulatory power" exception in a variety of
23 contexts, including government action to abate a public nuisance, detect and pursue legal remedies
24 for fraudulent business activities, and enforcing consumer protection laws. See, In re Universal
25 Life Church, Inc., 128 F.3d at 1297-99 (revocation of tax-exempt status excepted from stay under
26 both pecuniary purpose and public policy tests, revocation served public welfare purpose of
27 detecting fraud and protecting potential donors against misuse of charitable donations); In re
28 Porter, 42 B.R. 61 (Bankr. S.D. Tex. 1984) (padlocking building and enjoining persons connected

1 with premises from maintaining public nuisance excepted from automatic stay); Javens v. City of
2 Hazel Park (In re Javens), 107 F.3d 359 (6th Cir. 1997) (order to demolish buildings predicated
3 upon danger to public health, safety and welfare a "classic exercise of the police power" excepted
4 from automatic stay); Smith-Goodson v. Citifed Mortgage Corp. (In re Smith-Goodson), 144 B.R.
5 72 (Bankr. S.D. Ohio 1992) (same); SEC v. Towers Financial Corp., 205 B.R. 27 (S.D.N.Y. 1997)
6 (action arising from debtor's Ponzi scheme protected public from fraud and was excepted from
7 stay); U.S. Dept. of Housing and Urban Dev. v. CCMV, 64 F.3d 920 (4th Cir. 1995) (suit for non-
8 compliance with federal land sale statute excepted from stay as consumer protection); State of
9 Ohio v. Hughes (In re Hughes), 87 B.R. 49 (Bankr. S.D. Ohio 1988) (suit for odometer tampering
10 excepted from automatic stay, even though civil penalties sought in addition to injunction as action
11 primarily relates to enforcement of consumer protection law).

12 L.A. County's exercise of police and regulatory power to protect public health,
13 safety and welfare in prosecuting the Superior Court Action is excepted from the automatic stay.

14 B. The Superior Court Action is Exempt from the Stay Under Both the
15 Pecuniary Purpose and Public Policy Tests.

16 L.A. County asserts a cause of action to abate a public nuisance caused by the
17 Debtor's distribution and marketing practices that promote illegal firearms trafficking. The public
18 nuisance cause of action seeks to enjoin these practices and thereby protect the public from the
19 higher level of crime, death and injuries to the citizens of Los Angeles County and in addition to
20 the higher levels of fear, discomfort and inconvenience resulting attributable to the Debtor's
21 business practices. Accordingly, the public nuisance claim meets the pecuniary purpose test in that
22 it primarily concerns matters of public health, safety and welfare.

23 Moreover, in the public nuisance cause of action L.A. County is not advancing or
24 adjudicating any private rights, but rather are only effectuating the public policy of upholding a
25 primary government function to protect the public from the use of handguns wrongfully designed,
26 manufactured, supplied, promoted, marketed and sold by the Debtor. As such, the public nuisance
27 cause of action meets the public policy test.

28

1 L.A. County also states a cause of action for violations of § 17200, *et seq.*, of
2 California's Business & Professions Code, for unfair, fraudulent and unlawful business practices.

3 The inclusion of a monetary penalty as a means of enforcing laws designed to detect
4 fraud and protect the public "does not abrogate the police or regulatory power function" or render
5 the exception inapplicable. "Only if the action is pursued 'solely to advance a pecuniary interest of
6 the governmental unit will the automatic stay bar it.'" In re Universal Life Church, 128 F.3d at
7 1299 (emphasis added), quoting In re Thomassen, 15 B.R. at 909; see, 11 U.S.C. § 362(b)(4)
8 (plaintiff permitted to obtain but not enforce a money judgment); Continental Hagen Corp.,
9 932 F.2d at 832 (governmental units allowed to fix amount of penalties, up to and including entry
10 of money judgment); S. Rep. No. 95-989 at 52; H.R. Rep. No. 95-595 at 343 ("Where a
11 governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection,
12 consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for
13 violation of such a law, the action or proceeding is not stayed under the automatic stay."
14 (underline added); see also, City of New York v. Exxon Corp., 932 F.2d 1020, 1024 (2d Cir.
15 1991); NLRB v. P*F*E Nationwide, Inc., 923 F. 2d 506, 511-512 (7th Cir. 1991); Eddleman v.
16 U.S. Dept. of Labor, 923 F.2d 782, 790-791 (10th Cir. 1991); In re Commonwealth Companies,
17 Inc., 913 F. 2d 518, 522-523 (8th Cir. 1990); U.S. v. Nicolet, Inc., 857 F. 2d 202, 207-209 (3d Cir.
18 1988); In re Commerce Oil Co., 847 F.2d 291, 295 (6th Cir. 1988); EEOC v. McLean Trucking
19 Co., 834 F. 2d 398, 400-402 (4th Cir. 1987) (same).

20 Although Business & Professions Code § 17200 provides remedies including civil
21 penalties, restitution and disgorgement, each is asserted by L.A. County as a means to protect the
22 public by detecting and halting the Debtor's unlawful, unfair, and fraudulent business activities.
23 Both causes of action are alleged to protect the health, safety and welfare of the public, and to
24 effectuate the public policy of averting injury to the public. Neither is maintained solely for
25 pecuniary gain or to adjudicate private rights.

