

**COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION_____**

Andrews Sporting Goods Inc. dba Turner's Outdoorsman

Petitioners,

vs.

Superior Court for the State of California, County of San Diego

Respondent,

The People of the State of California, *ex rel.* the County of Los Angeles, on
behalf of itself and the general public, et al.

Real Parties in Interest.

From the Superior Court for San Diego County Hon. Vincent P. Di Figlia

JCCP NO. 4095

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

Superior Court of California County of Los Angeles No. BC210894

Superior Court of California County of Los Angeles No. BC214794

**SUPPORTING DOCUMENTS TO PETITION FOR
WRIT OF MANDATE/PROHIBITION OR OTHER
EXTRAORDINARY RELIEF**

**VOLUME I
(00001-00110)**

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**LOS ANGELES
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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF LOS ANGELES

14 **BC214794**

15 PEOPLE OF THE STATE OF CALIFORNIA, *ex*
rel. the County of Los Angeles, COUNTY OF LOS
16 ANGELES, on behalf of itself and the general
public, and GLORIA MOLINA, ZEV
17 YAROSLAVSKY and YVONNE BRATHWAITE
BURKE, SUPERVISORS OF LOS ANGELES
18 COUNTY, on behalf of the general public,

19 Plaintiffs,

20 v.

21 ARCADIA MACHINE & TOOL, BRYCO ARMS,
INC., DAVIS INDUSTRIES, INC., LORCIN
22 ENGINEERING CO., INC., PHOENIX ARMS,
SUNDANCE INDUSTRIES, INC., EXCEL
23 INDUSTRIES, INC., ACCU-TEK FIREARMS,
BERETTA U.S.A., CORP., PIETRO BERETTA
24 Sp.A., BROWNING ARMS CO., CARL
WALTHER GmbH, CHARTER ARMS, INC.,
25 COLT'S MANUFACTURING CO., INC., FORJAS
TAURUS, S.A., GLOCK, INC., GLOCK GmbH,
26 H&R 1871, INC., HECKLER & KOCH, INC., MKS
SUPPLY, INC., HI-POINT FIREARMS, KEL-TEC
27 CNC INDUSTRIES, INC., CHINA NORTH
INDUSTRIES A/K/A NORINCO, NAVEGAR,
28 INC. D/B/A INTRATEC U.S.A., INC., NORTH
AMERICAN ARMS, INC., SIGARMS, INC.,

Case No.

COMPLAINT FOR:

1. PUBLIC NUISANCE
2. VIOLATIONS OF BUSINESS AND
PROFESSIONS CODE § 17200
3. VIOLATIONS OF BUSINESS AND
PROFESSIONS CODE § 17500

[caption continued]

8- 00001

1 SMITH & WESSON CORP., STURM, RUGER &
2 COMPANY, INC., S.W. DANIEL, INC., A/K/A
3 COBRAY FIREARMS, INC., TAURUS
4 INTERNATIONAL MANUFACTURING, INC.,
5 AMERICAN SHOOTING SPORTS COUNCIL,
6 INC., NATIONAL SHOOTING SPORTS
7 FOUNDATION, INC., SPORTING ARMS AND
8 AMMUNITION MANUFACTURERS'
9 INSTITUTE, INC., B.L. JENNINGS, ELLETT
10 BROTHERS, INTERNATIONAL ARMAMENT
11 CORP, D/B/A INTERARMS INDUSTRIES, INC.,
12 RSR WHOLESALE GUNS, INC., SOUTHERN
13 OHIO GUN DISTRIBUTORS, B&B GROUP, INC.,
14 B&E GUNS, ANDREWS SPORTING GOODS,
15 INC., NATIONAL GUNS SALES, INC., S.G.
16 DISTRIBUTING, INC., HAWTHORNE
17 DISTRIBUTORS, INC., and DOES 1-300,

18 Defendants.

19 The People of the State of California, *ex rel.* the County of Los Angeles, The County
20 of Los Angeles, on behalf of itself and the general public, and Gloria Molina, Zev Yaroslavsky and
21 Yvonne Brathwaite Burke, Supervisors of Los Angeles County, on behalf of the general public,
22 allege as follows, upon information and belief:

23 INTRODUCTION

24 1. This action is brought against handgun manufacturers, distributors, retailers
25 and trade associations that adversely impact California. These Defendants design, manufacture,
26 market, distribute, advertise, promote, supply and sell handguns in a manner that facilitates both the
27 easy availability of handguns to juveniles and criminals for their use in crime and the operation of
28 handguns by children, with the resulting yearly toll of injury and loss of life in of Los Angeles
County, and throughout the State of California.

2. Defendants' pattern of unfair, unlawful and fraudulent business acts and
practices and unfair, deceptive, untrue or misleading statements and advertisements have resulted in
Defendants being unjustly enriched.

3. Defendants, and each of them, have engaged in conduct that is injurious to
health and has resulted in the creation and maintenance of a public nuisance in Los Angeles County.

1 4. Defendants, and each of them, design, market, distribute, advertise, promote,
2 supply and sell handguns — a dangerous instrument that is the primary tool for violent crime — in a
3 manner that facilitates the easy availability and misuse by felons, minors under the age of 21, and
4 other prohibited or unauthorized purchasers and users. Further, Defendants, and each of them,
5 design, market, distribute, advertise, promote, supply and sell handguns that fail to incorporate
6 reasonable safety features, and over-promote the purported self-defense and home protection benefits
7 of handguns, in a manner that undermines the minimal warnings or instructions provided by
8 Defendants regarding safe storage, possession and use of handguns, thereby resulting in the unsafe
9 storage, possession and use of handguns.

10 5. Defendants' pattern of unfair, unlawful and fraudulent business acts and
11 practices and unfair, deceptive, untrue or misleading statements and advertisements have
12 undermined federal, state and local gun laws and the public policies embodied in those laws.
13 Defendants have unjustly enriched themselves and have shifted the burden and responsibility of the
14 foreseeable costs of Defendants' products to the victims of gun violence and to the taxpayers. The
15 resulting levels of shooting deaths and injuries in California and the entire nation exceed those in
16 almost every other area of the world, impose enormous economic costs, and unreasonably interfere
17 with the safety, health, well-being and quality of life of the People of the State of California.

18 6. As a result of Defendants' unfair, unlawful and fraudulent business acts and
19 practices and unfair, deceptive, untrue or misleading statements and advertisements, thousands of
20 California residents have died, suffered serious bodily injury, and been exposed to criminal activity
21 involving handguns.

22 7. In Los Angeles County, in 1997 there were 1,385 firearms deaths caused by
23 firearms. Additionally, in 1997 there were 2,336 hospitalizations for non-fatal injuries. Of these,
24 2,269 were assault/homicides; 64 were self-inflicted wounds/suicides, and 198 resulted from
25 unintentional shootings.

26 8. In Los Angeles County, 271 young people aged 19 or younger were killed
27 with firearms in 1997 and an additional 839 were hospitalized for firearms-related injuries.
28

1 9. Homicides committed with handguns are the leading cause of firearms related
2 injuries and death in California. In 1997 alone, there were 1,835 homicides committed with a
3 firearm in California and over 25,000 firearms-related injuries. The vast majority of these deaths and
4 injuries are attributable to handguns.

5 10. Theses statistics demonstrate the magnitude of the problem caused by
6 Defendants' unfair, unlawful and fraudulent business acts and practices.

7 11. In order to reduce the number of handgun-related tragedies, Plaintiffs bring
8 this action to enjoin the unfair, unlawful and fraudulent business acts and practices of Defendants, to
9 obtain disgorgement of Defendants' wrongfully-obtained profits, to collect civil penalties, and abate
10 the nuisance caused by Defendants' conduct alleged herein.

11 THE PARTIES

12 PLAINTIFFS

13 12. People of The State of California, *ex rel.* the County of Los Angeles, County
14 of Los Angeles, on behalf of itself and the general public, and Gloria Molina, Zev Yaroslavsky, and
15 Yvonne Brathwaite Burke, Supervisors of Los Angeles County, on behalf of the general public,
16 bring this action pursuant to Business and Professions Code §§ 17204 and 17535 and Code of Civil
17 Procedure § 731.

18 DEFENDANTS

19 13. Defendants, and each of them, design, manufacture, market, distribute,
20 advertise, promote, supply and sell handguns.

21 14. Defendants, and each of them, are sued individually as a primary violator and
22 as an aider and abettor. In acting to aid and abet the commission of the unfair, unlawful and
23 fraudulent business acts and practices complained of herein, each Defendant acted with the actual or
24 constructive awareness of the wrongfulness of such acts and practices and nonetheless rendered
25 substantial assistance or encouragement to accomplish the wrongful acts and practices and was
26 aware of the overall contribution to the common course of wrongful acts and practices alleged
27 herein.

1 15. Whenever in this Complaint reference is made to any act or omission of a
2 corporate Defendant, such allegation refers to the officers, directors, employees and agents of the
3 corporate Defendant who did or do authorize such act(s) or omission(s) while actively engaged in the
4 management, direction, operation or control of the affairs of the corporate Defendant, and while
5 acting in the course and scope of their agency and employment.

6 16. The following Defendants, and each of them, design and manufacture
7 handguns that are or were designed, manufactured, marketed, distributed, advertised, promoted,
8 supplied and sold in California (hereinafter referred to as the "Defendant Manufacturers"):

9 17. Defendant Arcadia Machine & Tool ("AMT") is a corporation organized and
10 existing under the laws of the State of California with its principal place of business in California.

11 18. Defendant Bryco Arms, Inc. ("Bryco") is a corporation organized and existing
12 under the laws of the State of Nevada with its principal place of business in California.

13 19. Defendant Davis Industries, Inc. ("Davis") is a corporation organized and
14 existing under the laws of the State of California with its principal place of business in California.

15 20. Defendant Lorcin Engineering Co., Inc. ("Lorcin") is a corporation organized
16 and existing under the laws of the State of California with its principal place of business in
17 California.

18 21. Defendant Phoenix Arms ("Phoenix") is a corporation organized and existing
19 under the laws of the State of California with its principal place of business in California.

20 22. Defendant Sundance Industries, Inc. ("Sundance") is a corporation organized
21 and existing under the laws of the State of California with its principal place of business in
22 California.

23 23. Defendant Excel Industries, Inc. is a corporation organized and existing under
24 the laws of the State of California with its principal place of business in California.

25 24. Defendant Accu-Tek Firearms is a corporation organized and existing under
26 the laws of the State of California with its principal place of business in California.

27 25. Defendant Beretta U.S.A. Corp. ("Beretta U.S.A.") is a corporation organized
28 and existing under the laws of the State of Maryland with its principal place of business in Maryland.

1 and imports handguns manufactured by defendant Pietro Beretta Sp. A., a corporation organized and
2 existing under the laws of Italy with its principal place of business in Italy.

3 26. Defendant Pietro Beretta Sp. A. ("Pietro Beretta") is a corporation organized
4 and existing under the laws of Italy with its principal place of business in Italy.

5 27. Defendant Browning Arms Co. ("Browning") is a corporation organized and
6 existing under the laws of the State of Utah with its principal place of business in Utah.

7 28. Defendant Carl Walther GmbH ("Carl Walther") is a corporation organized
8 and existing under the laws of the Federal Republic of Germany with its principal place of business
9 in the Federal Republic of Germany.

10 29. Defendant Charter Arms, Inc. ("Charter Arms") is a corporation organized and
11 existing under the laws of the State of Connecticut, with its principal place of business in New
12 Jersey.

13 30. Defendant Colt's Manufacturing Company, Inc. ("Colt") is a corporation
14 organized and existing under the laws of the State of Delaware with its principal place of business in
15 Connecticut.

16 31. Defendant Forjas Taurus, S.A. ("Forjas Taurus") is a corporation organized
17 and existing under the laws of Brazil with its principal place of business in Brazil.

18 32. Defendant Glock, Inc. is a corporation organized and existing under the laws
19 of the State of Georgia with its principal place of business in Georgia, and imports handguns
20 manufactured by defendant Glock GmbH, an Austrian corporation with its principal place of
21 business in Austria.

22 33. Defendant Glock GmbH is a corporation organized and existing under the
23 laws of Austria with its principal place of business in Austria.

24 34. Defendant H&R 1871, Inc. ("H&R") is a corporation organized and existing
25 under the laws of the State of Massachusetts with its principal place of business in Massachusetts.

26 35. Defendant Heckler & Koch, Inc. ("Heckler & Koch") is the United States
27 subsidiary of Heckler & Koch, GmbH, organized in the Federal Republic of Germany, with its
28 principal place of business in Virginia.

1 36. Defendant Kel-Tec CNC Industries, Inc. ("Kel-Tec") is a corporation
2 organized and existing under the laws of the State of Florida, with its principal place of business in
3 Florida.

4 37. Defendant China North Industries a/k/a Norinco ("Norinco") is a corporation
5 organized and existing under the laws of the State of California with its principal place of business in
6 California.

7 38. Defendant Navegar, Inc. d/b/a Intratec U.S.A., Inc. ("Navegar") is a
8 corporation organized and existing under the laws of the State of Florida with its principal place of
9 business in Florida.

10 39. Defendant North American Arms, Inc. is a corporation organized and existing
11 under the laws of the State of Utah with its principal place of business in Utah.

12 40. Defendant Sigarms, Inc. ("Sigarms") is a corporation organized in the State of
13 New Hampshire, with its principal place of business in New Hampshire.

14 41. Defendant Smith & Wesson Corp. ("Smith & Wesson") is a corporation
15 organized and existing under the laws of the State of Delaware with its principal place of business in
16 Massachusetts.

17 42. Defendant Sturm, Ruger & Company, Inc. ("Sturm Ruger") is a corporation
18 organized and existing under the laws of the State of Delaware with its principal place of business in
19 Connecticut.

20 43. Defendant S.W. Daniel, Inc. a/k/a Cobray Firearms, Inc., ("Cobray") is a
21 corporation organized and existing under the laws of the State of Georgia, with its principal place of
22 business in Georgia.

23 44. Defendant Taurus International Manufacturing, Inc. ("Taurus") is a
24 corporation organized and existing under the laws of the State of California with its principal place
25 of business in California, and imports handguns manufactured by defendant Forjas Tauras, S.A., a
26 Brazilian corporation with its principal place of business in Brazil.

27 45. At all times relevant herein, DOES 1-100, inclusive, were business entities,
28 the status of which are currently unknown. DOES 1-100 designed and manufactured handguns that

1 are or were marketed, distributed, advertised, promoted, supplied and sold within the jurisdictional
2 limits of California (hereinafter referred to as part of the "Defendant Manufacturers"):

3 46. The following Defendants are industry trade associations (hereinafter referred
4 to as the "Defendant Trade Associations") that are composed of handguns manufacturers,
5 distributors, and sellers, including some or all of the Defendant Manufacturers:

6 47. Defendant American Shooting Sports Council, Inc. (hereinafter referred to as
7 the "ASSC" is a tax exempt business league under § 501(c)(6) of the Internal Revenue Code
8 organized and existing under the laws of the State of Georgia with its principal office in Georgia.
9 ASSC is an industry trade association composed of handgun manufacturers and sellers, including
10 some or all of the Defendant Manufacturers.

11 48. Defendant National Shooting Sports Foundation, Inc. (hereinafter referred to
12 as the "NSSF") is a tax exempt business league under § 501(c)(6) of the Internal Revenue Code
13 organized and existing under the laws of the State of Connecticut with its principal office in
14 Connecticut. NSSF is an industry trade association composed of firearm manufacturers and sellers,
15 including some or all of the Defendant Manufacturers.

16 49. Defendant Sporting Arms and Ammunition Manufacturers' Institute, Inc.
17 (hereinafter referred to as the "SAAMI") is a tax exempt business league under § 501(c)(6) of the
18 Internal Revenue Code organized and existing under the laws of the State of Connecticut with its
19 principal office in Connecticut. SAAMI is an industry trade association composed of handgun
20 manufacturers and sellers, including some or all of the Defendant Manufacturers.

21 50. At all times relevant herein, DOES 101-125, inclusive, were business entities,
22 the status of which are currently unknown. DOES 101-125 are industry trade associations
23 (hereinafter referred to as part of the "Defendant Trade Associations"), which are composed of
24 handgun manufacturers, distributors, and sellers, including some or all of the Defendant
25 Manufacturers.

26 51. The following Defendants, and each of them, marketed, distributed,
27 advertised, promoted, supplied and sold handguns that are or were found within the jurisdictional
28 limits of California (hereinafter referred to as the "Defendant Distributors"):

1 52. Defendant B.L. Jennings is a corporation organized and existing under the
2 laws of the State of Nevada with its principal place of business in Nevada. B.L. Jennings distributes
3 guns made by Defendant Manufacturer Bryco in California.

4 53. Defendant Ellett Brothers is a corporation organized and existing under the
5 laws of the State of South Carolina with its principal place of business in South Carolina. Ellett
6 Brothers telemarkets handguns nationwide, including in California.

7 54. Defendant International Armament Corp. d/b/a Interarms Industries, Inc.
8 ("Interarms") is a corporation organized and existing under the laws of the State of Delaware with its
9 principal place of business in Virginia. Interarms imports and/or distributes handguns made by
10 several different manufacturers, including defendant Carl Walther GmbH. Interarms distributes its
11 products to at least 46 California dealers, which are identified on its Internet site.

12 55. Defendant MKS Supply Inc. is a corporation organized and existing under the
13 laws of the State of Ohio, with its principal place of business in Ohio.

14 56. RSR Wholesale Guns, Inc. is a corporation organized and existing under the
15 laws of the State of New York with its principal place of business in New York. Based on
16 information and belief, RSR Wholesale Guns, Inc., distributes firearms in California, including guns
17 manufactured by defendant Taurus International Manufacturing, Inc.

18 57. Southern Ohio Gun Distributors is a corporation organized and existing under
19 the laws of the State of Ohio with its principal place of business in Ohio. Based on information and
20 belief, Southern Ohio Gun Distributors distributes firearms in California.

21 58. At all times relevant herein, DOES 126-200, inclusive, were business entities,
22 the status of which are currently unknown. DOES 126-200 marketed, distributed, advertised,
23 promoted, supplied and sold handguns that are or were found within California (hereinafter referred
24 to as part of the "Defendant Distributors").

25 59. The following defendants, and each of them, market, distribute, advertise,
26 promote, supply and sell handguns that are or were found within the jurisdictional limits of
27 California (hereinafter referred to as "Defendant Dealers");
28

1 60. Defendant B&B Group, Inc. is a corporation organized and existing under the
2 laws of the State of California with its principal place of business in California.

3 61. Defendant B&E Guns is a corporation organized and existing under the laws
4 of the State of California with its principal place of business in California.

5 62. Defendant Andrews Sporting Goods, Inc., is a corporation organized and
6 existing under the laws of the State of California with its principal place of business in California.

7 63. Defendant National Gun Sales, Inc., is a corporation organized and existing
8 under the laws of the State of Florida with its principal place of business in California.

9 64. Defendant S. G. Distributing, Inc., is a corporation organized and existing
10 under the laws of the State of California with its principal place of business in California.

11 65. Defendant Hawthorne Distributors, Inc., is a corporation organized and
12 existing under the laws of the State of California with its principal place of business in California.

13 66. At all times relevant herein, DOES 201-300, inclusive, were business entities,
14 the status of which are currently unknown. DOES 201-300 market, distribute, advertise, promote,
15 supply and sell handguns that are or were found within California (hereinafter referred to as part of
16 the "Defendant Dealers").

17 67. Plaintiff is ignorant of the true names and capacities of Defendants sued
18 herein as DOES 1-300. Plaintiff alleges that each of the fictitiously named Defendants is responsible
19 in some manner for the violations herein alleged. Plaintiff will seek leave to amend this Complaint
20 to allege such names and capacities when such have been ascertained. All of the above-named
21 Defendants, DOES 1-300, and the agents and employees of those Defendants, were responsible in
22 some manner for the obligations, liabilities and violations herein mentioned, which were legally
23 caused by the aforementioned Defendants and DOES 1-300.

