

Attorneys for Defendant Colt's Manufacturing Co., Inc.

Coordination Proceedings
Special Title (rule 1550(b)).

FIREARMS CASES

**COLT'S MANUFACTURING CO.,
INC.'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
EX PARTE MOTION FOR
PROTECTIVE ORDER RE:
DOCUMENT PRODUCTION BY COLT**

Including actions:

People, et al. v. Arcadia Machine & Tool, et al.;
San Francisco Superior Court No. 303753

People, et al. v. Arcadia Machine & Tool, Inc., et al.; Los Angeles Superior Court No. BC 210894

Date: December 19, 2000
Time: 8:30 a.m.
Place: Dept. 65
Judge: Vincent P. DiFiglia

People, et al. v. Arcadia Machine & Tool, Inc., et al.; Los Angeles Superior Court No. BC 214794

Pursuant to the section 2031(f)(3) and (4) of the Code of Civil Procedure, Colt's Manufacturing Company, Inc. ("Colt") respectfully moves the Court to order that production of Colt's documents collected and organized in a document depository in Hartford, Connecticut, as they are maintained in the ordinary course of business, is a proper and acceptable method of document production in this multi-jurisdictional litigation. Making Colt's documents available for inspection at its document depository not only satisfies, but exceeds, Colt's discovery obligations for the following reasons: 1) production

1 of documents in a depository as they are kept in the usual course of business with a file-level index
2 exceeds the requirements of California law; and 2) requiring Colt to copy and reproduce its entire
3 document collection and ship it to multiple jurisdictions or to another location is without precedent and
4 would be unduly burdensome and expensive.

5 BACKGROUND

6 Since November 1998, Colt and other firearms manufacturers have been defending lawsuits,
7 similar to the lawsuits coordinated in this Court, that were brought against the manufacturers by
8 municipalities and other entities across the country. Recognizing the complexity and magnitude of
9 these many lawsuits, Colt decided early in the litigation that the most efficient and effective means of
10 responding to multiple discovery requests and producing documents was to create a document
11 depository in Hartford, Connecticut that would contain potentially relevant documents. The document
12 depository could be made available to plaintiffs and plaintiffs' counsel from around the country in
13 response to their numerous and frequently repetitive discovery requests. In this way, Colt could
14 mobilize and undertake a single sweep and a single collection of potentially relevant documents and
15 make them available whenever requested by interested plaintiffs and their counsel.

16 Colt began work on the document depository in July 1999, with the creation of document review
17 procedures and categories of documents to be included in the depository. Declaration of Morgan P.
18 Rueckert in Support of Colt's Manufacturing Co., Inc.'s Motion for Protective Order, dated December
19 12, 2000 ("Rueckert Decl." at ¶ 4). Over the course of the last eighteen months, and with the work of
20 fourteen attorneys (both local and national counsel for Colt), five summer associate/intern employees,
21 five paralegals and two copy personnel employees, Colt engaged in a four-phase process to create the
22 depository. *Id.* at ¶ 3.

23 In Phase I, Colt identified and screened file cabinets and shelves and boxes that may have
24 contained documents that fit into one or more of the listed categories. *Id.* at ¶ 5. To accomplish this
25 task, Colt facilities were visited, employees were interviewed, and current and archived files were
26 examined. *Id.* at ¶ 6. The review included Colt's On-Site buildings in West Hartford, Colt's Iron
27 Mountain records storage facility, and various off-site employee offices. *Id.* As a result, approximately
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1 225 file cabinets and shelves and 230 boxes of documents were included in the review. *Id.* In Phase
2 II, Colt reviewed the identified files and tagged for copying documents that fell within one or more of
3 the listed categories. *Id.* at ¶ 5. When documents were tagged as falling within the listed categories,
4 the copy personnel copied the tagged documents, the file in which they were kept and the tracking sheet
5 created by the reviewing personnel. *Id.* at ¶ 7. In Phase III, attorneys created a searchable file-level
6 index and made an initial determination whether any of the documents were privileged or protected.
7 *Id.* at ¶ 5. The file-level index resides in a searchable computer database that can be made available to
8 plaintiffs and includes such information as file name, date range, document types and issue numbers
9 corresponding to the categories set out in the screening guidelines. *Id.* at ¶ 8. In Phase IV, lawyers
10 reviewed the documents initially determined to be privileged or protected, decided whether the
11 documents were privileged or protected, removed and marked the documents appropriately, and created
12 a privilege log. *Id.* at ¶ 5. At each phase, there were multiple quality-control procedures. *Id.* at ¶¶ 5,
13 10.