26 Additionally, the monetary penalties sought under Business & Professions Code
27 § 17500 will not conflict with this Court's control of the Debtor's property. Rather, L.A. County
28 seeks only to obtain a judgment in order to fix the amount of their unsecured claims against the

1 Debtor. LA. County's lawsuit "would not convert the government into a secured creditor, force the
2 payment of a prepetition debt, or otherwise give the government a pecuniary advantage over other
3 creditors." United States v. Commonwealth Companies Inc. (In re Commonwealth Companies
4 Inc.), 913 F.2d 518, 524 (8th Cir. 1990). Accordingly, the Business & Professions Code causes of
5 action meet both the pecuniary purpose and public policy tests.

6 Under either the pecuniary purpose or public policy tests, the Superior Court Action
7 is an exercise of police and regulatory power excepted from the automatic stay.

8 **IV. L.A. COUNTY IS ENTITLED TO RELIEF FROM THE AUTOMATIC**
9 **STAY FOR CAUSE**

10 In the event the Court determines that the "police or regulatory power" exception is
11 inapplicable and the automatic stay bars continuation of the Superior Court Action, cause exists to
12 lift the automatic stay.

13 **A. Cause to Lift the Stay is Within the Court's Discretion.**

14 Bankruptcy Code § 362(d)(1) provides that the Court shall grant relief from the
15 automatic stay for "cause." 11 U.S.C. § 362(d)(1); Benedor Corp. v. Conejo Enters., Inc. (In re
16 Conejo Enters., Inc.), 96 F.3d 346, 352 (9th Cir. 1996). "Because there is no clear definition of
17 what constitutes 'cause' discretionary relief from the stay must be determined on a case by case
18 basis." McDonald v. McDonald (In re McDonald), 755 F.2d 715, 717 (9th Cir. 1985);
19 Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162, 1166 (9th Cir.
20 1990).

21 Pertinent examples of "cause" sufficient to grant stay relief include considering the
22 judicial economy achieved from lifting the automatic stay to allow a trial to proceed in another
23 forum, particularly in litigation involving multiple parties. Piombo Corp. v. Castlerock Properties
24 (In re Castlerock Properties), 781 F.2d 159, 163 (9th Cir. 1986). "Cause" may also exist whenever
25 the automatic stay harms a creditor, and lifting the stay will not unjustly harm the debtor or other
26 creditors. United States v. Fisher, No. CV 90-1571-Kn, 1992 U.S. Dist. LEXIS 20075, at *1 (C.D.
27 Cal. filed Dec. 4, 1992); In re Priestley, 93 Bankr. 253, 261 (Bankr. D.N.M. 1988).

28

1 B. Cause Exists to Lift the Automatic Stay to Continue the Superior Court
2 Action.

3 In this case, the stay should be lifted in the interests of judicial economy. The
4 Superior Court Action involves multiple parties, including numerous non-debtor parties.
5 Moreover, the Debtor's on-going unlawful, unfair and fraudulent business practices, which
6 promote the illegal trafficking of firearms, constitute post-petition violations of California law to
7 which the automatic stay is inapplicable. Accordingly, if the automatic stay is not lifted, L.A.
8 County will be forced to litigate simultaneously in the Superior Court for post-petition violations
9 and in this Court for pre-petition violations. Judicial economy dictates that the stay should be
10 lifted.

11 Additionally, assuming *arguendo* that it applies, the automatic stay harms L.A.
12 County as it prohibits it from carrying out its responsibility to protect the public from the Debtor's
13 wrongful business practices. Conversely, lifting the automatic stay to permit the Superior Court
14 Action to proceed and conclude would not harm the Debtor or creditors. It would not alter the
15 right of any creditor to participate in a distribution from the Debtor's bankruptcy case. As noted,
16 the Debtor's schedules reveal no financial difficulty since the Debtor lists \$614,000 in assets and
17 \$203,000 in liabilities. (Debtor's Sch. B, D, E, F, docs. #16, 18, 19 20, filed June 11, 1999.) The
18 Debtor has sufficient assets to pay its listed, liquidated creditors. Therefore, stay relief would
19 resolve the primary reason the Debtor filed this bankruptcy — to forestall the Superior Court
20 Action and similar lawsuits, and thereby shield and preserve the Debtor's wrongful business
21 practices.

22 Under the circumstances, "cause" exists to lift the automatic stay. The Superior
23 Court Action should proceed to its conclusion without further delay.

24 V. CONCLUSION

25 Los Angeles County respectfully requests that the Court enter an order determining
26 that the Superior Court Action is an exercise of their police and regulatory powers and therefore is
27
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1 exempt from the automatic stay. In the alternative, Los Angeles County seeks relief from the
2 automatic stay to enable the Superior Court Action to proceed.
3

4 DATED: November 7, 1999.
5

6 Respectfully submitted,
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8 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
9

10 By: Pierce Gore
11 Pierce Gore
12 Attorneys for Creditor
13 Los Angeles County
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1 fraudulent conduct by the Debtor. Further, under California's Business & Professions Code
2 §§ 17200 and 17500, L.A. County seeks statutory remedies including civil penalties, injunctive
3 relief, restitution and disgorgement.

4 6. A true and correct copy of the cited portions of the Transcript of Debtor's
5 § 341 Meeting of Creditors is attached as Exhibit 2.

6 I declare under penalty of perjury under the laws of the United States that the
7 foregoing is true and correct. Executed this 7th day of November 1999, in San Francisco,
8 California.

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11 Pierce Gore
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