24 **JURISDICTION AND VENUE**

25 68. Defendants, and each of them, are subject to the jurisdiction of the Courts of
26 the State of California by virtue of their business dealings and transactions in California, by causing
27 an injurious effect in California through their acts or omissions, and/or by their violations of
28

1 California Business and Professions Code §§ 17200 and 17500, and California Civil Code §§ 3479
2 and 3480.

3 69. Venue is proper in this court because the violations of law herein alleged and
4 the resulting injuries have been committed within Los Angeles County and elsewhere throughout
5 California. Defendants, and each of them, at all times mentioned in this Complaint have transacted
6 business within Los Angeles County and elsewhere throughout California.

7 **GENERAL ALLEGATIONS**

8 **I.**

9 **HANDGUN-RELATED CRIME IS A NATIONAL PROBLEM THAT**
10 **VICTIMIZES THOUSANDS OF CALIFORNIANS**

11 70. The widespread availability and misuse of firearms by minors, convicted
12 criminals, and other unauthorized users is one of the most serious problems facing this nation. In
13 1996, the most recent year for which final nationwide statistics are available, more than 34,000
14 people were killed with firearms. Of these, more than 14,300 were homicides and about 18,100 were
15 suicides, with more than 1,100 deaths from accidental shootings.

16 71. Statewide statistics for California reveal similar patterns of handgun violence.
17 In 1997 alone, there were 1,835 homicides committed with firearms, the majority of which are
18 handguns. In 1997, firearms were the predominant means of committing homicide, constituting
19 72.3% of total homicides. Handguns alone represented over 6400 of the total homicides and 89% of
20 firearm homicides. During the five-year period 1992 through 1997, handguns were used in over
21 62% of the total homicides. In addition, in 1997, there were over 25,000 incidents in California in
22 which a victim suffered serious injuries from a firearm.

23 72. As set forth below, this pattern of handgun violence is repeated in Los
24 Angeles County as well.

25 73. For each fatal shooting, there are roughly three non-fatal shootings that require
26 emergency room care.

27 74. These deaths and injuries are devastating for the individuals involved, for their
28 families and communities, and for the State of California. Moreover, the pervasive threat of

1 handgun violence affects the tenor and quality of everyday life, even for those who are not direct
2 victims.

3 II.

4 THE HIGH LEVEL OF FIREARM CRIME IN CALIFORNIA IS FUELED 5 BY THE EASY AVAILABILITY OF HANDGUNS TO ILLEGITIMATE USERS

6 75. Defendants, and each of them, employ a two-tier distribution system to market
7 handguns to the public. Through a two-tier distribution system, handguns flow from the
8 manufacturer to distributor to dealer to purchaser. This distribution system facilitates, and, in fact, is
9 designed to facilitate, handgun acquisition by persons not authorized or intended to use, sell or
10 possess handguns (through what is hereinafter referred to as the "illegitimate secondary market"),
11 such as criminals and minors. It is inappropriate to market a lethal product such as a handgun in an
12 unsafe and uncontrolled manner as it results in the distribution of handguns to the broadest market
13 possible without employing safeguards against the illegal sale, possession and use of handguns by
14 illegitimate users.

15 76. A substantial percentage of the handguns used to inflict harm and injury on
16 California residents are obtained through the illegitimate secondary market created and promoted by
17 the unfair, unlawful and fraudulent business acts and practices of Defendants. The fact that the
18 Defendants' acts and omissions have created and promoted the illegitimate secondary market is a
19 matter of common knowledge to Defendants, as is demonstrated by the following sworn statement of
20 Robert Haas, the former Senior Vice-President of Marketing and Sales for defendant Smith &
21 Wesson:

22 "The company [Smith & Wesson] and the industry as a whole are fully
23 aware of the extent of the criminal misuse of handguns. The company
24 and the industry are also aware that the black market in handguns is
25 not simply the result of stolen guns but is due to the seepage of guns
26 into the illicit market from multiple thousands of unsupervised federal
27 handgun licensees. In spite of their knowledge, however, the industry's
28 position has consistently been to take no independent action to insure
responsible distribution practices, to maintain that the present minimal
federal regulation of federal handgun licensees is adequate and to call
for creator criminal enforcement of those who commit crimes with
guns as the solution to the firearm crime problem. . . . I am familiar
with the distribution and marketing practices of the [sic] all of the
principal U.S. handgun manufacturers and wholesale distributors and
none of them, to my knowledge, take additional steps, beyond

1 determining the possession of a federal handgun license, to investigate,
2 screen or supervise the wholesale distributors and retail outlets that sell
their products to insure that their products are distributed responsibly."

3 77. National surveys demonstrate that handguns are easily available to minors and
4 convicted criminals through the illegitimate secondary market. For example, a recent survey showed
5 that approximately 29% of 10th grade boys and 23% of 7th grade boys have at one time carried a
6 concealed handgun. Another survey showed that 70% of all prisoners felt that they could easily
7 obtain a firearm upon their release. Similarly, a recent study of 27 cities by the federal Bureau of
8 Alcohol, Tobacco and Firearms ("ATF"), which analyzed more than 75,000 firearm trace requests,
9 reported that more than 11% of firearms picked up in crime in major urban centers throughout the
10 United States were possessed by juveniles under age 18. In Los Angeles, the percentage of crime
11 guns seized from juveniles was higher, at 13.4%. The same ATF study indicated that in the United
12 States another 15% of crime guns were seized from persons 18-20 years old, more than from any
13 other three-year age group, adult or juvenile. Moreover, ATF tracing of trafficked crime guns found
14 that more than 45% of the weapons seized were illegally possessed by convicted felons. Large
15 percentages of these guns have been used in assaults, robberies, homicides, and other violent crimes.

16 78. Despite these statistics, Defendants have not taken reasonable steps to keep
17 handguns out of the hands of minors. To the contrary, Defendants market their products in such a
18 way that they appeal to minors. For example, one of the gun industry's leading trade associations,
19 Defendant National Shooting Sports Foundation (NSSF), announced in 1992 a "new focus on
20 women and youngsters." NSSF started a "Youth Education Program" in a search for new customers
21 and expansion of the gun market. The September/October 1992 issue of NSSF's magazine S.H.O.T.
22 Business carried a column by a noted celebrity in the industry, Grits Gresham, in which he said:

23 "There's a way to help insure that new faces and pocketbooks will
24 continue to patronize your business: Use the schools [I]t's time
to make your pitch for young minds, as well as for the adult ones."

25 79. The ease with which handguns are moved into the illegitimate marketplace is
26 also demonstrated by the short time between retail sale and criminal misuse for a significant
27 percentage of firearms. ATF tracing data indicates that as many as 43% of firearms traced to crime
28 in cities across America have been bought from retail dealers less than three years earlier, which

1 according to ATF is a strong indication that the firearm has been trafficked. An ATF study of
2 Southern California crime guns, including those picked up in Los Angeles County, found that 31%
3 of the guns traced had been purchased from a licensed dealer less than one year earlier. This same
4 study noted that handguns were especially prone to quick turnaround; a third of the crime guns that
5 were handguns were seized within one year of being purchased, and more than half were seized
6 within two years.

7 III.

8 DEFENDANTS HAVE CREATED A DISTRIBUTION SYSTEM 9 THAT FACILITATES AND SUPPLIES AN ILLEGITIMATE 10 SECONDARY MARKET OF HANDGUNS

11 80. Defendants, and each of them, employ marketing and distribution policies and
12 practices that facilitate, promote and yield high volume sales, widespread availability and easy access
13 without any meaningful attention to or concern for their consequences.

14 81. Defendants, and each of them knew, or should have known, for at least four
15 years prior to the filing of this Complaint, that a substantial percentage of the handguns they design,
16 manufacture, market, distribute, advertise, promote, supply and sell are purchased by unauthorized
17 persons, including minors and convicted criminals. Many of the guns illegally sold in this market
18 are subsequently used in the commission of crime. Defendants, and each of them, knew, or should
19 have known, that their manufacturing, marketing, distributing, advertising, promotional, supplying
20 and sales acts and practices would facilitate and encourage their handguns to flow into an
21 illegitimate secondary market and be purchased, possessed and used by unauthorized persons.
22 Further, it was foreseeable that defendants' manufacturing, marketing, distributing, advertising,
23 promotional, supplying and sales acts and practices would facilitate handguns to flow into an
24 illegitimate secondary market and be purchased, possessed and used by unauthorized persons.

25 A. Defendants Over-Saturate the Legitimate Market.

26 82. Defendants, and each of them, produce, market and distribute substantially
27 more handguns than they reasonably expect to sell to legal purchasers. There are approximately 65
28 million handguns in the United States, and about 2.5 million more are added each year. A

1 substantial percentage of these sales are diverted to an illegitimate secondary market. By
2 deliberately producing, marketing and distributing more handguns than they can reasonably expect to
3 sell to legal purchasers, defendants, and each of them, knowingly participate in and facilitate the
4 illegitimate secondary market for handguns.

5 **B. Defendants Over-Saturate Jurisdictions With Weak Gun Control Laws.**

6 83. Handguns move from jurisdictions with relatively weak gun control laws to
7 jurisdictions with stronger gun control laws. Defendants, and each of them, knew of or should have
8 known of, for at least four years from the filing of this Complaint, this illegal trafficking movement,
9 yet did nothing to control or monitor sales in weak gun control jurisdictions to restrict illegal
10 trafficking of guns from those jurisdictions into more heavily regulated jurisdictions. To the
11 contrary, defendants, and each of them, eagerly sell as many handguns as are necessary to meet the
12 demands of the illegitimate secondary market in weak gun control jurisdictions. As an example of
13 this problem, Arizona and Nevada both border California and have weaker gun control laws than this
14 State. According to ATF statistics, approximately 30% of the firearms traced in Southern California
15 were originally sold at retail locations outside of California, principally Nevada and Arizona.
16 Although this movement of handguns across state lines contravenes federal law as well as reduces
17 the efficacy of California and local law, Defendants, and each of them, continue to facilitate and
18 encourage this movement of handguns.

19 **C. Defendants Distribute Handguns Without Exercising Adequate Control.**

20 84. Defendants' employment of a two-tier distribution system maximizes their
21 sales without any check or precaution, and without placing effective controls on their distributors or
22 dealers, which include disreputable gun shops, pawnshops, gun shows, and telemarketers. Although
23 Defendants' distribution practices increase sales volumes and hence profits, they minimize contacts
24 between Defendant Manufacturers and Defendant Distributors and Defendant Dealers, thereby
25 precluding any meaningful monitoring of compliance with federal, state and local laws.

26 85. Defendant Manufacturers, and each of them, do not monitor or supervise their
27 distributors or dealers, except in ways aimed at maximizing profits. Certain Defendants have
28 distribution agreements that provide for the right of termination, and on occasion, have terminated or

1 warned distributors or dealers. However, the reasons contemplated for termination are not
2 maintaining minimum prices, advertising the price that the distributor pays to the manufacturer, or,
3 in some instances, selling to law enforcement or making foreign sales. However, engaging in a
4 dangerous and unfair sales practice that makes handguns easily available for potential criminal use
5 has not been the basis for termination and is not included in the terms of the distribution agreements.
6 There is no sanction, such as termination, specified within the distribution agreements for the act of
7 selling to or facilitating the illegitimate secondary market.

8 86. Defendant Manufacturers, and each of them, do not require that their dealers
9 and retailers be trained or instructed to: (1) detect illegal and straw purchasers; (2) educate or require
10 any training or instruction of purchasers about the safe and proper possession, use and storage of
11 handguns; or (3) inquire or investigate purchasers' level of knowledge or skill or purposes for buying
12 handguns. Defendant Manufacturers, and each of them, do not train, monitor or supervise their
13 distributors and dealers to insure that handguns are sold to authorized users, and possessed, used and
14 stored in a safe manner.

15 87. Defendant Manufacturers, and each of them, purposely avoid any connection
16 to or vertical integration with the distributors and dealers that sell their products. They offer high
17 volume monetary incentives and generally refuse to accept returns, and they contractually attempt to
18 shift all liability and responsibility for the harm done by their products to the distributors and dealers.

19 88. Defendants, and each of them, do not use available computerized inventory
20 and sales tracking systems that are commonly and inexpensively used throughout American industry,
21 particularly in industries that produce dangerous or harmful products. Such systems are utilized, in
22 part, for the purpose of limiting and screening customers.

23 89. Unlike other manufacturers of dangerous or harmful products, including
24 manufacturers of chemicals and paints, Defendant Manufacturers, and each of them, have completely
25 failed and refused to adopt any limits in the distribution of their handguns or to engage in even
26 minimal monitoring or supervision of their distributors and dealers, to avoid the known and
27 foreseeable detrimental consequences arising from the possession, use and storage of handguns.

1 **D. Defendants' Practices Facilitate "Straw Purchases" and Multiple Sales.**

2 90. Defendant Manufacturers, and each of them, do not require or encourage their
3 distributors and dealers to limit the number, purpose or frequency of handgun purchases, nor do they
4 monitor or supervise their distributors or dealers to encourage practices or policies that limit access
5 to handguns for criminal purposes. As a direct, foreseeable and known result of defendants'
6 aforesaid conduct, a large number of handguns are regularly diverted to the illegitimate secondary
7 market through "straw purchases "

8 91. A "straw purchase" occurs where the lawful purchaser of the handgun, as
9 reflected in the governmental application forms, is a "dummy" purchaser for someone else, most
10 often a person who is not qualified to purchase the handgun under the applicable federal, state and
11 local laws. In some situations, the real purchaser will be present during the sale of the handgun. He
12 or she may select the handgun, handle it and even provide the cash for the purchase. In other
13 situations, for example in a straw purchase for gang members, the straw purchaser will purchase a
14 number of handguns within a short period of time. In this situation, a straw purchaser may engage in
15 repeated multiple handgun purchases.

16 92. Straw purchases account for a substantial percentage of handguns diverted
17 into the illegitimate secondary market. According to a recent study, more than one-half of the
18 firearms subject to firearm trafficking investigations were initially acquired as part of a straw
19 purchase. Another study, this one involving firearms seized by law enforcement officials in
20 Southern California, revealed that more than 80% of the guns retrieved by law enforcement were in
21 the possession of a person other than the original purchaser.

22 93. Similarly, the level of multiple sales in California is substantial. One recent
23 law enforcement study of Southern California analyzed 5,743 instances of multiple sales over a nine-
24 month period involving the purchase of 13,181 guns. A significant percentage of these transactions
25 involved the purchase of three or more guns at a time. The report concluded that "[m]ultiple
26 purchases seem relatively common in California, where there has been no set limit to the number of
27 guns that a private person can purchase." More recent data indicates that as many as 22% of all
28 handguns purchased in California in 1998 were part of multiple sales.

1 94. Although straw purchases often occur under circumstances that indicate, or
2 should indicate, that a straw purchase is being made, Defendants, and each of them, take no steps to
3 prevent these straw purchases from occurring or to limit the number of straw purchases that occur.
4 For example, Defendant Manufacturers, and each of them, offer no training or guidance to enable a
5 retail store clerk to recognize when a straw purchase is occurring. Similarly, Defendants, and each
6 of them, undertake no remedial actions to prevent a known straw purchaser from continuing to make
7 purchases. Defendant Manufacturers, and each of them, fail to adequately supervise and monitor
8 both their distributors and dealers with respect to straw purchases. Additionally, Defendant
9 Manufacturers, and each of them, do not investigate their distributors and dealers or review their
10 records to determine whether straw purchases are occurring or the extent to which they are. Finally,
11 Defendant Manufacturers, and each of them, fail to impose any sanctions against distributors and
12 dealers, including possible termination of the relationship, upon learning that a straw purchase or a
13 series of straw purchases has occurred.

14 E. **Defendants Allow Sales to "Kitchen Table" Dealers Which Supply the Criminal**
15 **Market.**

16 95. "Kitchen table" dealers are handgun dealers who do not sell handguns from an
17 established retail store but rather sell handguns in informal settings, including, but not limited to, a
18 house, car, flea market, gun show, or even on the street. Many of these kitchen table dealers operate
19 illegally, in violation of state and local licensing and zoning laws. Many of these dealers also engage
20 in other corrupt practices, including, but not limited to, selling handguns without completing the
21 appropriate and necessary background checks on the purchaser, failing to report sales, failing to
22 keep records of sales, falsifying records of sales, obliterating serial numbers on firearms, and falsely
23 claiming that sold guns were stolen.

24 96. Defendants, and each of them, knew, or should have known, about the
25 practices of kitchen table dealers set forth herein. Defendants, and each of them, have nevertheless
26 marketed, distributed and sold thousands of guns to kitchen table dealers, without taking appropriate
27 steps to prevent unlawful sales of handguns by such dealers. Such steps include, but are not limited
28 to, supervising and monitoring such dealers, tracking crime gun trace requests relating to such

1 dealers, reviewing dealer records for inaccuracies and falsified information, requiring distributors to
2 sell guns only to dealers with a permanent store location, and requiring all dealers to maintain a
3 permanent store location.

4 **F. Defendants' Products Are Illegally Sold At Gun Shows.**

5 97. Gun shows are events at which private citizens and federally-licensed gun
6 dealers, collectors and hobbyists congregate to buy and sell firearms and related paraphernalia. On
7 almost every weekend of the year, across the United States, gun shows are held in auditoriums, at
8 fairgrounds, and other public outlets. "Hobbyists" — individuals without Federal Firearms
9 Licenses — routinely sell guns from their "personal collections" at gun shows without following any
10 of the requirements imposed upon holders of Federal Firearms Licenses. In addition, guns are
11 routinely sold at gun shows without any form of background check on purchasers, resulting in
12 substantial sales to criminals and underage purchasers.

13 98. Defendants, and each of them, knew, or should have known, about the sales of
14 their products at gun shows as alleged herein. Defendants, and each of them, have nevertheless
15 failed to take any steps to prevent the unlawful sales of guns at gun shows.

16 **G. Defendants Design Weapons Without Features to Discourage Unauthorized Use.**

17 99. Handgun trafficking depends upon the ability of unauthorized users to operate
18 weapons obtained from traffickers and the inability to trace handguns. Designs and features that
19 promote these factors, such as those that prevent unauthorized use or facilitate tracking of handguns,
20 would discourage trafficking and reduce the flow of weapons to the illegitimate secondary market.
21 Notwithstanding the availability and feasibility of incorporating such designs and features into
22 handguns, Defendants, and each of them, have continued to manufacture, distribute and sell
23 handguns that do not include a design or feature preventing unauthorized use.

24 100. Thousands of handguns diverted to crime also have had their serial numbers
25 obliterated to prevent tracing of the firearm by law enforcement. Such handguns are more useful to
26 criminals who seek to eliminate the tracks of their crimes. Defendants, and each of them, are aware
27 of this problem, and the ease with which serial numbers can be obliterated, but have taken no
28 initiative to make their serial numbers tamper-proof. The recent ATE study of 27 cities found, on

1 average, that more than 11% of the guns traced to crime had obliterated serial numbers. Another
2 study identified a single corrupt dealer in Southern California who obliterated the serial numbers on
3 a major portion of 1,200 guns the dealer diverted to the criminal marketplace.

4 IV.

5 **DEFENDANTS HAVE DESIGNED HANDGUNS TO APPEAL TO CRIMINALS**
6 **AND HAVE INCREASED PRODUCTION TO MEET DEMAND**
7 **FROM THE ILLEGAL MARKET**

8 101. Over the last 20 years, Defendants, and each of them, have changed certain
9 design features of handguns to appeal to the illegitimate secondary market. Previously, most
10 handguns produced were revolvers, with six bullets stored in a rotating cylinder that could not be
11 reloaded quickly. Now most handguns are semi-automatic with bullets stored in magazines. These
12 handguns fire at a faster rate, and their magazines typically can be detached and replaced very
13 quickly, allowing for sustained firing against multiple targets.

14 102. Handguns are increasingly smaller, easier to conceal, more powerful and,
15 hence more lethal and rapid-firing. Many are also considerably cheaper than in the past. All of these
16 factors make contemporary handguns appealing to criminals.

17 103. The production of cheap handguns has been especially prevalent among
18 Defendants AMT, Lorcin, Bryco, Davis, Phoenix Arms, and Sundance. This group of California
19 manufacturers are all within 50 miles of the County of Los Angeles and has been dubbed by a well-
20 known researcher as the "Ring of Fire." Older, established companies, such as Defendants Smith &
21 Wesson, Sturm, Ruger & Co., and Colt, have followed the lead of the "Ring of Fire" companies,
22 producing lines of similar inexpensive handguns.