14 The total number of hours spent on the document depository through November 2000 is
15 estimated to be in excess of 6,000 hours. *Id.* at ¶ 11. The depository contains in excess of 135 boxes
16 of documents. *Id.* In addition to the documents that have been placed in the depository as set forth
17 above, Colt also has available in West Hartford, Connecticut, form and repetitive documents that, by
18 reason of their volume and organization, did not need to be recopied and placed physically in the
19 depository. *Id.* at ¶ 13. These documents include purchase orders, design drawings, shipping
20 documents, and similar voluminous repetitive documents. *Id.* Upon request, Colt will make these
21 documents available to plaintiffs at the depository in Hartford, Connecticut, if not otherwise
22 objectionable, pursuant to applicable protective orders and privileges. *Id.*

23 Colt has made the document depository available to plaintiffs in this litigation, yet plaintiffs
24 have declined to use the depository to select the documents they want or need. *See* Declaration of
25 Robert Wright in Support of Colt's Manufacturing Co., Inc.'s Ex Parte Motion For Protective Order
26 Re: Document Production by Colt, ¶¶ 3-7. Refusing to acknowledge the time, money and effort already
27 spent by Colt on creating the depository, plaintiffs now seek to require Colt to copy the entire depository
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1 and ship it to another location, at Colt's expense. *Id.* at ¶ 3. For the reasons discussed below, the Court
2 should deny plaintiffs' request by finding that production of Colt's documents as they are kept in the
3 ordinary course of business satisfies Colt's discovery obligations and that requiring Colt to copy and
4 ship its entire depository to the plaintiffs in these coordinated cases would be unduly burdensome and
5 expensive.

6 ARGUMENT AND AUTHORITIES

7 a. Production of Documents in the Depository as They are Kept in the Usual Course of 8 Business Complies with California Law

9 The Code of Civil Procedure provides that "[a]ny documents demanded shall either be produced
10 as they are kept in the usual course of business, or be organized and labeled to correspond with the
11 categories in the demand." Cal. Civ. Proc. Code § 2031(g)(1) (West 2000). By making its documents
12 available as they are kept in the ordinary course of business, Colt has satisfied its discovery obligations
13 under the Code. Colt documents in the depository were pulled, reviewed, and copied from their original
14 files as those files were kept in the usual course of business. Rueckert Declaration at ¶¶ 6-8. Copies
15 of Colt documents that fell within one or more of the listed categories were placed into copies of their
16 original file folders and placed in the depository, without alteration of the integrity of the original file
17 structure. *Id.* at ¶ 8. A file-level index was prepared. *Id.*

18 A party seeking production of documents must choose a "reasonable place" for the inspection.
19 Cal. Civ. Proc. Code § 2031(c)(3). Although there is a dearth of California case law on the subject of
20 where production should occur, the commentators are unanimous that when the documents are
21 voluminous, "the responding party's office is the better place for inspection." J. Hogan & G. Webber,
22 California Civil Discovery § 6.10 (1997). "Absent agreement, courts usually look to whatever burden
23 is involved in producing the evidence, *i.e.*, the more voluminous the records, the more likely inspection
24 will be ordered where the records are usually kept." R. Weil & I. Brown, Jr., Civil Procedure Before
25 Trial ¶ 8:1448 (2000).
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1 b. Requiring Colt to Copy its Entire Depository and Ship it to Another Location Would be
2 Unduly Burdensome and Expensive

3 The Code of Civil Procedure provides that a court shall restrict discovery methods if it
4 determines that "[t]he selected method of discovery is unduly burdensome or expensive" CAL.
5 CIV. PROC. CODE § 2019(b)(2) (West 2000). In view of the size of the depository, it would be unduly
6 burdensome and expensive for Colt to copy its entire document depository and send it to the plaintiffs.
7 Given the time, money and effort Colt already has spent on creation of the depository, and the need for
8 Colt to respond to comparable discovery requests in the many other similar lawsuits Colt is defending,
9 it would be unreasonable to require Colt to copy and send its entire depository to plaintiffs in these
10 coordinated cases.