23 104. Defendant Manufacturers, and each of them, have increased the production of
24 particular handguns that are popular for use by criminals. For example, over the past decade.
25 Defendants, and each of them, increased their production of 9-millimeter handguns although their
26 own market research showed that the market for 9 millimeters handguns among law-abiding
27 purchasers was already saturated. Nine-millimeter handguns are popular in the illicit drug trade and,
28 according to most national studies, are among the handguns used most frequently in crime. A recent

1 study concluded that 9 millimeter handguns are the weapons of choice for criminals, accounting for
2 almost a third of all homicides.

3 105. Defendants, and each of them, knew or should have known, that they
4 manufacture, market and design handguns which emphasize concealability, lethality, and other
5 features attractive to criminals. Defendants' emphasis on concealability is particularly problematic in
6 California, where state law bans possession of a concealed weapon without a concealed-carry permit,
7 of which few have been issued.

8 **V.**

9 **DEFENDANTS' CONDUCT UNDERMINES THE PUBLIC POLICY**
10 **EMBODIED IN LOCAL, STATE AND FEDERAL LAWS**

11 106. Federal, state and local firearm laws have been enacted in an effort to curb the
12 abuses of gun violence and to protect the general public's health and safety. Despite the fact that all
13 levels of government have implemented statutes and ordinances to lessen the incidences of gun
14 violence, Defendants, and each of them, have manufactured, designed, distributed, marketed and
15 sold handguns in ways that undermine and impede the public policies embodied in both state and
16 local law. The conduct and practices of Defendants, as set forth herein, have undermined and
17 impeded the restrictions, prohibitions, and public policies set forth in local, state and federal laws
18 and regulations including, but not limited to: Title 18, United States Code §§ 921 – 930 *et seq.*
19 (Chapter 44 – Firearms); California Penal Code §§ 12020-12040 *et seq.* (Chap. 1, Article 2 –
20 Unlawful Carrying and Possession of Weapons); 12050 - 12054 *et seq.* (Chap. 1, Article 3 –
21 Licenses to Carry Pistols and Revolvers); 12070 - 12085 *et seq.* (Chap. 1, Article 4 – Licenses to Sell
22 Firearms); 12200 –12250 *et seq.* (Chap. 2 – Machine Guns); 12270 -12290 *et seq.* (Roberti-Roos
23 Assault Weapons Control Act of 1989); 12100 *et seq.* (Chap. 1, Article 7 – Juveniles - Prohibition of
24 Sale or Transfer of Concealable Firearm to Minors); 12500 – 12520 *et seq.* (Chap. 5, Articles 1 and
25 2 – Unlawful Possession of Firearm Silencers/Misc.); 12800 – 12809 *et seq.* (Chap. 6, Article 8 –
26 Basic Firearms Safety Instruction and Certificate); Los Angeles County Code, Chapters 7.46 and
27 13.65.
28

1 107. For example, the California Roberti-Roos Assault Weapons Control Act of
2 1989, California Penal Code §§ 12275 –12290, and the United States 1968 Gun Control Act, as
3 amended, 18 U.S.C. § 925 *et seq.*, ban the importation, manufacture, sale, and possession of "assault
4 weapons," including handguns. As the California legislature found and declared, this ban is based
5 on the conclusion that such assault weapons "are particularly dangerous in the hands of criminals and
6 serve no necessary hunting or sporting purpose for honest citizens." The ban enacted by the
7 California legislature explicitly applies to both listed weapons and "any other models which are only
8 variations of those weapons with minor differences, regardless of manufacturer."

9 108. Despite the enactment of the California Roberti-Roos Assault Weapons
10 Control Act of 1989, Defendant Navegar has marketed and sold in California assault weapon
11 handguns substantially similar to or identical to the one banned by the statutes. In fact, Defendant
12 Navegar has made only minor modifications to the banned assault weapon handguns or renamed the
13 ones enumerated in the above-referenced statutes in order to avoid these laws. For example, after the
14 California legislature banned the TEC-9 assault weapon, Defendant Navegar continued to distribute
15 and sell the identical assault weapon handgun in California under the name "TEC-DC9." Navegar
16 later distributed and sold a handgun under the name "TEC-DC9" that was the same design as the
17 banned TEC-9, with only cosmetic modifications. At all relevant times, Defendant Navegar has
18 been on notice of the lethal consequences of this practice. Navegar's assault weapon handguns have
19 frequently been used in multiple homicides, including the 101 California Street massacre in which a
20 gunman killed eight and injured six law firm employees at a San Francisco office building.

21 109. Additionally, numerous local ordinances prohibit the sale of "junk guns" or
22 "Saturday Night Specials" in Los Angeles County, including, but not limited to Los Angeles County
23 Code Chapter 13.65. The "Saturday Night Special" ("SNS") ordinances enacted in over 40
24 jurisdictions throughout California were designed to protect the public from poorly made, easily
25 concealable handguns. These handguns have been, and continue to be, frequently used in the
26 commission of crimes. Notwithstanding these ordinances, certain Defendants unlawfully market,
27 distribute or sell prohibited "Saturday Night Specials" adjacent to jurisdictions banning such sales.

110. On July 20, 1999, Governor Gray Davis signed into law the nation's most comprehensive ban on assault-style weapons. The new law outlaws weapon characteristics, instead of named weapons, essentially banning the manufacture, import or sale of any semi-automatic rifles or pistols that can hold more than 10 rounds of ammunition or can be easily concealed, or have any one of various accessories like pistol grips or folding stocks — a stricter standard than the existing federal ban on some 20 types of assault weapons. The new law also makes it a crime to manufacture, import, sell or give away any magazine that can hold more than 10 rounds of ammunition. Governor Davis also signed a separate measure barring any individual from buying more than one handgun in a month.

VI.

**DEFENDANTS HAVE FAILED TO INCORPORATE FEASIBLE AND
EXISTING SAFETY TECHNOLOGY INTO THE DESIGN AND
DISTRIBUTION OF FIREARMS**

A. Adequate Warning and Safety Features Would Prevent Many Unintentional Shootings.

111. Defendants, and each of them, contribute to the serious harm inflicted on residents of Los Angeles County and citizens throughout the State, by failing to adequately warn users and to incorporate feasible and existing safety technology into the design of handguns, that would prevent shootings and their unauthorized possession and use. Defendants, and each of them, have designed, manufactured, made or sold handguns that are unreasonably dangerous because they lack basic safety features and contain inadequate warnings, all of which results in unintentional shootings. Defendants, and each of them, over-promote the purported self-defense and home protection benefits of their guns, in a manner that undercuts any warnings or instructions regarding safe storage of guns, and results, not only in irresponsible people possessing guns, but in the irresponsible storage and handling of guns. Defendants, and each of them, market and promote their handguns in a manner that ignores or understates the risks that such handguns pose to their owners and to other members of the household. Defendants' marketing and promotional practices encourage unsafe storage practices and unsafe use of their products.

1 112. Defendants, and each of them, knew, or should have known, that
2 approximately half of California residents who keep a firearm at home, a substantial percentage that
3 includes children, store their guns in an unsafe manner, and yet continued to distribute their
4 handguns without adequate warnings and instructions that inform the users of the risks of guns,
5 including proper storage and use of the weapons.

6 113. Defendants, and each of them, manufacture, distribute and sell handguns that
7 are unreasonably dangerous in that their design lacks safety features or contains inadequate safety
8 features. Defendants, and each of them, knew, or should have known, that users of semi-automatic
9 handguns would not understand or appreciate that an undetectable round of ammunition may be
10 housed in the firing chamber of a semi-automatic gun even though the ammunition magazine had
11 been removed or emptied. Consequently, it was, and continues to be, reasonably foreseeable that
12 this hazardous design would result in preventable, unintentional shootings. This hazardous design
13 could be easily corrected through the use of a "magazine-disconnect safety" that would prevent the
14 gun from firing with the magazine removed. These tragic, foreseeable shootings could also be
15 prevented by use of "chamber loaded indicator" that would warn a user when a bullet was in the
16 firing chamber. Defendant Manufacturers, and each of them, have failed to incorporate such devices
17 into their firearms.

18 114. Defendants' failure to incorporate adequate warnings and feasible safety
19 designs into firearms results in 1,400-1,500 unintentional shooting deaths and over 18,000 non-fatal
20 injuries from unintentional shootings every year. The U.S. General Accounting Office estimates that
21 each year, 23% of the unintentional shooting deaths occur because the user of the gun was not aware
22 that a round of ammunition had been loaded into the gun's firing chamber. This results in as many as
23 320 to 345 deaths nationwide each year. For each of these deaths, there are countless other
24 unintentional shooting injuries that are not fatal.

25 115. Unintentional shootings with Defendants' unsafe handguns often involve
26 adolescents. Adolescents are foreseeably attracted to guns and typically do not understand the risks
27 associated with handling a handgun. According to the U.S. General Accounting Office,
28

1 approximately 35% of all unintentional shooting deaths involve users of guns who were between the
2 ages of 10 to 13. Many such shootings have occurred in the State of California.

3 116. Defendants, and each of them, have failed to take reasonable steps to guard
4 against foreseeable unintentional shootings. Such reasonable steps include, but are not limited to,
5 designing their handguns with basic safety features and giving adequate warnings that would prevent
6 or reduce such unintentional shootings. Defendants, and each of them, were aware of, and had
7 available to them, devices, features, warnings, and other measures, which would prevent and
8 decrease the dangers of their products. Defendant Manufacturers, and each of them, have failed to
9 adequately warn customers of the dangers associated with handguns, failed to inform distributors,
10 dealers and buyers of available devices and measures that could prevent or decrease these dangers,
11 failed to incorporate safety devices and features into their handguns and impeded the development
12 and implementation of safety devices and features into their handguns. Defendant Trade
13 Associations, and each of them, failed to adopt adequate guidelines or standards relating to the
14 development and inclusion of such features in handguns. Defendants, and each of them, knew, or
15 should have known, that as a consequence of their actions. California residents have been, and will
16 continue to be killed or seriously injured.

17 **B. Personalized Safety Technology Would Prevent Access to Firearms by**
18 **Unauthorized Users.**

19 117. The unsafe and unreasonably dangerous design of Defendants' handguns
20 results in thousands of shootings each year by persons who are not authorized by law to possess a
21 handgun, or who, by reason of immaturity or other disability, do not appreciate the risks involved
22 with handguns. Such shootings often occur when an adolescent or a criminal improperly obtains
23 possession of a handgun.

24 118. Adolescent homicides and suicides are usually committed with a handgun that
25 the adolescent has obtained from his or her home. In California, millions of minors live in homes
26 where handguns are present. Studies have indicated that the odds that potentially suicidal minors
27 will kill themselves double when a gun is kept in the home. Moreover, nationwide for many years, a
28 youth aged 10-19 has committed suicide with a firearm at a rate of about once every six hours.

1 Firearms are used in 65% of male teen suicides and 47% of female teen suicides. In California, in
2 1996, there were 107 suicides of youth aged 19 and below.

3 119. At all pertinent times, it was reasonably foreseeable that Defendants' handguns
4 would fall into the hands of unauthorized users. There are guns in approximately one-half of the
5 homes in this country. One survey reports that 30% of gun-owners who have minors in the home
6 keep their guns loaded. Another survey reports that 36% of gun owners with minors in the home
7 keep their guns unlocked. The Federal Centers for Disease Control and Prevention estimates that 1.2
8 million elementary-aged, latchkey children have access to guns in their homes. Moreover, nearly
9 60% of juveniles between the ages of 10 and 19 have responded in surveys that they can acquire a
10 handgun should they want one.

11 120. At all pertinent times, Defendants, and each of them, knew, or should have
12 known, that when unauthorized users gained access to Defendants' handguns, tragic and preventable
13 shootings would result. Many teen suicides and shootings by minors and other unauthorized users
14 could be prevented had Defendants implemented safer handgun designs, including personalized
15 handgun technology that would prevent an unauthorized user from being able to fire the handgun.
16 Further, Defendants, and each of them, knew, or should have known, that by failing to make and sell
17 handguns with the means to prevent their firing by unauthorized users, it was reasonably foreseeable
18 that handguns stolen from private residences, gun stores and other locations could be employed by
19 unauthorized users in violent criminal acts.

20 121. A study by the Johns Hopkins University School of Hygiene and Public
21 Health's Center for Gun Policy and Research concluded that "[p]ersonalized handguns can eliminate
22 many deaths and injuries by preventing the unauthorized firing of the firearm. . . . [and] can be
23 especially effective in preventing teenage [deaths], unintentional deaths and injuries of children, and
24 shootings of police officers."

25 122. Defendants' dangerous and unsafe products have repeatedly victimized
26 California residents. At all pertinent times the Defendants manufactured, distributed, marketed,
27 designed, promoted and sold their handguns, Defendants, and each of them, knew, or should have
28 known, of the dangers of their handguns, including those described herein. Defendants, and each of

1 them, knew of, or should have known of, and had available to them, personalized safety features,
2 warnings, and other measures, that would prevent and decrease the dangers of their products.
3 Defendant Manufacturers, and each of them, nevertheless failed to remedy the deficiencies in their
4 handguns. Defendant Manufacturers, and each of them, further failed to incorporate personalized
5 safety features into their handguns and impeded the development and implementation of
6 personalized safety features. Defendant Trade Associations, and each of them, similarly failed to
7 adopt adequate guidelines or standards relating to the development and inclusion of such
8 personalized safety features in handguns. Defendants, and each of them, knew, or should have
9 known that, as a consequence of their aforementioned conduct, California residents would be killed
10 or seriously injured.

11 C. **Defendants Have Failed to Compete in the Marketplace to Develop Firearms**
12 **with Personalized Safety Technology.**

13 123. A handgun with personalized safety features sufficient to prevent, or
14 significantly reduce, the risk of unauthorized use would have the potential to appeal to a large
15 segment of the legitimate handgun market. Despite this market appeal, Defendant Manufacturers,
16 and each of them, have failed to compete in the marketplace to develop and market handguns with
17 such safety features.

18 124. Defendant Trade Associations, and each of them, have likewise discouraged
19 the development of such safety features. For example, Defendant SAAMI holds itself out to the
20 public as having been, since 1926, "the principal organization in the United States actively engaging
21 in the development and promulgation of product standards for firearms and ammunition." Although
22 SAAMI has promulgated numerous product standards for the firearms industry, it has failed to
23 develop any standards relating to personalized safety devices.

24 125. Instead of encouraging Defendant Manufacturers to develop safer products
25 and distribution practices, Defendant Trade Associations, and each of them, have sought to
26 discipline industry members who attempted to address safety issues. For example, when Defendant
27 Smith & Wesson was faced in 1976 with a public outcry that might have resulted in a ban of most
28 handguns in Massachusetts, Smith & Wesson announced that, as an alternative, it would support

1 screening and registration of handgun owners. For this breach of industry policy, Smith & Wesson
2 faced censure or ouster from SAAMI. To avoid possible action by SAAMI, Smith & Wesson for a
3 time withdrew from SAAMI, then conformed its proposals and positions to industry policies.

4 **VII.**

5 **DEFENDANTS' FALSE, DECEPTIVE AND MISLEADING** 6 **STATEMENTS AND ADVERTISEMENTS UNDERMINE MINIMUM** 7 **WARNINGS ON PROPER STORAGE OF HANDGUNS**

8 126. For at least four years preceding the filing of this Complaint, and continuing to
9 date, Defendants, and each of them, have misled, deceived and confused members of the general
10 public in California regarding the safety of handguns and the need for handguns within the home.
11 To increase sales and profits, Defendants, and each of them, have falsely and deceptively claimed
12 through advertising and promotion of their handguns that the ownership and possession of handguns
13 in the home increases one's security. For example, certain Defendant Manufacturers have promoted
14 handguns with slogans such as "homeowner's insurance," "tip the odds in your favor," and "your
15 safest choice for personal protection." Research demonstrates that, to the contrary, handguns
16 actually increase the risk and incidence of homicide, suicide and intentional and unintentional
17 injuries to gun owners and their families and friends. Defendants' promotional efforts have negated
18 and undercut any warnings they have provided regarding the risks of handguns in the home.

19 127. Defendants, and each of them, have made these false and deceptive statements
20 even though they knew or should have known, that studies and statistics demonstrate that the
21 presence of handguns in the home increase the risk of harm to firearm owners and their families, as
22 set forth in the following statistics:

- 23 a. One out of three handguns is kept loaded and unlocked in the home;
- 24 b. Studies that control for the relevant variables have demonstrated that the
25 homicide of a household member is almost three times more likely in homes with guns than in
26 homes without them, suicide is five times more likely; and for homes with teenagers, a suicide is ten
27 times more likely;

1 c. Studies have also shown that a gun in the home is at least 22 times more likely
2 to kill or injure a household member than it is to kill or injure an intruder in self defense;

3 d. A firearm is used for protection in fewer than two percent of home invasion
4 crimes;

5 e. For every time a gun in the home was used for self-defense or a legally
6 justifiable shooting, there were four unintentional shootings, seven criminal assaults or homicides,
7 and eleven attempted or completed suicides.

8 128. Defendants' advertising and promotion activities deceptively convey the
9 message that possession of a handgun, along with the enhanced lethality of particular handguns, will
10 increase the personal safety of the owner and owner's household. Defendants, and each of them, fail
11 to include any information or warning about the relative risk of keeping a handgun in the home. By
12 failing to disclose such risks, the advertisements and promotions fail to correct a material
13 misrepresentation in the minds of many consumers.

14 129. The U.S Commission on the Causes and Prevention of Violence in a 1968
15 article entitled "Handguns and Violence in American Life," noted an increasing number of firearm
16 deaths and injuries and concluded:

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

25 130. In California, a substantial number of deaths and injuries have occurred each
26 year because handguns were purchased for home protection but were, thereafter, used in
27 unintentional shootings, teen suicides, domestic disputes and other acts of violence as set forth
28 herein. Defendants, and each of them, choose to disregard these well-known statistics and data in an
effort to promote their handguns as security or "insurance" for the home, and to increase their sales
and profits.

131. Moreover, although Defendants, and each of them, state publicly that they
seek to preclude minors and criminals from possessing handguns, they, in fact, are engaging in acts

1 and practices that facilitate the illegal possession of handguns by minors and criminals through the
2 illegitimate secondary market. Defendants then utilize the threat posed by the criminal misuse of
3 handguns — a threat that their own practices have helped to create — to market and sell more
4 handguns to the "home protection" market.

5 **VIII.**

6 **DEFENDANTS HAVE PROFITED FROM THEIR UNFAIR,**
7 **UNLAWFUL OR FRAUDULENT BUSINESS PRACTICES AT**
8 **THE EXPENSE OF CALIFORNIA AND ITS RESIDENTS**

9 132. Defendants' unfair, unlawful and fraudulent acts and practices have
10 contributed to the overall success and profit for the \$2-\$3 billion firearm industry. Defendants, and
11 each of them, knew, or should have known, that the thousands of handguns distributed through the
12 illegitimate secondary market cause substantial injury and harm to California residents. Defendants'
13 actions and omissions set forth herein facilitate violations of federal, state and local laws or negate
14 and undermine the public policies established by those laws, contribute to physical harm, fear and
15 inconvenience to California residents, and are injurious to the public health, well-being and safety of
16 California residents, and, in general, contribute to the degradation of the quality of life of
17 communities throughout the State of California. Defendants' conduct, as set forth herein, has
18 directly and indirectly injured and harmed California residents in the form of loss of life, injury,
19 increased criminal activity involving handguns, law enforcement costs, medical costs and emergency
20 response costs. Said conduct has allowed Defendants to profit from their unfair, unlawful and
21 fraudulent business practices, thereby contributing to Defendants' overall financial success and
22 vitality at the expense of California and its residents.

23 **FIRST CAUSE OF ACTION**

24 **PUBLIC NUISANCE**

25 **(Against All Defendants)**

26 133. Paragraphs 1 through 132 are repeated and realleged as if set forth herein.

27 134. The citizens of Los Angeles County have a common right to be free from
28 conduct that creates an unreasonable jeopardy to the public health, welfare and safety and to be free

1 from conduct that creates a disturbance and reasonable apprehension of danger to person and
2 property.

3 135. Defendants' ongoing conduct has created and maintained a public nuisance in
4 Los Angeles County and throughout Southern California, as thousands of handguns that they directly
5 or indirectly supply to the illegitimate secondary market are thereafter used and possessed in
6 connection with criminal activity in Los Angeles County and throughout Southern California. As a
7 result of the use of many of these handguns, residents of Los Angeles County have been killed and
8 injured, fear for their health, safety and welfare and are subjected to conduct that creates a
9 disturbance and reasonable apprehension of danger to their person and property.

10 136. Defendants' ongoing conduct, as set forth herein, constitutes a public nuisance
11 in Los Angeles County and throughout Southern California because it is an unreasonable
12 interference with common rights enjoyed by the general public.

13 137. Defendants' ongoing conduct, as set forth herein, is an unreasonable
14 interference with common rights enjoyed by the general public in Los Angeles County and
15 throughout Southern California because it significantly interferes with the public's health, safety,
16 peace, comfort and convenience.

17 138. Defendants' ongoing conduct, as set forth herein, is an unreasonable
18 interference with common rights enjoyed by the general public in Los Angeles County and
19 throughout Southern California because Defendants, and each of them, knew or should have known
20 the conduct to be of a continuous and long-lasting nature that produces a permanent and long-lasting
21 significant negative effect on the rights of the public.

22 139. Defendants' ongoing conduct, as set forth herein, produces an ongoing public
23 nuisance, as thousands of handguns that they directly or indirectly supply to the illegitimate
24 secondary market and are thereafter illegally used and possessed in Los Angeles County and
25 throughout Southern California, will remain in the hands of persons who will continue to use and
26 possess them illegally for many years. As a result of the continued use and possession of many of
27 these handguns, residents of Los Angeles County and throughout Southern California will continue
28 to be killed and injured by these handguns and the public will continue to fear for its health, safety

1 and welfare and will be subjected to conduct that creates a disturbance and reasonable apprehension
2 of danger to person and property.

3 140. The presence of illegitimately possessed and used handguns in Los Angeles
4 County proximately results in significant costs in order to enforce the law, arm the Sheriff's
5 Department and treat the victims of handgun crime. Stemming the flow of handguns into the
6 illegitimate secondary market will help to abate the nuisance, will save lives, prevent injuries and
7 will make Los Angeles County and Southern California a safer place to live.

8 141. Defendants' ongoing conduct, as set forth herein, constitutes a public nuisance
9 in Los Angeles County since it significantly interferes with the public's health, safety, peace, comfort
10 and convenience. Defendants, and each of them, knew, or should have known, the conduct to be of a
11 continuous nature that produces a permanent and significant negative effect on the rights of the
12 public. Defendants' conduct constitutes a public nuisance within the meaning of Civil Code § 3480
13 and this action is brought under Civil Code §§ 3490, *et seq.*, and Code of Civil Procedure § 731.
14 Los Angeles County has a clearly ascertainable right to abate conduct that perpetuates this nuisance.
15 Stemming the flow of handguns into the illegitimate secondary market will help to abate the
16 nuisance, will save lives, prevent injuries and will make Los Angeles County a safer place to live.

17 **SECOND CAUSE OF ACTION**

18 **VIOLATION OF CALIFORNIA BUSINESS AND PROFESSIONS**

19 **CODE § 17200 *ET SEQ.* FOR UNFAIR, UNLAWFUL AND**

20 **FRAUDULENT BUSINESS PRACTICES**

21 **(Against All Defendants)**

22 142. Paragraphs 1 through 141 are hereby incorporated as though fully set forth
23 herein.

24 143. Within the four years preceding the filing of this Complaint, Defendants, and
25 each of them, individually, and in concert, have engaged in unfair, unlawful and fraudulent business
26 practices (collectively "unfair competition") within the meaning of Business and Professions Code
27 § 17200. These acts of unfair competition have caused handguns to be distributed to an illegal
28

1 market of users and, additionally, have resulted in intentional and accidental shootings by
2 unauthorized users.

3 144. Defendants, and each of them, have distributed, promoted, advertised, sold
4 and marketed handguns using practices that encourage sales to unauthorized users, including minors
5 and criminals without adequately screening, supervising, monitoring or regulating their employees,
6 distributors and dealers, and without adequately training, instructing, advising or setting standards
7 for distributors and/or dealers of handguns, regarding how to legally and responsibly sell handguns.
8 Defendants, and each of them, have caused, permitted, and allowed their handguns to be promoted,
9 marketed, distributed, and disseminated to unauthorized persons, including criminals and minors,
10 and have failed or refused to take reasonable steps to ensure that their handguns were not acquired by
11 unauthorized persons.

12 145. Defendants, and each of them, knew, or should have known, that their
13 distribution practices were unsafe. Defendant Manufacturers and Distributors, and each of them,
14 have continued to make sales to distributors and dealers, even though they knew, or should have
15 known, that such distributors and dealers had distributed handguns to illegal purchasers and the
16 illegitimate secondary market. Defendants, and each of them, knew, or should have known, that by
17 distributing handguns without adequate supervision, controls and reporting, their distribution
18 practices facilitate the flow of handguns into the illegitimate secondary market. Despite this
19 knowledge, defendants, and each of them have failed to monitor and control the distribution of
20 handguns, failed to change their acts and practices or to adopt procedures that would deter the flow
21 of handguns to the illegitimate secondary market, including but not limited to, Defendants' failure to
22 implement a product marketing plan, an electronic inventory and sales tracking system, and or
23 customer coverage policies.

24 146. Defendant Manufacturers and Distributors, and each of them, have adopted
25 distribution policies that allow and encourage distributors and dealers to make sales to likely straw
26 purchasers, including sales involving large numbers of handguns in a single transaction. Certain
27 Defendant Manufacturers and Distributors have adopted distribution policies that allow sales to
28 dealers who do not maintain a retail place of business for the sale of their handguns.

1 147. Defendants, and each of them, produce, market and distribute substantially
2 more handguns than they reasonably expect to sell to legitimate purchasers. In particular,
3 Defendants, and each of them, over-saturate markets with handguns in jurisdictions with relatively
4 weak gun control laws to meet the demand of the illegitimate secondary market in jurisdictions with
5 more restrictive gun control laws.

6 148. Defendant Manufacturers and Distributors, and each of them, have distributed
7 handguns to dealers without requiring dealers to ensure that purchasers' identification,
8 documentation and address is accurate.

9 149. Defendants, and each of them, have designed their handguns to appeal to
10 criminals and have increased production to meet this demand.

11 150. Defendant Manufacturers, and each of them, have designed and sold handguns
12 without incorporating feasible safety features and personalized gun technology that would prevent
13 unintentional shootings and unauthorized and unintended users from gaining access to the handguns,
14 have impeded the development and implementation of such features and devices, and have not
15 competed with each other in the marketplace by introducing handguns utilizing such technology.
16 Defendant Manufacturers, and each of them, have designed and sold handguns without incorporating
17 feasible technology that would prevent persons from unlawfully obliterating the serial numbers
18 required by law to be placed on those guns.

19 151. Defendants, and each of them, sell their handguns without providing adequate
20 warnings and instructions regarding the storage or use of their handguns.

21 152. Defendant Manufacturers, and each of them, have over-promoted the
22 purported self-defense and home protection benefits of their handguns in a manner that negates or
23 undercuts any warnings or instructions regarding safe storage of handguns, and have deceived,
24 misled, and confused the citizens of California regarding the safety of handguns by marketing their
25 product in a manner that promotes the belief that the use of handguns will increase home safety and
26 security, without providing to the public the information available to Defendants which demonstrates
27 that handguns possessed in the home actually increase the risk and incidence of homicide, suicide,
28 and unintentional injuries to handgun owners, their families and friends.

1 153. Defendants, and each of them, have undermined the public policies embodied
2 in local, state, and federal laws, including but not limited to California Penal Code § 12020.5, which
3 bans any advertising in California of certain unlawful weapons, including assault weapons.

4 154. Certain Defendants have engaged in unlawful business practices by violating
5 or aiding and abetting the violation of the California Roberti-Roos Assault Weapon Control Act of
6 1989, California Penal Code §§ 12275-12290.

7 155. Within the four years preceding the filing of this Complaint, Defendants, and
8 each of them, individually and in concert, have also engaged in unfair competition within the
9 meaning of Business and Professions Code § 17200 by unlawfully creating and maintaining public
10 and private nuisances as follows:

11 a. Defendants, and each of them, have unlawfully violated Penal Code § 372 by
12 creating and maintaining a public nuisance as defined by Penal Code § 370;

13 b. Defendants, and each of them, unlawfully created and maintained a public
14 nuisance as defined by Civil Code §§ 3479 and 3480;

15 c. Defendants, and each of them, unlawfully created and maintained a private
16 nuisance as defined by Civil Code §§ 3479 and 3481.

17 156. Plaintiffs, pursuant to Business and Professions Code § 17203, seek an order
18 of this Court: (1) enjoining defendants from continuing to undertake these unfair business practices;
19 (2) ordering defendants to undertake a corrective advertising campaign warning consumers of the
20 dangers associated with owning a gun in the home and instruct hand gun owners of the proper way to
21 store handguns in the home; (3) ordering restitution to the public for all funds unfairly obtained by
22 defendants as a result of their violation of Business and Professions Code §§ 17200 *et seq.*; and
23 (4) ordering defendants to disgorge all revenues and profits acquired as a result of their unfair
24 business practices.

1 **THIRD CAUSE OF ACTION**

2 **VIOLATION OF CALIFORNIA BUSINESS AND PROFESSIONS**

3 **CODE § 17500 FOR DECEPTIVE, UNTRUE OR**

4 **MISLEADING STATEMENTS AND ADVERTISING**

5 **(Against All Defendants)**

6 157. Plaintiff incorporates by reference paragraphs 1 through 156 as though fully
7 set forth herein.

8 158. Defendants, acting individually and/or in concert, have made unfair,
9 deceptive, untrue or misleading statements and advertisements in connection with the marketing and
10 sale of firearms in violation of California Business and Professions Code §§ 17500, *et seq.*
11 Defendants' unfair, deceptive, untrue or misleading statements include, but are not limited to,
12 engaging in a campaign of deception and misrepresentation concerning the dangers of their firearms
13 by disseminating advertisements and other statements which falsely state or imply that ownership of
14 guns will increase home safety and security. Defendants knew or by the exercise of reasonable care
15 should have known that home ownership of guns increases the risk of homicides, suicides and
16 accidental injury or death in the home and that their advertisements and/or statements were untrue
17 and/or misleading. Defendants failed to disclose the true nature of the risks associated with home
18 ownership of guns or to correct their advertisements and/or statements despite their knowledge that
19 they were misleading or wrong. Defendants' false or misleading statements and/or advertisements
20 are and have been likely to deceive members of the general public in California.

21 159. Plaintiffs seek an order of this Court: (1) enjoining defendants from
22 continuing to issue unfair, deceptive, untrue or misleading statements and advertising; (2) ordering
23 defendants to undertake a corrective advertising campaign warning consumers of the dangers
24 associated with owning a gun in the home and instruct hand gun owners of the proper way to store
25 handguns in the home; (3) ordering restitution to the public for all funds unfairly obtained by
26 defendants as a result of their violation of Business and Professions Code §§ 17500 *et seq.*;
27 (4) ordering defendants to disgorge all revenues and profits acquired as a result of their violation of
28

1 Business and Professions Code §§ 17500 *et seq.*; and (5) ordering Defendants to pay civil penalties
2 as a result of their violation of Business and Professions Code §§ 17500 *et seq.*

3 **PRAYER FOR RELIEF**

4 Wherefore, Plaintiff prays for relief and judgment against the Defendants jointly and
5 severally, as follows:

6 1. On the First Cause of Action for public nuisance, for preliminary and
7 permanent injunctive relief, requiring Defendants and their respective successors, agents, servants,
8 officers, directors, employees and all persons acting in concert with them to cease and desist from
9 engaging in practices that create a public nuisance;

10 2. On the Second and Third Causes of Action, for injunctive and declaratory
11 relief pursuant to Business and Professions Code §§ 17203 and 17535:

12 a. Declaring that Defendants have engaged in unlawful, unfair, and
13 fraudulent business acts and practices in violation of Business and Professions Code §§ 17200 *et seq.*
14 and §§ 17500 *et seq.*, and

15 b. Enjoining Defendants and their respective successors, agents, servants,
16 officers, directors, employees and all persons acting in concert with them from engaging in conduct
17 in violation of Business and Professions Code §§ 17200 *et seq.* and §§ 17500 *et seq.*

18 3. For pre-judgment and post-judgment interest as provided by law;

19 4. For restitution and/or disgorgement of wrongfully obtained monies pursuant to
20 Business and Professions Code § 17203 and § 17535;

21 5. For civil penalties pursuant to Business and Professions Code § 17500;

22 6. For costs of suit as provided by law;

- 1 7. For attorneys' fees as provided by law; and
2 8. For such further relief as the Court deems equitable and just.
3

4 Dated: August 6, 1999

Respectfully submitted,

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By: Lo R. Hafetz

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8 ANDREW'S SPORTING GOODS, INC.
9 dba TURNER'S OUTDOORSMAN
10 and S.G. DISTRIBUTING, INC.

11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12
13 FOR THE COUNTY OF SAN DIEGO

14	Judicial Council Coordination Proceeding Special Title (Rule 1550(b)))	JUDICIAL COUNCIL COORDINATION PROCEEDINGS NO. 4095
15	FIREARM CASES)	
16	Coordinated actions:)	
17	THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel. the County of Los Angeles, et. al.,)	Superior Court of California City & County of San Francisco No. 303753
18	v.)	Superior Court of California County of Los Angeles No. BC210894
19	ARCADIA MACHINE & TOOL, et. al.,)	Superior Court of California County of Los Angeles No. BC214794
20	THE PEOPLE OF THE STATE OF CALIFORNIA, by and through JAMES K. HAHN, City Attorney of the City of Los Angeles, et. al.,)	DEFENDANT ANDREWS SPORTING GOODS, INC.'S AND S.G. DISTRIBUTING'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS.
21	v.)	
22	ARCADIA MACHINE & TOOL, et. al.,)	Date: Time: 8:30 a.m. Dept. 65 Hon. Vincent. P. DiFiglia
23	THE PEOPLE OF THE STATE OF CALIFORNIA, by and through San Francisco City Attorney Louise H. Renne, v.)	
24	ARCADIA MACHINE & TOOL, et. al.)	

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on _____, 2003 at 8:30 a.m., or as soon as can be
3 heard, in Department 65, of the above-entitled court, Defendant, ANDREW'S SPORTING
4 GOODS, INC. dba TURNERS OUTDOORSMAN, and S.G. DISTRIBUTING will move this
5 Court for an Judgment on the Pleadings on some claims brought against ANDREWS by plaintiffs
6 involved in the three separate actions that have been coordinated in this Court.

7 In essence, Plaintiffs' three separate actions allege that defendants' otherwise lawful
8 manufacture, distribution, and sale of firearms creates a public nuisance and constitutes unfair
9 business practices. All 23 plaintiffs allege causes of action for injunctive relief based on public
10 nuisance (Code of Civil Procedure section 731 ("Section 731")) and unfair business practices
11 (Business and Professions Code §§ 17200 et seq. ("Section 17200")). Eleven of those plaintiffs
12 also include a cause of action for false advertising (Business and Professions Code §§ 17500 et
13 seq. ("Section 17500")). Plaintiffs further seek civil penalties under the latter two causes of action
14 (under Sections 17206 and 17536). Thus, most plaintiffs seek injunctive and monetary relief under
15 five separate statutes—75 statutory claims, in all. A threshold problem, however, is that most
16 plaintiffs lack standing to raise some or any of those claims.

17 This Motion is based upon this Notice and Motion, the Memorandum of Points and
18 Authorities filed herewith, the files and records of this case, and any evidence, argument, or
19 authorities to be presented at the hearing on the motion.

20 Dated: January 3, 2003

TRUTANICH • MICHEL, LLP:

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22 C. D. Michel

23 C. D. Michel
24 Attorneys for Defendant
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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Haydee Villegas, declare:

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

2. On January 3, 2003, I served the foregoing document(s) described as **DEFENDANT ANDREW’S SPORTING GOODS, INC.’S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS** on the interested parties in this action by JusticeLink Electronic filing on all persons appearing on the Service List.

I declare under penalty that the foregoing is true and correct. Executed this 3rd day of January 2002, at San Pedro, California.

Haydee Villegas
Haydee Villegas

3

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6 Attorneys for Defendants
7 Andrews Sporting Goods, Inc.,
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9 and SG Distributing, Inc.

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

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

13 FIREARMS CASES)

14 Coordinated actions:)

15 THE PEOPLE OF THE STATE OF)
16 CALIFORNIA, by and through San)
17 Francisco City Attorney Louise H. Renne,)

18 v.)

19 ARCADIA MACHINE & TOOL, et al.,)

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

24 v.)

25 ARCADIA MACHINE & TOOL, et al.,)

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

v.)

ARCADIA MACHINE & TOOL, et al.)

JUDICIAL COUNCIL COORDINATION
PROCEEDINGS NO. 4095

Superior Court of California, City and County
of San Francisco, Case No. 303753

Superior Court of California, City and County
of Los Angeles, Case No. BC210894

Superior Court of California, City and County
of Los Angeles, Case No. BC214794

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT ANDREWS SPORTING
GOODS'S AND S.G. DISTRIBUTING'S
MOTION FOR JUDGMENT ON THE
PLEADINGS**

Date:
Time: 8:30 a.m.
Dept. 65
Hon. Vincent. P. DiFiglia

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Lamont Storm Water Dist. v. Pavich (2000) 78 Cal. App. 4th 1081	3
Parker v. Bowron (1953) 40 Cal.2d 344	2
People v. Parmar (2001) 86 Cal.App. 4th 781	4
Santa Monica Rent Control Bd. v. Bluvshstein (1991) 230 Cal.App.3d 308	7
Stoops v. Abbassi (2002) 100 Cal.App.4th 644	2
Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d. 116	5

STATE STATUTES

Cal. Bus. & Prof. Code

§ 17200	6, 7
§ 17201	7, 13
§ 17204	6-11, 13
§ 17206	11, 4
§ 17500	7, 12-14
§ 17506	12, 13
§ 17535	8, 12, 13
§ 17536	12, 14

1 **I. INTRODUCTION**

2 Defendant Andrews Sporting Goods, Inc., dba Turners Outdoorsman ("ASG"), one of only two
3 viable firearm retailers remaining in this case, and SG Distributing ("SGD") (collectively "Defendants")
4 hereby move for Judgment on the Pleadings on most claims brought against Defendants by 12 of the 23
5 plaintiffs involved in the three separate actions that have been coordinated in this Court (the "FIREARMS
6 CASES"). In essence, Plaintiffs' three separate actions allege that Defendants' otherwise lawful
7 manufacture, distribution, and sale of firearms creates a public nuisance and constitutes unfair business
8 practices. A threshold problem, however, is that most plaintiffs lack standing to raise some or any of those
9 claims.

10 While the state legislature authorized certain government attorneys to bring these actions on behalf
11 of the "People of the State of California" and certain private parties to bring these actions on behalf of
12 themselves or the "general public," the state legislature also established *specific* standing requirements for
13 such actions. Based on a review of the standing requirements for the statutes at issue, this Court can and
14 should dismiss 49 of the 75 claims brought by Plaintiffs (as depicted on the "Statutory Standing Chart"
15 attached hereto as Exhibit "A"). Moreover, thirteen plaintiffs can be eliminated entirely, for they lack
16 standing to bring claims under *any* of the subject statutes.

17 Thus, Defendants seek by this motion for judgment on the pleadings to substantially reduce the
18 number of claims and parties in this coordinated case, thereby narrowing the issues, reducing its own
19 defense burden and, at the same time, serving judicial economy.¹

20
21 **II. JUDGMENT ON THE PLEADINGS, LIKE A DEMURRER, APPLIES TO LACK OF**
22 **STANDING.**

23 A defendant is entitled to a judgment on the pleadings if the complaint does not state facts sufficient
24 to constitute a cause of action against that defendant. (Cal. Code of Civ. Proc. § 438 (c)(1)(B)(ii).) A

25 ¹ **San Francisco Action:** The complaint filed by and through San Francisco City Attorney Louise H. Renne,
26 et al. (the "San Francisco City Suit"), does not name Defendants. San Francisco nonetheless has treated them as
27 though it were part of its lawsuit, something ASG and SGD deny, inasmuch as these cases have been coordinated not
28 consolidated. Regardless, because the standing analysis applies equally to the plaintiffs in the San Francisco City Suit,
this analysis includes those plaintiffs in footnotes to the standing analysis and the "Statutory Standing Chart" attached
hereto as Exhibit "A," for the Court's consideration.