11 As indicated above, creation of the Colt document depository began in July 1999 and continues
12 through today. Rueckert Declaration at ¶ 4 and 12. Individuals working on the project have included
13 fourteen attorneys, five summer associate/intern employees, five paralegals and two copy personnel
14 employees. *Id.* at ¶ 3. These individuals contributed in excess of an estimated 6,000 hours through
15 November 30, 2000 to the creation of the depository. *Id.* at ¶ 11. The depository presently contains in
16 excess of 135 boxes of documents. *Id.*

17 The expense and burden of having Colt copy its entire document depository and ship it to
18 plaintiffs outweighs the burden of having the plaintiffs come to Colt's depository to review documents.
19 This is particularly true given the multi-jurisdictional nature of this litigation and the fact that similar
20 demands and potential costs could be imposed on Colt in other jurisdictions if the concept of a single
21 document depository is not recognized and accepted by plaintiffs, as it should be. It will cost in excess
22 of approximately \$45,000 for Colt to copy its depository for the California plaintiffs. Rueckert
23 Declaration at ¶ 14. In addition, it will cost approximately \$1,500 for Colt to ship the copies to
24 Washington, D.C. as plaintiffs have requested. *Id.* Thus, it would be unduly burdensome and expensive
25 to require Colt to copy its depository and ship it elsewhere.

26 In addition, Colt had expected, and the Court's Protective Order contemplates, that it could
27 review documents in its depository for marking under the Court's order only for and as the documents
28 were selected by plaintiffs. Order at ¶ 4. If the entire depository must be copied and sent to plaintiffs,

1 all documents in the depository must be reviewed and marked in accordance with the order before the
2 documents are produced. It is estimated that this effort would take approximately three months and
3 require approximately 1,000 man-hours. *Id.* at ¶ 15.

4 Given these costs and taking into consideration Colt's good faith and resources already expended
5 on creation of the depository — and the potential for similar costs to be imposed in other
6 jurisdictions — plaintiffs' refusal to accept Colt's production of documents in Hartford, Connecticut is
7 unjustified, under California's discovery rules and otherwise.

8 In *Lestelle v. Asbestos Claims Management Corp.*, 755 So.2d 873 (La. 2000), the defendant, in
9 response to a wave of asbestos lawsuits across the country, created a document depository in Pittsburgh,
10 Pennsylvania consisting of over 200 boxes of documents. As here, the documents in the depository
11 were bates numbered and an index was created. As here, the plaintiffs in *Lestelle* declined to visit the
12 depository and, instead, asserted that the defendant should be required to produce the depository at the
13 offices of plaintiffs' counsel in New Orleans. The Supreme Court of Louisiana, reversing the order of
14 the trial court which had compelled the defendant to produce the documents in New Orleans, concluded:

15 The offer by [defendant] to make these documents available to plaintiffs'
16 counsel at its document repository in Pittsburgh, Pennsylvania represents
17 a reasonable accommodation which will serve the interests of both
18 parties.

18 *Id.* at 874. The court went on to order the defendant to provide plaintiffs' counsel with access to the
19 documents at the depository in Pittsburgh. Just as in *Lestelle*, Colt's offer to allow plaintiffs to access
20 Colt's documents as they are kept in the ordinary course of business at its depository in Hartford is a
21 reasonable accommodation of the interests of Colt and the plaintiffs. It also fully complies with —
22 indeed, greatly exceeds — Colt's duty of producing documents under the California discovery rules.