1 judgment on the pleadings “may be made on the same ground as those supporting a general demurrer.”
2 (*Stoops v. Abbassi* (2002) 100 Cal.App.4th 644, 650 [122 Cal.Rptr.2d 747].)

3 “It is elementary that a party asserting a claim must have standing to do so.” (*Berclain America*
4 *Latina v. Baan Co.* (1999) 74 Cal.App.4th 401, 405 [87 Cal.Rptr.2d 745].) Where an action is entirely
5 statutory, it is necessary to bring the action in name of a person to whom the right to sue was given by
6 statute, regardless of any question as to the real party in interest. (*Black Rock Placer Mining Dist. v.*
7 *Summit Water & Irrigation Co.* (1943) 56 Cal.App.2d 513, 517 [133 P.2d 58].) Where a complaint states
8 a cause of action in someone, but not in plaintiff, a general demurrer for failure to state a cause of action
9 will be sustained. (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351 [254 P.2d 6].)

10 Further, as noted in B. E. Witkin’s treatise on California procedure, lack of standing is commonly
11 raised through a motion for judgment on the pleadings:

12 Objections that a complaint does not state facts sufficient to constitute a cause of action
13 are normally raised by a general demurrer. But the general demurrer is not the only
14 procedural device available for this purpose, and it is possible to raise the objection more
15 than once by different methods. The most common is a motion at the trial, or prior to trial,
16 for judgment on the pleadings. That motion by the defendant is made on the same grounds,
17 and is decided on the same basis as a general demurrer, i.e., it will be granted only if the
18 complaint on its face fails to state a cause of action. Since this defect of substance is not
19 waived by failure to demur and may be raised at any time on trial or appeal (supra, §911),
20 the motion may be made without previously demurring, and an order overruling a general
21 demurrer does not preclude granting the motion at trial. (5 Witkin, Cal. Proc. 4th (1997)
22 Plead, § 954, p. 410-11 (case citations omitted)(emphasis added).)

23 As shown below, a number of plaintiffs lack standing to be party to this action, either in its entirety
24 or as to certain causes. Defendants will address the standing requirements for each cause of action and
25 claim for relief separately, and then examine whether each plaintiff in the FIREARMS CASES meets those
26 requirements.

27 **III. ONLY DISTRICT ATTORNEYS AND CITY ATTORNEYS MAY BRING ACTIONS ON**
28 **BEHALF OF “THE PEOPLE OF THE STATE OF CALIFORNIA” TO ABATE A PUBLIC**
NUISANCE UNDER CCP §731.

Fifteen of the twenty-three plaintiffs in the FIREARMS CASES allege a public nuisance cause of
action on the grounds that Defendants’ conduct is a public nuisance within the meaning of Civil Code
sections 3479 and 3480. The statutory standing provisions for a civil action seeking to abate a public
nuisance are found in Code of Civil Procedure section 731 (“Section 731”). Section 731 provides that such

1 actions may be brought by district or city attorneys, only, and must be brought in the name of the ‘People of
2 the State of California:”

3 731. . . . A civil action may be brought in the name of *the people of the State of California*
4 to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of
5 the Civil Code, *by the district attorney* of any county in which such nuisance exists, *or by the*
6 *city attorney* of any town or city in which such nuisance exists . . . (Code Civ. Proc., §
7 731)(emphasis added)

8 Standing for public nuisance actions under Section 731 has been narrowly construed to include only
9 those public officers listed, i.e., district attorneys and city attorneys, exclusively. For example, in *Lamont*
10 *Storm Water Dist. v. Pavich* (2000) 78 Cal. App. 4th 1081 [93 Cal.Rptr.2d 288], a storm water district
11 brought an action against a county and property owners seeking to have the diversion of certain water flows
12 declared an abatable public nuisance. (*Id.* at pp. 1082-83.) The court held that, despite the authority to sue
13 and be sued under its charter, the water district lacked standing to sue for abatement of a public nuisance,
14 noting that:

15 [W]hen the Legislature has intended to grant the power to abate a nuisance, it has done so
16 specifically and in clear terms. Thus, Code of Civil Procedure section 731 provides that the
17 district attorney and the city attorney have the right and, upon direction from their respective
18 legislative bodies, the duty to bring an action to abate a public nuisance. (*Id.* at pp. 1084-
19 1085.)

20 Similarly, in *Board of Sup'rs of Los Angeles County v. Simpson* (1951) 36 Cal.2d 671 [227 P.2d
21 14], the California Supreme Court held that it was the duty of the district attorney, not county counsel, to
22 abate a public nuisance. (*Id.* at p. 675) In that case, the Court examined the respective roles of the county
23 counsel and district attorney in the context of deciding who was the proper party to bring an action to abate
24 a public nuisance. The Court noted that the Los Angeles County charter “invests the county counsel with
25 the duty of representing all county officers in all matters pertaining to their duties and with ‘exclusive
26 charge and control of all civil actions and proceedings in which the county or any officer thereof, is
27 concerned or is a party.’ (*Id.* at p. 672, *citing* Los Angeles County Charter, § 21; Stats. 1913, p. 1484.)
28 Further, the Court noted that abatement of a public nuisance is a civil action. (*Ibid.*) The Court held,
however, that the specific provisions of Section 731 requiring district attorneys or city attorneys to
prosecute actions to abate a public nuisance in the name of the People of the State of California overrode
any general authority county counsel might have to bring such actions under its charter. Accordingly, the
Court held that it was the particular duty of the district attorney, not the county counsel, to seek abatement

1 of a public nuisance. (*Board of Sup'rs of Los Angeles County v. Simpson, supra*, 36 Cal.2d at p. 673.):

2 "A civil action may be brought in the name of the people of the State of California to abate
3 a public nuisance ... by the *district attorney* of any county in which such nuisance exists ...
4 and such district attorney ... of any county ... in which such nuisance exists *must* bring such
5 action whenever directed by the board of supervisors of such county ..." (Emphasis added.)
6 (Code Civ. Proc., § 731.) (See, also, Gov. Code, § 26528.) Thus the particular duty with
7 respect to abatement of public nuisances is that of the district attorney. That is a factor with
8 some significance as a particular statutory provision should prevail over a general one. (Civ.
9 Code, § 3534; Code Civ. Proc., § 1859.)

10 (*Ibid.*)

11 The court in *People v. Parmar* (2001) 86 Cal.App. 4th 781, 798 [104 Cal.Rptr.2d 31] thoroughly
12 analyzed the distinction between county counsel and district attorneys in the context of public nuisance
13 abatement:

14 2. The nature of the district attorney's office

15 . . . When county counsel is employed, most, but not all, of the district attorney's civil
16 functions are performed by the county counsel. *However, the district attorney retains some*
17 *civil law duties, including nuisance abatement.*

18 (*Ibid.*)(emphasis added).

19 Despite this clear legislative directive and settled case law, seven plaintiffs in the FIREARMS
20 CASES alleged public nuisance as a cause of action, even though they were not city attorneys or district
21 attorneys and/or did not bring the action in the name of the "People of the State of California." These
22 causes should be summarily dismissed.

23
24 **A. Los Angeles County Suit: All Plaintiffs Lack Standing to Bring a Public**
25 **Nuisance Claim; None are District Attorneys or City Attorneys.**

26 According to paragraph 12 of the complaint filed in the Los Angeles County Suit, the plaintiffs
27 therein bringing a public nuisance cause of action are as follows:

- 28 (1) The People of the State of California, *ex rel.* the County of Los Angeles;
(2) Los Angeles County, on behalf of itself and the general public;
(3) Gloria Molina, Supervisor of Los Angeles County, on behalf of the general public;
(4) Zev Yaroslavsky, Supervisor of Los Angeles County, on behalf of the general public;
(5) Yvonne Burke, Supervisor of Los Angeles County, on behalf of the general public.

None of the Los Angeles County plaintiffs is a district attorney or city attorney, thus all lack
standing. In addition, all but the first plaintiff listed above, People of the State of California, *ex rel.* the

1 County of Los Angeles, brought their public nuisance claims on behalf of the “general public,” another
2 disqualifying defect.²

3 Notably, the distinction between which plaintiffs bring the claims at issue in this FIREARMS CASE
4 is not merely one of form. It would make little sense for the legislature to draw such specific distinctions in
5 Section 731 and the other standing statutes at issue herein, if that were the case. In short, standing matters.
6 For example, in *Board of Sup'rs of Los Angeles County v. Simpson, supra*, 36 Cal.2d 671, Simpson was the
7 Los Angeles District Attorney and had refused the Board’s request to bring a public nuisance action. The
8 Board responded with a petition for writ of mandamus. (*Id.* at 672) In that case, the putative reason
9 District Attorney Simpson declined to bring the action was that it was the duty of county counsel to do so.
10 (*Ibid.*) It is not difficult to imagine, however, a district or city attorney’s office disagreeing with their
11 respective government entities about filing an action for any number of reasons, e.g., if the action were
12 frivolous, raised nonjusticiable claims, or was being brought for improper purposes.

13 Similarly, the Los Angeles County Board of Supervisors, some of whose members are named
14 plaintiffs herein,³ can direct the district attorney to abate a public nuisance under Section 731, but their
15 failure to do so is not necessarily insignificant. Again, the district attorney might have concerns about the
16 merits of this case, and might object to direction from the Board.

17 In any event, under the unambiguous provisions of Section 731, none of the plaintiffs bringing a
18 cause of action for public nuisance in the Los Angeles County Suit have standing to do so. Accordingly,
19 judgment should be entered against them on those causes.

20
21 ² The County of Los Angeles purports to be the “relator” on behalf of the State in this statutory action, rather
22 than the district attorney or county counsel (who signed the pleading). Even if county counsel (rather than the
23 County) were attempting to bring this public nuisance action on behalf of the People of the State of California, it
24 nonetheless fails because the county counsel is not authorized to bring such an action under Section 731, only district
attorneys and city attorneys may do so.

25 ³ It appears that Supervisors Gloria Molina, Zev Yaroslavsky, and Yvonne Brathwaite Burke are not
26 bringing an action to abate a public nuisance in their individual capacities, based on repeated references within the
27 complaint to these plaintiffs as Supervisors of Los Angeles County. Where it is doubtful in what capacity a party
28 sues or is sued, reference may be had to the entire complaint. (*Boland v. Cecil* (Super. 1944) 65 Cal.App.2d Supp.
832 [150 P.2d 819].) In the unlikely event that these Supervisors intended to sue in their individual capacities, they
nonetheless lack standing because, as individuals, they have not alleged any harm specific to them in their complaint,
let alone any injury different from that allegedly suffered by the public in general. (See *Venuto v. Owens-Corning
Fiberglas Corp.* (1971) 22 Cal. App. 3d. 116, 124 [99 Cal.Rptr. 350].)

1
2 **B. Los Angeles City Suit: As City Attorneys, Four Plaintiffs in This Action Arguably Have Standing.**

3 Four of the seven plaintiffs in the Los Angeles City Suit brought a cause of action for public
4 nuisance against defendants (Los Angeles City Complaint, ¶ 23). Each of those plaintiffs is a city attorney
5 acting on behalf of the People of the State of California, as required by Section 731. Therefore, these
6 plaintiffs pass the threshold test regarding standing under Section 731.⁴

7
8 **C. Conclusion: The Court Should Enter Judgment Against Seven Plaintiffs on Their Public Nuisance Claims Because Plaintiffs Lack Standing.**

9 The following Plaintiffs in the FIREARMS CASES alleged a public nuisance cause of action, but
10 failed to comply with the mandatory standing provisions of Section 731, thus rendering their claims
11 defective (defects underlined)⁵:

12 **Los Angeles County Suit:**

- 13 (1) People of the State of California, *ex rel.* County of Los Angeles;
14 (2) Los Angeles County on behalf of itself and the general public;
15 (3) Supervisor Gloria Molina on behalf of the general public;
16 (4) Supervisor Zev Yaroslavsky on behalf of the general public; and
17 (5) Supervisor Yvonne Brathwaite Burke on behalf of the general public.

18 Accordingly, these claims should be dismissed.

19
20 **IV. SEVENTEEN PLAINTIFFS FAILED TO MEET THE STATUTORY STANDING REQUIREMENTS OF SECTIONS 17204 & 17206.**

21 Business and Professions Code section 17200, et seq., (hereinafter, the Unfair Competition Law, or
22 “UCL”) defines unfair competition to include “any unlawful, unfair or fraudulent business act or practice
23

24 ⁴ This analysis, of course, does not address whether plaintiffs’ public nuisance claims are valid or whether
25 the issues are justiciable; Defendants contend they are neither.

26 ⁵ **San Francisco Action:** According to paragraph 4 of San Francisco’s First Amended Complaint (hereinafter
27 referred to as “FAC”), San Mateo County Counsel, Thomas F. Casey III; and Alameda County Counsel, Richard E.
28 Winnie brought public nuisance claims in their capacity as county counsel and, therefore, lack standing. (See *Board of Sup’rs of Los Angeles County v. Simpson, supra*, 36 Cal.2d at p. 673.) Alameda County Counsel Richard E. Winnie is listed as a plaintiff in paragraph 4 of San Francisco City’s First Amended Complaint, suing on behalf of the People of the State of California. But based on the caption and paragraph 5 of the First Amended Complaint, he appears to be representing only Alameda County suing on behalf of the general public, pursuant to Section 17204. Regardless of whether he represents the State and/or the general public, County Counsel Winnie still lacks standing to bring a public nuisance action under Section 731 because he is not a district or city attorney.

1 government agency; it is none of the things included in the definition of person. Therefore, it has no
2 standing to bring an action for an injunction pursuant to the Unfair Practices Act.”.) If it did not, then the
3 specific and exclusive list of public officials, and the parties on whose behalf they may act, would be
4 rendered meaningless by the general language of the section’s final clause. Under basic statutory
5 construction rules (e.g., *ejusdem generis*), the specific list of government officials who can bring actions
6 under the standing requirements of Sections 17204 (and 17535, discussed below) indicates that the general
7 term, “person,” was not meant to include other, unnamed government officials or entities, but rather applies
8 to private parties.

9 The canon [*Ejusdem generis*] presumes that if the Legislature intends a general word to be
10 used in its unrestricted sense, it does not also offer as examples peculiar things or classes of
11 things since those descriptions then would be surplusage. (*Kraus v. Trinity Management
Services* (2000) 23 Cal.4th 116, 141 [96 Cal.Rptr.2d 485].)

12 In addition, B. E. Witkin’s Summary of California Law provides an in depth analysis of proper
13 parties to actions under California’s unfair competition laws, along with references to supporting case law,
14 as set forth below. Witkin’s review of the UCL and case law reveals that “persons” for the purposes of the
15 UCL applies only to private parties:

16 **b-1. [§ 95A] (New) Parties to Actions.**

17 (2) *Government Officers or Entities as Parties.* With the exception of the government
18 attorneys expressly authorized to bring actions under the UCL, government officers or
entities generally may not sue or be sued.

19 (See 11 Witkin, Summary 9th (2002 supp.) Equity, § 95A, p. 450.)(See cases cited therein.)

20 In sum, only the government attorneys listed in Section 17204, as limited by the conditions set forth
21 therein, may bring an action under the UCL. Public entities and officers (with the exception of those listed)
22 are not proper parties; they cannot sue or be sued under the UCL. (11 Witkin, Summary 9th (2002 supp.)
23 Equity, § 95A, p. 450) Further, while private parties also may bring an action, apparently none of the
24 Plaintiffs herein is suing as a private party. Consequently, as shown below, seventeen Plaintiffs failed to
25 meet the statutory standing requirements to bring an action under the UCL.

26 **A. Los Angeles County Suit: None of the Plaintiffs Have Standing to Bring an Action**
27 **Under California’s Unfair Competition Law.**

28 According to paragraph 12 of the complaint filed in the Los Angeles County Suit, all plaintiffs

1 therein seek injunctive relief under the UCL, pursuant to Section 17204, as follows:

- 2 (1) People of the State of California, *ex rel.* Los Angeles County;
- 3 (2) On behalf of itself and the general public, Los Angeles County;
- 4 (3) On behalf of the general public, by Los Angeles County Supervisor Gloria Molina;
- 5 (4) On behalf of the general public, by Los Angeles County Supervisor Zev Yaroslavsky;
- 6 (5) On behalf of the general public, by Los Angeles County Supervisor Yvonne Burke.

7 The first two UCL claims are brought by the County of Los Angeles, one on behalf of the People of
8 the State of California, and the other on behalf of itself and the general public. As noted above, counties are
9 not proper parties, and have no standing to bring a UCL claim.⁷

10 County Supervisors are not among the public officers specifically listed in Section 17204 and,
11 therefore, cannot bring an action under the UCL in their public capacity. Further, there is nothing in the
12 complaint to suggest that any Supervisor plaintiffs therein brought their claims as a private party, or
13 “person,” under the last clause of Section 17204, and therefore they cannot sue in their private capacity on
14 behalf the general public. Thus, Supervisors Molina, Yaroslavsky, and Burke have no standing.

15
16 **B. Los Angeles City Suit: Only One Plaintiff Arguably Has Standing to Seek Injunctive**
17 **Relief Under the UCL.**

18 All seven plaintiffs in the Los Angeles City Suit brought a cause of action under the UCL against all
19 defendants (Los Angeles City Complaint ¶¶ 23 and 24), as follows:

- 20 (1) James K. Hahn, City Attorney of Los Angeles, on behalf of the People;
- 21 (2) Legrand H. Clegg II, City Attorney of Compton, on behalf of the People;
- 22 (3) Charles E. Dickerson III, City Attorney of Inglewood, on behalf of the People;
- 23 (4) Michael Jenkins, City Attorney of West Hollywood, on behalf of the People;
- 24 (5) Legrand H. Clegg II, City Attorney of Compton, on behalf of the general public;
- 25 (6) Roosevelt Dorn, Mayor of Inglewood, on behalf of the general public; and
- 26 (7) John Heilman, Mayor of West Hollywood, on behalf of the general public.

27 The first four plaintiffs filed as city attorneys acting on behalf of the “People of the State of
28 California” and, thus, are among the government attorneys considered by Section 17204. Only one, the Los
29 Angeles City Attorney, is from a city with a population exceeding 750,000. Under the standing provisions,

30 ⁷ Even assuming, *arguendo*, that the claims are being brought by county counsel, the subject complaint lacks
any allegation that Los Angeles County Counsel’s UCL claims are “authorized by agreement with the district attorney
in actions involving violation of a county ordinance,” as required (and as was done in the proper pleading by San
Mateo’s County Counsel, see discussion below, section IV, subsection “C”). Absent such allegations, the Los
Angeles County Counsel lacks standing to bring the subject claims.

1 the remaining city attorneys had to obtain and allege the consent of their respective district attorneys to
2 have standing. They did not. Consequently, they lack standing.

3 The remaining three plaintiffs are identified in the FAC as public officials, yet purport to bring UCL
4 actions as “persons” on behalf of the “general public.” As discussed above, the definition of “person” does
5 not include municipalities, public entities, or public officials. Consequently, as public officials they lack
6 standing. The two Mayors’ claims suffer from an additional defect, inasmuch as Mayors, like County
7 Supervisors, are not among the public officials listed in Section 17204, and lack standing on that basis.
8 Finally, City Attorney Clegg cannot evade the “district attorney consent” requirement by bringing his claim
9 on behalf of the general public rather than the People of the State of California. Thus, only the Los
10 Angeles City Attorney arguably complied with the standing requirements. The other six plaintiffs lack
11 standing, and judgment should be entered against them.

12
13 **C. Conclusion: The Court Should Dismiss All UCL Causes of Action Except those**
14 **Brought by the City Attorneys of Los Angeles and San Francisco and the County**
Counsel for San Mateo County.

15 Each plaintiff herein that brought a claim under UCL did so pursuant to the standing
16 provisions of Section 17204. The California legislature amended Section 17204 in 1993, inserting the word
17 “shall” for “may” and adding the word “exclusively” when designating those government attorneys who
18 could bring a UCL action, so that the section now begins: “Actions for **any relief** pursuant to this chapter
19 **shall be prosecuted exclusively . . .** by the Attorney General . . .” (West’s Ann. Cal. Bus. & Prof. Code §
20 17204 (West 2002)[Historical and Statutory Notes](emphasis added).) Accordingly, plaintiffs should be
21 required to plead based on the specific language in that section—it is mandatory, exclusive, and was altered
22 to that effect by a recent amendment. In short, the legislative intent is clear.

23 Based on the above analysis, only the City Attorneys for Los Angeles and San Francisco⁸ complied
24

25 ⁸ **San Francisco Action:** As discussed above, the definition of “person” for purposes of Section 17204 does
26 not include municipalities, nor public entities. Thus, the Cities of Berkeley, Oakland, and East Palo Alto, and the
27 County of Alameda lack standing since no other provision grants cities or counties standing. Sacramento Mayor Joe
28 Serna, Jr., also sues on behalf of the general public, presumably under the provision allowing suits by “persons.” The
Mayor, however, has not alleged a claim in his individual capacity and, therefore, does not come within the definition
of “person” for purposes of this action. Accordingly, Defendants Motion for Judgment on the Pleadings should be
granted as to the UCL claims brought by the above identified San Francisco City Suit plaintiffs.

1 with the specific provisions of Section 17204, by qualifying as “a city attorney of a city ...having a
2 population in excess of 750,000.” County Counsel for San Mateo also complied with the standing
3 provisions. The other city attorney plaintiffs represent cities with lesser populations, and did not obtain or
4 allege the “consent of the district attorney,” as required. The remaining plaintiffs improperly filed on behalf
5 of the general public and/or were not public officials listed in Section 17204. Each of these plaintiffs lacks
6 standing, and judgment should be entered against them on their UCL causes of action. The plaintiffs that
7 lack standing are listed below (with defects underlined):

8 **Los Angeles County Suit:**

- 9 (1) People of the State of California, *ex rel.* Los Angeles County;
10 (2) On behalf of itself and the general public, Los Angeles County;
11 (3) On behalf of the general public, by Los Angeles County Supervisor Gloria Molina;
12 (4) On behalf of the general public, by Los Angeles County Supervisor Zev Yaroslavsky;
13 (5) On behalf of the general public, by Los Angeles County Supervisor Yvonne Burke;

14 **Los Angeles City Suit:**

- 15 (6) Legrand H. Clegg II, City Attorney of Compton, on behalf of the State [<750,000];
16 (7) Charles E. Dickerson III, City Attorney of Inglewood, on behalf of the State [<750,000];
17 (8) Michael Jenkins, City Attorney of West Hollywood, on behalf of the State [<750,000];
18 (9) Legrand H. Clegg II, City Attorney of Compton, on behalf of the general public;
19 (10) Roosevelt Dorn, Mayor of Inglewood, on behalf of the general public;
20 (11) John Heilman, Mayor of West Hollywood, on behalf of the general public;

21 **D. Only Plaintiffs Bringing a UCL Claim in the Name of the “People of the State of
22 California” May Have Standing to Recover Civil Penalties, Under Section 17206.**

23 While plaintiffs’ lack of standing to bring a UCL action in the first instance precludes any associated
24 claims for relief, it should be noted that most plaintiffs who seek civil penalties under UCL claims lack
25 standing to do that, as well, due to the separate standing requirements for that particular relief. Standing
26 requirements for plaintiffs seeking civil penalties are set forth in Section 17206,⁹ which provides standing
27 exclusively to certain government attorneys, and only for actions brought in the name of the “People of the
28 State of California.”

29 ⁹Business and Professions Code section 17206 provides: “...civil penalties...shall be assessed and recovered in
30 a civil action brought in the name of the people of the State of California by the Attorney General, by any district
31 attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a
32 county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with
33 the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, or, with the
34 consent of the district attorney, by a city attorney in any city and county.

1 The standing provisions for civil penalties track those of Section 17204, discussed above, with one
2 notable exception: they do not include any provision for private parties or “persons.” By the statutes plain
3 terms, civil penalties may be recovered only by public law enforcement officials, not private litigants. In
4 such cases, the real party in interest is the State of California. (*People v. Steelcase, Inc.* (C.D.Cal. 1992)
5 792 F.Supp. 84, 86; *see also Brown v. Allstate Ins. Co.* (S.D.Cal.1998) 17 F.Supp.2d 1134, 1140 (private
6 individuals cannot seek damages on statutory claim for unfair business practices; private remedies are
7 limited to equitable relief, and civil penalties are recoverable only by specified public officers).)

8 Consequently, it is axiomatic that the same parties who lack standing to bring a UCL action for
9 injunctive relief (listed above in section “C”) also lack standing for civil penalties.

10
11 **V. FIVE PLAINTIFFS FAILED TO MEET THE STATUTORY STANDING**
12 **REQUIREMENTS OF SECTION 17535 AND THUS CANNOT BRING AN ACTION FOR**
13 **FALSE ADVERTISING.**

14 Plaintiffs in the Los Angeles County Suit and San Francisco City Suit claim violations of Section
15 17500, et seq., alleging that Defendants engaged in false and misleading advertising. The standing
16 provisions for injunctive relief and civil penalties for such claims are found in Business and Professions
17 Code sections 17535 (“Section 17535”) and 17536 (“Section 17536”) respectively.

18 Section 17535 provides:

19 . . . Actions for injunction under this section may be prosecuted by the Attorney General or
20 any district attorney, county counsel, city attorney, or city prosecutor in this state in the
21 name of the people of the State of California upon their own complaint or upon the
22 complaint of any board, officer, person, corporation or association or by any person acting
23 for the interests of itself, its members or the general public.

24 This provision is broader than Section 17204 in that it does not place restrictions on the government
25 attorneys listed, other than that they bring their false advertising actions in the name of the People of the
26 State of California. The restrictions as to “persons” bringing actions on behalf of the “general public,”
27 however, remain the same: only private parties can do so. The definition of “person” for purposes of
28 Section 17535 is: “all natural persons, corporations, firms, partnerships, joint stock companies, associations
and other organizations of persons.” (Cal. Bus. & Prof. Code §17506) “Government entities...are not
included in this definition of person.” (*Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824,
831.)

- 1 (6) Legrand H. Clegg II, City Attorney of Compton, on behalf of the general public;
2 (7) Roosevelt Dorn, Mayor of Inglewood, on behalf of the general public;
3 (8) John Heilman, Mayor of West Hollywood, on behalf of the general public

4 The Los Angeles City plaintiffs listed below have standing as to some claims. However, judgment
5 should be entered against them on individual causes of action¹³, as follows: The City Attorney of Compton,
6 City Attorney of Inglewood, and the Mayor of West Hollywood (i.e., the plaintiffs listed in paragraph 24 of
7 the FAC) lack standing to bring a UCL cause of action on behalf of the general public, because they are not
8 private parties.

9 VII. CONCLUSION

10 Plaintiffs in the coordinated FIREARMS CASES have filed three separate causes of action against
11 Defendants, each of which requires compliance with statutory standing provisions. Defendants asks this
12 Court to enforce the statutory standing provisions and dismiss those plaintiffs identified herein who lack
13 standing to bring *any* of the causes of action alleged, and therefore are not proper parties to this case. As to
14 the remaining plaintiffs, judgment should be entered against them on individual causes of action for which
15 they lack standing.

16 As a practical matter, Defendants respectfully submit that there will be ample parties and lawyers
17 remaining to fully air the issues of fact and law as to each cause of action alleged in these coordinated cases,
18 even with the departure of those parties that lack standing. In addition, not all defects noted herein are
19 curable. And some that may be cured in theory, may not be cured in fact, especially in those situations
20 where current "improper" parties require consent from experienced and objective prosecutors before they
21 can attain standing to proceed.

22 For the reasons stated, Defendants asks that this Court grant this Motion for Judgment on the
23 Pleadings as to the individual causes of action for which plaintiffs herein lack standing, as identified above
24 and listed in summary form in Exhibit A ("Statutory Standing Chart").

25 Dated: January 3, 2003

TRUTANICH • MICHEL, LLP

26 _____
27 ¹³ **San Francisco Action:** San Mateo County Counsel, Thomas F. Casey III, on behalf of the People of the
28 State of California, has no standing to bring a cause of action to abate a public nuisance under Section 731 because he
is not a district attorney or city attorney; Nor does Alameda County Counsel, Richard E. Winnie, for the same reason.

/s/ C. D. Michel
C. D. Michel, Attorneys for Defendant,
Andrew's Sporting Goods, Inc., dba Turner's
Outdoorsman and SG Distributing, Inc.

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PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Haydee Villegas, declare:

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

On January 3, 2003, I served the foregoing document(s) described as **DEFENDANT ANDREWS SPORTING GOODS, INC., dba TURNERS OUTDOORSMAN'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ANDREWS SPORTING GOODS, INC.'S MOTION FOR JUDGMENT ON THE PLEADINGS** on the interested parties in this action by JusticeLink Electronic filing on all persons appearing on the Service List.

I declare under penalty that the foregoing is true and correct. Executed this 3rd day of January, 2003, at San Pedro, California.

Haydee Villegas

Haydee Villegas

4

1 C.D. Michel - S.B.N. 144258
2 TRUTANICH • MICHEL, LLP
3 407 North Harbor Boulevard
4 San Pedro, CA 90731
5 Telephone: 310-548-0410
6 Facsimile: 310-548-4813

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8 Attorneys for Defendants,
9 Andrews Sporting Goods, Inc. dba
10 Turners Outdoorsman, and S.G. Distributing, Inc.

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

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

FIREARM CASES

Coordinated actions:

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

v.

ARCADIA MACHINE & TOOL, et. al.,

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

v.

ARCADIA MACHINE & TOOL, et. al.,

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

ARCADIA MACHINE & TOOL, et. al.

JUDICIAL COUNCIL COORDINATION
PROCEEDINGS NO. 4095

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

Superior Court of California County of Los
Angeles No. BC210894

Superior Court of California County of Los
Angeles No. BC214794

**DEFENDANTS ANDREWS SPORTING
GOODS' AND S. G. DISTRIBUTING'S
NOTICE OF LODGING OF FEDERAL
AUTHORITIES SUPPORT OF
DEFENDANT ANDREWS SPORTING
GOODS'S AND S.G. DISTRIBUTING'S
MOTION FOR JUDGMENT ON THE
PLEADINGS**

Date:
Time: 8:30 a.m.
Dept. 65
Hon. Vincent. P. DiFiglia

The following authorities are hereby lodged with the Court as authorities cited by Defendant Andrews Sporting Goods and S.G. Distributing in their Motion for Judgment on the Pleadings:

FEDERAL CASES:

1. *Brown v. Allstate Ins. Co.* (S.D.Cal.1998) 17 F.Supp.2d 1134, 1140
2. *Freeman v. Time, Inc.* (Cal.App.9 (Cal.)1995) 68 F.3d 285, 288
3. *People v. Steelcase, Inc.* (C.D.Cal. 1992) 792 F.Supp. 84, 86

Dated: January 3, 2003

TRUTANICH • MICHEL, LLP:

C. D. Michel

C. D. Michel
Attorneys for Defendants

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Haydee Villegas, declare:

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

2. On January 3, 2003, I served the foregoing document(s) described as
DEFENDANTS ANDREWS SPORTING GOODS' AND S. G. DISTRIBUTING'S NOTICE OF LODGING OF FEDERAL AUTHORITIES SUPPORT OF DEFENDANT ANDREWS SPORTING GOODS'S AND S.G. DISTRIBUTING'S MOTION FOR JUDGMENT ON THE PLEADINGS on the interested parties in this action by JusticeLink Electronic filing on all persons appearing on the Service List.

I declare under penalty that the foregoing is true and correct. Executed this 3rd day of January 2003, at San Pedro, California.

Haydee Villegas
Haydee Villegas

EXHIBIT 1

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EXHIBIT 1

United States District Court,
S.D. California.

Michael T. BROWN, Plaintiff,
v.

ALLSTATE INSURANCE COMPANY, a
corporation; Ken Baker, an individual; Jim
Tomasello, an individual; Robert Gick, an individual;
and Does 1-50,
inclusive, Defendants.

Civ. No. 98-CV-0094-B(POR).

July 31, 1998.

Proprietor of plumbing businesses, who performed insurance claim work, brought action against insurance company and others for unlawful termination and various tort claims. Action was removed to federal court. On motion to dismiss and order to show cause why case should not be remanded, the District Court, Brewster, Senior District Judge, held that: (1) nondiverse defendants were fraudulently joined; (2) proprietor stated claim for termination in violation of public policy; (3) proprietor stated claim for breach of implied contract of continued employment; but (4) proprietor did not state any tort claims.

Remand denied; motion to dismiss granted in part and denied in part.

West Headnotes

[1] Removal of Cases ☞ 107(7)
334k107(7)

Burden of establishing federal jurisdiction is on the party seeking removal from state court. 28 U.S.C.A. § 1441.

[2] Removal of Cases ☞ 2
334k2

Removal statutes are construed restrictively, so as to limit removal jurisdiction and prevent waste of judicial resources. 28 U.S.C.A. § 1441.

[3] Removal of Cases ☞ 36
334k36

Nondiverse defendants who were included in caption of removed complaint, but against whom no allegations

were made in body of complaint, were fraudulently joined and to be disregarded in determining existence of removal jurisdiction based on diversity. 28 U.S.C.A. § 1441.

[4] Federal Courts ☞ 303
170Bk303

Party may be disregarded for jurisdictional purposes if district court determines that party's joinder is fraudulent or a sham and that no cause of action has been stated against that party. 28 U.S.C.A. § 1441(b).

[5] Federal Courts ☞ 303
170Bk303

If the plaintiff fails to state a cause of action against a defendant, and the failure is obvious according to the settled rules of the state, the joinder of the defendant is fraudulent and may be disregarded for jurisdictional purposes. 28 U.S.C.A. § 1441(b).

[6] Federal Civil Procedure ☞ 1829
170Ak1829

[6] Federal Civil Procedure ☞ 1835
170Ak1835

District court need not accept every allegation in the complaint as true, on motion to dismiss for failure to state claim, but, rather, will examine whether conclusory allegations follow from the description of facts as alleged by the plaintiff. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[7] Federal Civil Procedure ☞ 1831
170Ak1831

Whether proprietor of plumbing businesses, who performed insurance claim work for insurance company, was employee of insurance company, or was independent contractor who could not maintain claim for unlawful termination in violation of public policy, was a fact-specific determination that could not be resolved in context of motion to dismiss for failure to state claim. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[8] Federal Civil Procedure ☞ 1832
170Ak1832

Documents whose contents are alleged in a complaint

and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a motion to dismiss without converting the motion into a motion for summary judgment. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[9] Federal Civil Procedure ⚡1832
170Ak1832

Court may, on a motion to dismiss, take judicial notice of facts outside the pleadings. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[10] Master and Servant ⚡39(1)
255k39(1)

Proprietor of plumbing businesses, who performed insurance claim work for insurance company, stated claim under California law for breach of implied contract of continued employment, where he alleged that he and insurance company entered into an implied-in-fact employment agreement that provided that he would not be terminated without good cause, that he was employed in excess of four years, that he consistently received excellent performance evaluations, and that he was assured on numerous occasions that he would not be terminated arbitrarily, but that he was terminated without just cause. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[11] Master and Servant ⚡8(1)
255k8(1)

[11] Master and Servant ⚡40(1)
255k40(1)

Under California law, at-will employment is presumed, and therefore a party seeking to establish an implied contract of continued employment has the burden of demonstrating such an agreement.

[12] Master and Servant ⚡4
255k4

Under California law, an implied contract of employment may arise from a combination of factors, including longevity of service, commendations and promotions, oral and written assurances of stable and continuous employment, and an employer's personnel practices.

[13] Damages ⚡50.10
115k50.10

Under California law, the elements of a cause of action for intentional infliction of emotional distress are (1) outrageous conduct so extreme as to exceed all bounds of that usually tolerated in a civilized society, (2) an intention to cause or reckless disregard of the probability of causing emotional distress, (3) plaintiff's severe emotional suffering, and (4) actual and proximate causation of that suffering.

[14] Damages ⚡149
115k149

Conclusory allegations of outrageous conduct, intent, and severe emotional suffering were insufficient to state claim under California law for intentional infliction of emotional distress. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[15] Damages ⚡50.10
115k50.10

[15] Damages ⚡149
115k149

Corporate entity was incapable of committing tort of intentional infliction of emotional distress, and such claim could not be pursued without specifying which individual or individuals committed the alleged tort.

[16] Libel and Slander ⚡74
237k74

[16] Libel and Slander ⚡80
237k80

Corporate entity was incapable of committing defamation, and such claim could not be pursued without specifying which individual or individuals committed the alleged tort.

[17] Torts ⚡10(1)
379k10(1)

Under California law, elements of intentional interference with prospective economic advantage are (1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages.

[18] Torts Ⓒ10(3)
379k10(3)

[18] Torts Ⓒ26(1)
379k26(1)

Proprietor of plumbing businesses, who performed insurance claim work for insurance company, failed to state claim against insurance company for intentional interference with prospective economic advantage, where he did not allege any specific existing relationships that were interfered with, and made only conclusory allegations of economic benefit to insurance company.

[19] Trade Regulation Ⓒ864
382k864

Under California law, private individuals cannot seek damages on statutory claim for unfair business practices; private remedies are limited to equitable relief, and civil penalties are recoverable only by specified public officers. West's Ann.Cal.Bus. & Prof.Code §§ 17200, 17203-17206;

[20] Conspiracy Ⓒ2
91k2

Under California law, corporation could not "conspire" with its agents, employees, or officers.

*1136 Patrick L. Prindle, Anne L. Rauch, The Reed Law Firm, San Diego, CA, for plaintiff.

Peter H. Klee, Luce, Forward, Hamilton, & Scripps, LLP, San Diego, CA, for defendant.

ORDER (1) DECLINING REMAND AND
VACATING MAY 19, 1998 ORDER TO SHOW
CAUSE, (2)
DISMISSING DEFENDANTS BAKER,
TOMASELLO AND GICK AS FRAUDULENTLY
JOINED, (3)
GRANTING IN PART AND DENYING IN PART
DEFENDANT ALLSTATE'S RULE 12(B)(6)
MOTION TO DISMISS, AND (4) GRANTING
PLAINTIFF LEAVE TO FILE A SECOND
AMENDED
COMPLAINT

BREWSTER, Senior District Judge.

I. BACKGROUND

Michael Brown ("Plaintiff") owns two plumbing

companies that performed plumbing contracting and insurance claim work for Allstate Insurance Company ("Allstate"). A business dispute ensued between Plaintiff and Allstate, and Allstate subsequently ceased to use Plaintiff's services. On December 18, 1997, Plaintiff sued Allstate and three alleged Allstate employees, Ken Baker, Jim Tomasello, and Robert Gick, in the Superior Court of California, alleging nine state law causes of action.

On January 20, 1998, Defendants [FN1] removed the case to the United States District Court for the Southern District of California pursuant to 28 U.S.C. § 1441(b), asserting that this Court possessed diversity jurisdiction under 28 U.S.C. § 1332. [FN2] On March 30, 1998, Allstate filed a motion to dismiss Plaintiff's complaint pursuant to FED. R. CIV. P. 12(b)(6). [FN3] Plaintiff filed a First Amended Complaint ("FAC") on May 1, 1998, and the parties subsequently stipulated that the motion to dismiss would be deemed applicable to the FAC. On May 19, 1998, the Court deferred action on the pending motion to dismiss and ordered Allstate to show cause why the case should not be remanded to state court for want of subject matter jurisdiction.

FN1. It is ambiguous upon whose behalf the notice of removal was submitted. On page 1, line 5 of the notice, Counsel identifies himself and his firm as "Attorneys for Defendant Allstate Insurance Company." However, at page 1, lines 24-28 and page 7, lines 6-10, the notice purports to request removal on behalf of all Defendants, and on page 7, lines 15-17, below his signature, Counsel states that he and his firm are "Attorneys for Defendants Allstate Insurance Company, Ken Baker, Jim Tomasello, and Robert Gick."

FN2. 28 U.S.C. § 1446(b) requires that a notice of removal be filed within thirty days after the date on which the defendant receives the removable pleading. The notice of removal states that the first date on which any defendant received Plaintiff's complaint was December 24, 1997.