23 Other courts which have addressed the issue in similar complex, multi-jurisdictional litigation
24 have reached the same conclusion. For example, in *Huddleston v. R.J. Reynolds Tobacco Co.*, the court
25 ordered that "Defendant has fulfilled its burden to produce documents under Federal Rule of Civil
26 Procedure 34 by producing documents to the Minnesota Depository and the Internet website, and thus
27 making those documents available to Plaintiff." Order dated June 15, 1999 in *Huddleston v. R.J.*

1 *Reynolds Tobacco Co.*, No. 1:98-CV-1865-TWT (N.D. Ga. 1999), at 1. In *Huddleston*, the court denied
2 the plaintiff's motion to compel production of documents, finding that "[g]iven the volume of
3 responsive documents and the number of 'smoking and health' lawsuits pending against Defendant, it
4 is unreasonable to require Defendant to produce every document in each such lawsuit given that
5 responsive documents are available both at a central location at the Minnesota Depository and on the
6 Internet website" *Id.* at 1. The court further found that it would be no more costly or burdensome
7 on the plaintiff to travel to the depository than it would be to travel to defendant's headquarters to
8 review the documents and that requiring plaintiff to review documents at the depository did not justify
9 the unnecessary expense on defendant to produce the documents at its headquarters. *Id.* at 2.¹

10 c. Colt's Proposed Order Reasonably Addresses Access to the Colt Depository

11 The proposed Stipulation and Order re: Document Production by Colt's Manufacturing Co., Inc.
12 is a reasonable effort to fulfill Colt's discovery obligations without unduly burdening either party.
13 Specifically, the Stipulation provides for access to the depository and the index by plaintiffs, and states
14 that documents selected by plaintiffs will be copied and produced to plaintiffs in San Diego. The
15 Stipulation also provides that plaintiffs' review of the documents in the depository will be subject to
16 the provisions of the Protective Order governing these coordinated cases. Further, the Stipulation
17 provides that any disputes that may arise will be resolved by the Court. Because the Stipulation
18 proposed by Colt provides plaintiffs with reasonable access to the depository and contemplates a
19 procedure consistent with both Colt's discovery obligations and the Protective Order in these
20 coordinated cases, Colt requests that the Court enter an order consistent with the terms of the
21 Stipulation.

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24 ¹See also, *In re Bank of Louisiana/Kenwin Shops, Inc.*, No. Civ.A. MDL 1193,
25 1999 WL 600328, at *1 (E.D. La. Aug. 5, 1999) (finding that where defendant, in
26 bankruptcy lacked manpower and money to perform a search of 150 boxes housed in a
27 warehouse, defendant should make the 150 boxes available for inspection as they
28 were housed); and *In re Norplant Contraceptive Products Liability Litigation*, MDL
No. 1038, 1995 WL 116134, at *4 (E.D. Tex. Feb. 22, 1995) (ordering, in complex
litigation case, that document production by defendants pursuant to the court's
order and Rule 34 requests could be accomplished by the creation by defendants of
a depository that plaintiffs could visit to review the documents).

1 CONCLUSION

2 Colt created its document depository as a means to effectively and efficiently respond to the
3 multitude of discovery requests it expects plaintiffs to serve in the numerous lawsuits brought against
4 it across the nation. By making its documents available in its document depository, as the documents
5 are kept in the ordinary course of business and with a file-level index, Colt has not only complied with,
6 but gone beyond, the requirements of California's discovery rules and satisfied its discovery obligations
7 under California law. It would be unduly burdensome and expensive to require Colt to copy its entire
8 depository for the plaintiffs in this (and, potentially, every other) lawsuit against it.

9 Colt respectfully moves this Court to adopt the proposed order establishing the procedures for
10 access to Colt's Document Depository, order that making Colt's Document Depository available to
11 plaintiffs satisfies Colt's discovery obligations, and for such other relief to which Colt may be justly
12 entitled.

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15 WRIGHT & L'ESTRANGE
16 Attorneys for Colt's Manufacturing Co., Inc.

17 Dated: December 12, 2000

18 By 
Robert C. Wright