FN3. It is ambiguous upon whose behalf the motion was submitted. On page 1, line 5 of the amended notice of motion, Counsel purported to represent Defendants Allstate, Baker, Tomasello, and Gick, and the document refers to "Defendants" at page 1, lines 5 (caption), 24, and 28 and page 2, line 1, but only Allstate is named as the moving party at page 1, line 22. Because this Court is dismissing the employee defendants on its

own motion, it will address the motion to dismiss as if it were brought only on behalf of Allstate.

II. FEDERAL JURISDICTION AND REMAND

[1][2] The Court must determine whether this case was properly removed to federal court in the first instance under 28 U.S.C. § 1441. *See Emrich v. Touche Ross and Co.*, 846 F.2d 1190, 1194-95 (9th Cir.1988). Section 1441(a) authorizes removal of "any civil action brought in a State Court of which the district courts of the United States have original jurisdiction." Where, as here, subject matter jurisdiction would be based on diversity of citizenship, a suit is removable "only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which the action is brought." 28 U.S.C. § 1441(b). If it appears that the district court lacks subject matter jurisdiction, the case must be remanded. 28 U.S.C. § 1447(c). The burden of establishing federal jurisdiction is on the party seeking removal, and the removal statutes are construed restrictively, so as to limit *1137 removal jurisdiction and prevent waste of judicial resources. *See Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992).

[3][4][5] This Court appears to lack jurisdiction because Defendants Baker, Tomasello, and Gick are alleged to be California residents. *See* 28 U.S.C. § 1441(b). However, Allstate argues that removal was proper because the individual defendants were fraudulently joined in the complaint. A party may be disregarded for jurisdictional purposes if the Court determines that party's joinder is fraudulent or a sham and that no cause of action has been stated against that party. *See McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir.1987). If the plaintiff fails to state a cause of action against a defendant, and the failure is obvious according to the settled rules of the state, the joinder of the defendant is fraudulent and may be disregarded. *See id.* Fraudulent joinder is a term of art and is not intended to impugn the integrity of Plaintiff or his counsel.

Although Plaintiff's complaint and FAC name the three individual defendants in the caption and in the headings of some causes of action, no material allegations against these defendants are made. Because Plaintiff has failed to state a cause of action against them, the individual defendants have been fraudulently joined.

Plaintiff attempts to explain the absence of the

individual defendants' names in the body of the complaint as a typographical error, and requests (although not by noticed motion) leave to amend the FAC to correct this error. However, "[w]hether an action should be remanded must be resolved by reference to the complaint at the time the petition for removal was filed." *Kruso v. I.T.T.*, 872 F.2d 1416, 1426 n. 12 (9th Cir.1989) (citations omitted). The complaint as it existed at removal does not allege any wrongdoing by the individual defendants. Therefore, these defendants are fraudulently joined and are hereby dismissed, without prejudice. As the requirements for jurisdiction under 28 U.S.C. § 1332 and § 1441 are now satisfied, the Court declines to remand the action against Allstate and vacates its order to show cause.

III. MOTION TO DISMISS

A. Standard of Law

[6] A motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) tests the legal sufficiency of the claims in the complaint. This court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them, and must construe the complaint in the light most favorable to plaintiff. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir.1995). The court need not, however, accept every allegation in the complaint as true; rather, the court "will examine whether conclusory allegations follow from the description of facts as alleged by the plaintiff." *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir.1992) (citation omitted).

B. Analysis

Plaintiff's FAC contains nine causes of action: (1) termination in violation of public policy, (2) breach of implied contract of continued employment, (3) breach of implied covenant of good faith and fair dealing, (4) intentional infliction of emotional distress, (5) defamation, (6) intentional interference with prospective economic advantage, (7 and 8) unfair competition, and (9) civil conspiracy.

1. Unlawful Termination in Violation of Public Policy

[7] Plaintiff's first cause of action alleges that Allstate terminated his employment in violation of public policy. To prevail on this claim, Plaintiff must establish that he maintained an employment relationship with Allstate and that he was terminated from that relationship for reporting or failing to participate in an unlawful act or for engaging in some

protected activity. See *Gantt v. Sentry Insurance*, 1 Cal.4th 1083, 1090, 4 Cal.Rptr.2d 874, 824 P.2d 680 (1992). Plaintiff's FAC alleges that he was employed by Allstate and that he was terminated because he had objected to Allstate's alleged violations of California Insurance Code § 790.

While Plaintiff's allegations of his employment would generally be sufficient to survive the low-threshold standard for a motion to *1138 dismiss, the Court recognizes that there is evidence in the letters written by Plaintiff to Allstate dated August 1, 1996 and March 17, 1997, that suggests that Plaintiff was in fact an independent contractor and not an employee.

[8] "Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios v. Richard Feiner and Company*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) (citation omitted). "However, material which is properly submitted as part of the complaint may be considered." *Id.* (citation omitted). Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a motion to dismiss without converting the motion into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 453-454 (9th Cir.1994).

Plaintiff states in his opposition to the motion that there is "no reference, whatsoever, to the March 17, 1997 letter" in his complaint. However, both the Complaint and FAC clearly and unambiguously refer to the March 17, 1997 letter and the August 1, 1996 letter. See FAC, ¶ 8. The FAC even states that the March 17, 1997 letter was attached thereto as Exhibit 1, although in fact no exhibits were attached. (That letter was attached to the original complaint as Exhibit 1.) Therefore, if these letters were deemed pertinent, the Court could review them in considering the motion to dismiss.

[9] Also, apparently in support of its motion to dismiss, Allstate urges judicial notice of two requests for admissions made upon Plaintiff and Plaintiff's responses thereto. A court may, on a motion to dismiss, take judicial notice of facts outside the pleadings. *Mack v. South Bay Beer Distributors*, 798 F.2d 1279, 1282 (9th Cir.1986) (citation omitted). Therefore, "on a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment." *Id.*

However, judicial notice is generally limited to a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EV. 201(b).

Distinguishing between an employee and an independent contractor "requires a fact-specific inquiry which depends upon the economic realities of the situation." *Mitchell v. Frank R. Howard Memorial Hosp.*, 853 F.2d 762, 766 (9th Cir.1988) (internal quotations omitted) (reversing a district court's dismissal of claim made on finding that plaintiff was an independent contractor and not an employee). The Court proceeds with particular caution with respect to a request for judicial notice when, as here, it is urged so to resolve a fundamental, dispositive factual dispute. Therefore, the Court declines to resolve this issue with the disfavored remedy of dismissal. Allstate's request for judicial notice and its motion to dismiss Plaintiff's unlawful termination claim are denied.

2. Breach of Implied Contract of Continued Employment

[10][11][12] Plaintiff next alleges that Allstate breached its alleged implied contract of continued employment. Under California law, at-will employment is presumed, and therefore a party seeking to establish an implied contract of continued employment has the burden of demonstrating such an agreement. *Davis v. Consolidated Freightways*, 29 Cal.App.4th 354, 366-367, 34 Cal.Rptr.2d 438 (1994). "Under California law, an implied contract of employment may arise from a combination of factors, including longevity of service, commendations and promotions, oral and written assurances of stable and continuous employment, and an employer's personnel practices." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 389 n. 2, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (citations omitted). Plaintiff alleges that in or about March 1993, Plaintiff and Allstate entered into an implied-in-fact employment agreement that provided that Plaintiff would not be terminated without good cause. Plaintiff further alleges that he was employed by Allstate for a period in excess of four years, that he consistently received excellent performance evaluations, and that he *1139 was assured on numerous occasions that he would not be terminated arbitrarily. Plaintiff argues that Allstate breached this contract by terminating him without just cause in May 1997.

While Allstate questions the depth of Plaintiff's factual basis, Plaintiff has alleged a *prima facie* case of breach of implied contract of continued employment. The Court will not resolve factual disputes at this stage of litigation. Therefore, Allstate's motion to dismiss the second cause of action is denied.

3. Covenant of Good Faith and Fair Dealing

Plaintiff alleges that his employment agreement with Allstate "contained an implied covenant of good faith and fair dealing" which Allstate allegedly violated by terminating him without cause. This cause of action is not available in California for employees who allege that they have been discharged in violation of the covenant. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 700, 254 Cal.Rptr. 211, 765 P.2d 373 (1988). Plaintiff has agreed that this claim may be dismissed as a matter of law. Therefore, the Court dismisses this claim without leave to amend.

4. Intentional Infliction of Emotional Distress

[13] Under California law, the elements of a cause of action for intentional infliction of emotional distress are (1) outrageous conduct so extreme as to exceed all bounds of that usually tolerated in a civilized society, (2) an intention to cause or reckless disregard of the probability of causing emotional distress, (3) plaintiff's severe emotional suffering, and (4) actual and proximate causation of that suffering. See *Molko v. Holy Spirit Assn.*, 46 Cal.3d 1092, 1120, 252 Cal.Rptr. 122, 762 P.2d 46 (1988). Legal remedy is available only in exceptional cases:

On the spectrum of offensive conduct, outrageous conduct is that which is the most extremely offensive. Depending on the idiosyncrasies of the plaintiff, offensive conduct which falls along the remainder of the spectrum may be irritating, insulting or even distressing but it is not actionable and must simply be endured without resort to legal redress.

Yurick v. Superior Court, 209 Cal.App.3d 1116, 1129, 257 Cal.Rptr. 665 (1989).

[14][15] While ordinarily a question of fact, Plaintiff's conclusory allegations of outrageous conduct, intent, and severe emotional suffering are so inadequate so as to justify dismissal without prejudice. In any case, the Court also dismisses this claim on the ground that Plaintiff has not specified which individual, or individuals, committed this alleged tort. "[A] corporation is a fictitious legal person ... [that] can act

only through its duly constituted organs, primarily its board of directors." John Alexander & Harry Henn, *Laws of Corporations*, 145-146 (West 1989). Because Allstate as a corporation is incapable of committing these wrongs, Plaintiff fails to state a claim against Allstate. [FN4] Therefore, Plaintiff's intentional infliction of emotional distress claim is dismissed with leave to amend.

FN4. It should be noted that Allstate can be vicariously liable for torts committed by an employee in the course and scope of employment.

5. Defamation

[16] Plaintiff's fifth cause of action alleges that Allstate defamed him by informing the public that Plaintiff was not competent in his trade. Allstate is a corporation, not an individual, and is unable to make a statement. Plaintiff does not allege the identity of any individual who made a defamatory statement or when it was made. Therefore, Plaintiff's defamation claim is dismissed with leave to amend.

6. Intentional Interference with Prospective Economic Advantage

[17][18] Plaintiff's sixth cause of action, intentional interference with prospective economic advantage, requires five elements: "1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit; 2) knowledge by the defendant of the existence of the relationship; 3) intentional acts on the part of the defendant designed to disrupt the relationship; 4) actual disruption of the relationship; *1140 and 5) damages." *Blank v. Kirwan*, 39 Cal.3d 311, 330, 216 Cal.Rptr. 718, 703 P.2d 58 (1985) (citation omitted). Plaintiff must establish an actual economic relationship or a protected expectancy with a third person, not merely a hope of future transactions. See *id.* at 330-331, 216 Cal.Rptr. 718, 703 P.2d 58. In this case, Plaintiff fails to identify any specific existing relationships with which Allstate tortiously interfered. Furthermore, as Allstate is not a competitor of Plaintiff's, the Court finds as inadequate Plaintiff's conclusory allegation that Allstate derived an economic benefit from its alleged interference. Therefore, Plaintiff's sixth cause of action is dismissed with leave to amend.

7. Unfair Competition (California Business and Professions Code § 17200)

[19] Plaintiff's seventh cause of action alleges that Allstate is liable for unfair competition pursuant to California Business and Professions Code § 17200. Private individuals cannot seek damages for unfair business practices under this statute. Private remedies are limited to equitable relief, and civil penalties are recoverable only by specified public officers. See CAL. BUS. & PROF. CODE §§ 17200, 17203-17206; see also *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal.App.3d 758, 774, 259 Cal.Rptr. 789 (1989) (compensatory damages are not recoverable under § 17200). Therefore, Plaintiff's seventh cause of action is dismissed with leave to amend.

8. Unfair Competition (California Business and Professions Code § 17500)

Plaintiff's eighth cause of action alleges that Allstate is liable for unfair competition pursuant to California Business and Professions Code § 17500. While § 17500 provides only for criminal penalties, individuals may seek remedy for violations of § 17500 through § 17200. However, private remedies are limited to equitable relief, and civil penalties are recoverable only by specified public officers. See CAL. BUS. & PROF. CODE §§ 17500, 17535; see also *Chern v. Bank of America*, 15 Cal.3d 866, 875, 127 Cal.Rptr. 110, 544 P.2d 1310 (1976) ("section 17500 does not authorize recovery of damages by private individuals"). Therefore, Plaintiff's eighth cause of action is dismissed with leave to amend.

9. Civil Conspiracy

[20] Plaintiff's ninth cause of action, "civil

conspiracy," alleges that Allstate and Does 1-50 (alleged in the FAC to be or have been employees, agents, or officers of Allstate) conspired to wrongfully interfere with Plaintiff's prospective economic relationships. Under California law, Allstate, a corporation, cannot "conspire" with its agents, employees, or officers. See, e.g., *Doctors' Co. v. Superior Court*, 49 Cal.3d 39, 44, 260 Cal.Rptr. 183, 775 P.2d 508 (1989). Therefore, this claim is dismissed with leave to amend.

IV. CONCLUSION

Defendants Baker, Tomasello, and Gick are dismissed as fraudulently joined. Therefore, the Court declines to remand this action and vacates its order to show cause. Defendant Allstate's 12(b)(6) motion to dismiss is granted in part and denied in part. Plaintiff is granted thirty days leave to amend his FAC. If Plaintiff does not amend, Allstate is not required to appear until ten days after the earlier of these events: (1) the expiration of the thirty day period provided for leave to amend, or (2) Plaintiff notifies the Court and Allstate's attorney that he will not file a second amended complaint. If Plaintiff files a second amended complaint, any defendant's obligation to file a responsive pleading is governed by Rule 12(a) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

17 F.Supp.2d 1134, 98 Daily Journal D.A.R. 10,203

END OF DOCUMENT

EXHIBIT 2

EXHIBIT 2

C

United States Court of Appeals,
Ninth Circuit.

Michael FREEMAN, Plaintiff-Appellant,
v.
The TIME, INC., Magazine Company, et al.,
Defendants-Appellees.

Nos. 94-55089 and 94-55091.

Submitted July 13, 1995. [FN*]

FN* The panel unanimously finds this case appropriate for decision without oral argument. Fed.R.App.P. 34(a); 9th Cir.R. 34-4(c).

Decided Aug. 21, 1995.
Order and Opinion filed Oct. 6, 1995.

Plaintiff filed two action on various claims under California law related to allegedly fraudulent, deceptive and misleading sweepstakes promotional materials, and defendant publisher removed action. The United States District Court for the Central District of California, Terry J. Hatter, Jr., J., granted defendant's motions to dismiss, and plaintiff appealed. Actions were consolidated on appeal. The Court of Appeals, Tashima, District Judge, sitting by designation, held that: (1) "reasonable consumer" standard applied to claims under California's false advertising and unfair business practices statutes; (2) plaintiff failed to show that public was likely to be deceived by promotional materials; and (3) materials did not falsely represent that recipient had won contest.

Affirmed.

West Headnotes

[1] Federal Courts ☞776
170Bk776

Dismissal of action on merits for failure to state claim is reviewed de novo. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] Federal Civil Procedure ☞1773
170Ak1773

Complaint should be dismissed for failure to state claim when it appears beyond doubt that plaintiff can

prove no set of facts in support of claim which would entitle plaintiff to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] Federal Courts ☞776
170Bk776

Where there is no dispute or conflict in evidence, findings of trial court that advertisements are not in violation of applicable provisions of California Business and Professions Code amount to conclusions of law and are reviewed de novo. West's Ann.Cal.Bus. & Prof.Code §§ 17200, 17500.

[4] Consumer Protection ☞32
92Hk32

[4] Consumer Protection ☞33
92Hk33

California's statutory law of unfair competition authorizes actions for injunctive relief by certain state and local officers and persons acting for interests of themselves or the general public. West's Ann.Cal.Bus. & Prof.Code § 17200.

[5] Consumer Protection ☞7
92Hk7

Any violation of false advertising law necessarily violates unfair competition law. West's Ann.Cal.Bus. & Prof.Code §§ 17200, 17500.

[6] Consumer Protection ☞38
92Hk38

To state a claim under California's Unfair Business Practices Act, one need not plead and prove elements of tort; instead, one need only show that members of public are likely to be deceived. West's Ann.Cal.Bus. & Prof.Code § 17200.

[7] Consumer Protection ☞7
92Hk7

"Reasonable consumer" standard, rather than "unwary consumer" standard, was appropriate for evaluating claims under California's false advertising and unfair business practices statutes in action involving allegedly deceptive sweepstakes promotional materials; mailings were sent to millions of California residents, and there was no allegation that particularly vulnerable group

was targeted. West's Ann.Cal.Bus. & Prof.Code §§ 17200, 17500.

[8] Consumer Protection ☞7
92Hk7

Recipient of sweepstakes promotional material failed to show that public was likely to be deceived by those materials, in action under California false advertising and unfair business practices statutes; promotions expressly and repeatedly stated conditions which had to be met to win, qualifying language was not hidden or unreadably small, qualifying language appeared immediately next to representations it qualified and no reasonable reader could have ignore it, and any ambiguities in language was dispelled by promotion as a whole. West's Ann.Cal.Bus. & Prof.Code §§ 17200, 17500.

[9] Consumer Protection ☞7
92Hk7

Provisions of California's false advertising law relating to certain contests was inapplicable in action involving sweepstakes promotional material, where subject sweepstakes did not involve any skill or require payment or purchase. West's Ann.Cal.Bus. & Prof.Code § 17539.1(a)(8).

[10] Consumer Protection ☞7
92Hk7

Sweepstakes promotional materials did not falsely represent that recipient had won contest when read reasonably and in context, and therefore materials were not actionable under California's Consumer Legal Remedies Act. West's Ann.Cal.Civ.Code §§ 1770(n), 1780(a).

*286 Michael D. Freeman, Encino, CA, in pro per for plaintiff-appellant.

Robert C. Vanderet, O'Melveny & Myers, Los Angeles, CA, for defendants- appellees.

Appeals from the United States District Court for the Central District of California.

*287 Before: FARRIS and O'SCANNLAIN, Circuit Judges, and TASHIMA, District Judge. [FN**]

FN** Hon. A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

ORDER

The Memorandum disposition, filed August 21, 1995, is redesignated as an authored Opinion by Judge Tashima.

OPINION

TASHIMA, District Judge:

These are two consolidated appeals from the district court's dismissal of two separate actions alleging that sweepstakes promotional materials were fraudulent and misleading.

FACTS

Plaintiff-appellant Michael Freeman ("Freeman") received two separate mailers for the "Million Dollar Dream Sweepstakes," a promotion of defendant-appellee Time, Inc. ("Time"). [FN1] The mailers, personalized by computer, are similar in content and format--both contain statements in large type representing that Freeman won the sweepstakes, qualified by language in smaller type indicating that Freeman would win only if he returned a winning prize number. For example, the *Sports Illustrated* promotion states "If you return the grand prize winning number, we'll officially announce that MICHAEL FREEMAN HAS WON \$1,666,675.00 AND PAYMENT IS SCHEDULED TO BEGIN." It continues, "If you return the grand prize winning entry, we'll say \$1,666,675.00 WINNER MICHAEL FREEMAN OF ENCINO, CALIFORNIA IS OUR LARGEST MAJOR PRIZE WINNER!" The promotion provides, "We are now scheduled to begin payment of the third and largest prize--the \$1,666,675 listed next to the name MICHAEL FREEMAN! In fact, arrangements have already been made which make it possible to begin payment of the \$1,666,675 DIRECTLY to MICHAEL FREEMAN if one of your numbers is the grand prize winner." It concludes that "[i]f you return your entry with the Validation Seal attached and your entry includes the grand prize winning number, MICHAEL FREEMAN IS GUARANTEED TO BE PAID THE ENTIRE \$1,666,675.00!"

FN1. One promotion was from *Money* magazine and the other from *Sports Illustrated*, both of which are Time publications.

The mailer includes an "Official Entry Certificate" on which recipient could check a box marked "YES!"

[Send free gifts and magazine subscription] Also, enter me in the sweepstake and notify me if I'm a winner" or a box marked "NO! [Don't send gifts and subscription] But enter me in the sweepstakes." Separate return envelopes are enclosed for "yes" and "no" entries--printed outside both envelopes is the statement "enter me in the sweepstakes and notify me if I am a millionaire."

The "Million Dollar Dream Sweepstakes Official Rules" provide that random selection of the winner would take place by April 1, 1994 and indicate that "[c]hances of winning are dependent upon the number of entries distributed and received. Distribution of the sweepstakes is estimated not to exceed 900 million." The rules provide an address from which it was possible to obtain a list of major winners, available after August 1994.

Freeman filed a complaint in California Superior Court on April 12, 1993 regarding the *Money* magazine promotion, alleging six causes of action: (1) common law breach of contract; (2) common law fraud; (3) unfair and misleading business practices in violation of California's Unfair Business Practices Act ("UBPA") (Cal.Bus. & Prof.Code § 17200); (4) untrue and misleading advertising in violation of UBPA (Cal.Bus. & Prof.Code § 17500 *et seq.*); (5) failure to include an "odds of winning" statement in violation of Cal.Bus. & Prof.Code § 17537.1; and (6) unfair and deceptive practices under the California Consumer Legal Remedies Act (Cal.Civ.Code § 1770). On April 27, 1993, plaintiff filed an action alleging identical causes of action with respect to the *Sports Illustrated* promotion. Both actions seek monetary damages, restitution and disgorgement of profits, and injunctive relief. Time removed *288 these two actions to federal court on May 26, 1993 and June 4, 1993, respectively.

Shortly after removal, Time moved to dismiss both complaints pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted. Freeman conceded his fifth cause of action. The district court granted both motions on December 6, 1993 without discussion. [FN2] Plaintiff filed notices of appeal on January 3, 1994. [FN3] The parties stipulated request to consolidate the two actions was granted on March 23, 1994. The district court had jurisdiction under 28 U.S.C. §§ 1441(a) & (b) and 1332(a)(1). We have jurisdiction under 28 U.S.C. § 1291.

FN2. The district court's docketing sheet

describes the order granting the motion to dismiss as "terminating case." "If it appears that the district court intended the dismissal to dispose of the action, [dismissal] may be considered final and appealable." *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1171 n. 1 (9th Cir.1984).

FN3. Time contends that Freeman failed to perfect his appeals because his notices of appeal were signed by a lawyer who was not, at that time, counsel of record. Time's motion to dismiss the appeals on this ground was denied on May 31, 1994.

DISCUSSION

Freeman does not challenge the dismissal of his breach of contract and fraud claims. He argues only that the district court erred in dismissing his third, fourth and sixth causes of action for violations of the UBPA and the California Consumer Legal Remedies Act.

I. Standard of Review

[1][2][3] This court reviews *de novo* a district court's dismissal of an action on the merits for failure to state a claim. *Everest & Jennings, Inc. v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir.1994). A complaint should be dismissed when "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). Where "[t]here is no dispute or conflict in the evidence.... the finding of the trial court that the advertisements are not in violation of the applicable provisions of the Business and Professions Code amounts to a conclusion of law." *State Board of Funeral Directors & Embalmers v. Mortuary in Westminster Memorial Park*, 271 Cal.App.2d 638, 642, 76 Cal.Rptr. 832 (1969). Questions of law are reviewed *de novo*. *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir.1984).

II. Unfair Business Practices Act

[4] The UBPA defines unfair competition to include "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising." Cal.Bus. & Prof.Code § 17200. "California's statutory law of unfair competition ... authorizes actions for injunctive relief ... by certain state and local officers and persons acting for the interests of themselves or the general public." *Mangini v. R.J. Reynolds Tobacco*

(Cite as: 68 F.3d 285, *288)

Co., 7 Cal.4th 1057, 1061, 31 Cal.Rptr.2d 358, 875 P.2d 73 (1994), *cert. denied*, 513 U.S. 1016, 115 S.Ct. 577, 130 L.Ed.2d 493 (1994). California law "also authorizes courts to make such orders as 'may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by such unfair competition.'" *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1267, 10 Cal.Rptr.2d 538, 833 P.2d 545 (1992) (quoting Bus. & Prof.Code § 17203). The California Legislature considered the goals of deterring future violations and foreclosing retention of ill-gotten gains "so important that it authorized courts to order restitution without individualized proof of deception, reliance, and injury if necessary to prevent the use or employment of an unfair practice." *Id.*

[5] The UBPA also contains a false advertising provision which prohibits dissemination of any statement concerning real or personal property for sale "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." Cal.Bus. & Prof.Code § 17500. Section 17535 authorizes injunctive relief and restitution for violations of the false advertising provision. *289 "Any violation of the false advertising law, moreover, necessarily violates the unfair competition law." *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 210, 197 Cal.Rptr. 783, 673 P.2d 660 (1983).

A. Likely to be Deceived

[6] "[T]o state a claim under the [UBPA] one need not plead and prove the elements of a tort. Instead, one need only show that 'members of the public are likely to be deceived.'" *Bank of the West*, 2 Cal.4th at 1267, 10 Cal.Rptr.2d 538, 833 P.2d 545 (quoting *Chern v. Bank of America*, 15 Cal.3d 866, 876, 127 Cal.Rptr. 110, 544 P.2d 1310 (1976)). Freeman argues that to demonstrate that "members of the public are likely to be deceived" he need show only that some members of the public, such as the elderly, minors or the mentally disadvantaged, are likely to be deceived. Time argues that the court must consider whether "a person of ordinary intelligence" would be misled.

In a virtually identical case involving the same Time promotion, the district court rejected the plaintiffs proposed "unwary consumer" standard in favor of a "reasonable person" standard. *Haskell v. Time, Inc.*, 857 F.Supp. 1392, 1398 (E.D.Cal.1994) (dismissing claims for false or misleading advertising and unfair competition); see also *State Board of Funeral*

Directors, 271 Cal.App.2d at 642, 76 Cal.Rptr. 832 (applying standard of "what a person of ordinary intelligence" would conclude in false advertising case); *Audio Fidelity, Inc. v. High Fidelity Recordings, Inc.*, 283 F.2d 551, 557 (9th Cir.1960) (applying standard of "the eye of the ordinary purchaser" to the interpretation of unfair competition and misleading advertising under California law).

[7] An "ordinary person" standard is not inconsistent with the standard of *Bank of the West*--to determine whether members of the public are "likely to be deceived" the court must apply some standard. Plaintiff admits that "California courts have looked to interpretations of similar provisions in federal law under the Federal Trade Commission Act." AOB at 13. *Haskell* noted that "[s]ince 1982 the FTC has interpreted 'deception' in Section 5 of the Federal Trade Commission Act to require a showing of 'potential deception of consumers acting reasonably in the circumstances,' not just any consumers." 857 F.Supp. at 1399 (quoting *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1436 (9th Cir.1986)). *Haskell* further noted that

the reasonable person standard is well ensconced in the law in a variety of legal contexts in which a claim of deception is brought. It is the standard for false advertising and unfair competition under the Lanham Act, for securities fraud, for deceit and misrepresentation and for common law unfair competition. This list no doubt could be much expanded.

Id. at 1398 (citations omitted). "[B]y explicitly imposing a 'reasonable care' standard on advertisers, § 17500 implicitly adopts such a standard for consumers as well: unless particularly gullible consumers are targeted, a reasonable person may expect others to behave reasonably as well." *Id.* at 1399; *Compare Committee on Children's Television*, 35 Cal.3d 197, 197 Cal.Rptr. 783, 673 P.2d 660 (defendant's advertisements for sugar-filled cereals were targeted at children). In this case, the mailings were sent to millions of persons and there is no allegation that a particularly vulnerable group was targeted. "[I]n view of the allegations here, the false or misleading advertising and unfair business practices claim must be evaluated from the vantage of a reasonable consumer." *Haskell*, 857 F.Supp. at 1399.

[8] Freeman argues that his complaint adequately alleges that members of the public would be deceived, since it is likely that the reader will review the large print and ignore the qualifying language in small print. This argument is not persuasive. The promotions

expressly and repeatedly state the conditions which must be met in order to win. None of the qualifying language is hidden or unreadably small. The qualifying language appears immediately next to the representations it qualifies and no reasonable reader could ignore it. Any persons who thought that they had won the sweepstakes would be put on notice that this was not guaranteed simply by doing sufficient reading*290 to comply with the instructions for entering the sweepstakes.

Freeman further contends that the qualifying language in the promotion, even if read by the recipient, is ambiguous. He argues, for example, that the statement "If you return the grand prize winning number we'll officially announce that [you have won]" leaves room for the reader to draw an inference that he or she *has* the winning number. Such an inference is unreasonable in the context of the entire document. In dismissing the complaint against Time in *Haskell*, the court noted that such "statements, in context, are not misleading. It is clear from the exemplar that no reasonable addressee could believe that the mailing announced that the addressee was already the winner...." 857 F.Supp. at 1403. We agree. Any ambiguity that Freeman would read into any particular statement is dispelled by the promotion as a whole.

[9] Freeman argues that, although he did not plead it, his complaint states a claim for violation of provisions governing the operation of certain contests found in Cal.Bus. & Prof.Code § 17539.1(a)(8). This section prohibits "representing directly or by implication that the number of participants has been significantly limited, or that any particular person has been selected to win a prize unless such is the fact." This code section, however, clearly does not apply to the contest in question--the section is limited to a contest involving "skill or any combination of chance and skill and which is, or in whole or part may be, conditioned upon the payment of consideration." Cal. Bus. & Prof.Code § 17539.3(e). The entry here expressly notes that no

payment or purchase is necessary to win.

Freeman failed to state a claim that the promotions violated the UBPA; therefore, the district court's dismissal of such claims is affirmed.

III. Consumers Legal Remedies Act

[10] California's Consumer Legal Remedies Act provides that "[a]ny consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against such person" for actual damages, injunctive relief, restitution of property, punitive damages, and other relief that the court deems proper. Cal.Civ.Code § 1780(a). Freeman claims that Time violated the prohibition on "[r]epresenting that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law." Cal.Civ.Code § 1770(n). According to Freeman, the promotion falsely represents that the reader has won and thus been conferred certain rights. As discussed above, when read reasonably and in context, the promotion makes no such false representation. [FN4]

FN4. Moreover, it is doubtful that Freeman has "suffer[ed] any damage as a result of" the promotion. The only possible damage is a *de minimis* 29 cents for postage to mail in his entry.

Freeman's complaint does not state a claim under the California Consumer Legal Remedies Act and the district court's dismissal of this claim is also affirmed.

AFFIRMED.

68 F.3d 285, 95 Cal. Daily Op. Serv. 7882, 95 Daily Journal D.A.R. 13,545

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EXHIBIT 3

EXHIBIT 3

▷

United States District Court,
C.D. California.

The PEOPLE OF the STATE OF CALIFORNIA,
Plaintiff,
v.
STEELCASE INC., etc., et al., Defendants.

No. CV 92-1618 AWT.

April 30, 1992.

The People of the state of California filed a civil enforcement action alleging violations of the California antitrust and unfair competition statutes. The defendant company removed the actions on the ground of diversity of citizenship. The District Court, Tashima, J., held that: (1) state was the real party in interest in an action under state unfair competition statute to enforce civil penalties; (2) state of California was not a citizen of any state and thus could not be sued in diversity; (3) jurisdiction was barred under the Eleventh Amendment; and (4) remand order was not appealable.

Remanded.

West Headnotes

[1] Trade Regulation ⚡864
382k864

The people of California were the proper party plaintiff and real party in interest in action seeking civil penalties under California unfair competition statute; penalties not damages which could be recovered for the benefit of private parties, and action was more akin to a criminal enforcement action and was brought in the public interest. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.

[2] Trade Regulation ⚡864
382k864

The state of California was the real party in interest in a civil penalty enforcement action under California's unfair competition statute. West Ann.Cal.Bus. & Prof.Code § 17200 et seq.

[3] Federal Courts ⚡283
170Bk283

For diversity purposes, a state is not a citizen of itself and therefore cannot sue or be sued in a diversity action.

[4] Federal Courts ⚡283
170Bk283

In a removed civil penalty enforcement action under the California unfair competition statute, the state of California was the real party in interest, and thus there could not be complete diversity; the state of California was not a citizen of any state. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.

[5] Removal of Cases ⚡41
334k41

Federal district court lacked jurisdiction over removed civil enforcement action brought by the People of the state of California alleging violations of state antitrust statute and state unfair competition statute, in which the state of California was a real party in interest, in light of the Eleventh Amendment sovereign immunity granted to a state against suit in federal court. U.S.C.A. Const.Amend. 11; 28 U.S.C.A. § 1441(a).

[6] Removal of Cases ⚡59
334k59

In a diversity action, the entire action must be removable; there is no exception where a nonremovable claim is joined with a removable claim. 28 U.S.C.A. § 1441(c).

[7] Removal of Cases ⚡107(11)
334k107(11)

The state of California was not entitled to an award of attorney fees it incurred in opposing removal of an action under the California antitrust and unfair competition statutes on diversity grounds; the defendant's novel arguments for removal jurisdiction were at least colorable. 28 U.S.C.A. § 1447(c).

[8] Removal of Cases ⚡107(9)
334k107(9)

Defendant was not entitled to certification of interlocutory appeal from an order remanding the case to the state court from which it was removed. 28 U.S.C.A. §§ 1292, 1447(d).

*85 Ira Reiner, Dist. Atty., Michael J. Delaney, Martin

L. Herscovitz, Deputy Dist. Attys., Los Angeles, Cal., for plaintiff.

John H. Brinsley, William Billick, Peter J. Most, Nicki M. Varyu, Paul, Hastings, Janofsky & Walker, Los Angeles, Cal., for defendant Steelcase Inc.

MEMORANDUM OPINION AND ORDER

TASHIMA, District Judge.

This is a civil enforcement action brought by the People of the State of California (People) by and through the District Attorney of the County of Los Angeles, State of California. The complaint charges two violations of state law: the state antitrust statute, known as the Cartwright Act, Cal.Bus. & Prof.Code, § 16720 *et seq.*, and the state unfair competition statute, Cal.Bus. & Prof.Code, § 17200 *et seq.* The complaint seeks injunctive relief under both statutes and civil penalties under the unfair competition statute. Cal.Bus. & Prof.Code, § 17206.

The action was removed to this court on the asserted jurisdictional basis of diversity of citizenship. Because of substantial doubt as to the existence of diversity jurisdiction, the court *sua sponte* issued an order to show cause (OSC) why this action should not be remanded to state court. The issues have now been fully briefed in the parties' responses to the OSC. [FN1] For the reasons stated below, the court concludes that diversity of citizenship jurisdiction does not exist in this case and that the Eleventh Amendment prohibits removal of this case to federal court.

FN1. In its notice of removal, defendant contended that this action was removable because it was a *parens patriae* action. It argued that such an action is brought on behalf of the citizens of California who are the real parties in interest; therefore, that complete diversity of citizenship existed because all plaintiffs are citizens of California and defendant is a citizen of Michigan. In its response to the OSC, defendant has abandoned this contention and the court need not pursue it further.

I

Defendant first contends that diversity jurisdiction exists because the real party in interest [FN2] is "the County as purchaser of Steelcase furniture," and counties are citizens of the state for purposes of diversity jurisdiction. *Moor v. County of Alameda*, 411

U.S. 693, 721, 93 S.Ct. 1785, 1801-02, 36 L.Ed.2d 596 (1973). Defendant argues that although the action is purportedly brought in the name of the People, under the Cartwright Act, a district attorney is authorized to prosecute civil actions only on behalf of the county or public agencies located within the county. Cal.Bus. & Prof.Code § 16750(g).

FN2. Defendant correctly notes that the existence of diversity of citizenship jurisdiction should be based on an examination of the citizenship of the real parties in interest. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460-61, 100 S.Ct. 1779, 1781-82, 64 L.Ed.2d 425 (1980).

While defendant accurately quotes the Cartwright Act, it fails to mention that the unfair competition statute expressly authorizes this action to be prosecuted in the name of the People. An action for civil penalties under that statute expressly may be "brought in the name of the people of the State of California by the Attorney General or by any district attorney...." Cal.Bus. & Prof.Code § 17206(a). That act also authorizes a district attorney to prosecute actions for injunctive relief. Cal.Bus. & Prof.Code § 17204. [FN3]

FN3. Section 17204 does not expressly state that an injunctive action may be brought in the name of the People. Because of the express grant of authority to the district attorney in § 17206(a), to proceed in the name of the People, the court need not decide whether such a right may be implied under § 17204. It also need not decide the related issue of whether, under either the Cartwright Act or the unfair competition statute, the district attorney retains any common law power to proceed in the name of the People in a civil enforcement action.

[1] Thus, at least with respect to the Second Cause of Action, which seeks both civil penalties and injunctive relief under Cal.Bus. & Prof.Code § 17200 *et seq.*, the *86 People is the proper party plaintiff and the real party in interest. Civil penalties are not damages recovered for the benefit of private parties; they are more akin to a criminal enforcement action and are brought in the public interest. [FN4]

FN4. All criminal actions are brought in the name of the People. Cal.Pen.Code § 684. The vast majority of felony prosecutions are instituted by district attorneys who prosecute them through the trial court. Cal.Gov't Code

§ 26501 (this section also appears impliedly to recognize the district attorney's authority to engage in "civil cases on behalf of the people"). In most criminal appeals, as a perusal of the California appellate reports discloses, the People are represented by the Attorney General. Cf. Cal.Pen.Code § 1256 (district attorney to assist and cooperate with attorney general in criminal appeals). In sum, the attorney general and district attorneys represent the same party in criminal actions, the People. See Cal. Const., Art. 5, § 13; Cal.Gov't Code § 12550 (attorney general's supervisory authority over district attorneys).

[2] The People are the same party as the State of California (State) and the district attorney has the authority to bind the State. *People of the State of California v. Mendez*, 234 Cal.App.3d 1773, 1783 (1991). Thus, in this civil penalty enforcement action, the State of California is the real party in interest. This has at least two consequences.

II

[3][4] First, for diversity purposes, a state is not a citizen of itself. Therefore, it cannot sue or be sued in a diversity action. *Moor*, 411 U.S. at 717. Even assuming *arguendo* that defendant is correct that the County of Los Angeles is the real party in interest and the proper party in the Cartwright Act claim, diversity jurisdiction does not lie because, under long-established teaching, there must be complete diversity, i.e., all plaintiffs must be diverse from defendant. E.g., *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806). Here, there cannot be complete diversity because, to repeat, the State of California is not a citizen of any state. [FN5]

FN5. This situation is similar to citizens of the United States who are domiciled abroad, who are not citizens of any state. They cannot sue or be sued in federal court on the basis of diversity of citizenship jurisdiction. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828- 29, 109 S.Ct. 2218, 2220-21, 104 L.Ed.2d 893 (1989).

III

[5] Independent of its failure to meet the complete diversity test, the court lacks jurisdiction over this case because of the bar of the Eleventh Amendment to the Constitution. The Eleventh Amendment is a grant of sovereign immunity to a state against suit in federal

court. It is in "the nature of a jurisdictional bar." *Alabama v. Pugh*, 438 U.S. 781, 782 n. 1, 98 S.Ct. 3057, 3058 n. 1, 57 L.Ed.2d 1114 (1978) (per curiam), quoting from *Edelman v. Jordan*, 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974).

Defendant, relying on the literal wording of the Eleventh Amendment, contends that this is not a "suit ... against one of the United States ..." (emphasis added) because the State is the plaintiff. However, since the immunity granted by the Eleventh Amendment is an immunity from being made an involuntary party to an action in federal court, it should apply equally to the case where the state is a plaintiff in an action commenced in state court and the action is removed to federal court by the defendant.

The statute under which this action was removed requires, for an action to be removable, that the district courts "have original jurisdiction" over the action. 28 U.S.C. § 1441(a). Because of the jurisdictional bar of the Eleventh Amendment, the district courts would not have original jurisdiction over this action, absent the consent of the State. The State does not consent to removal. Therefore, subject matter jurisdiction is lacking, at least as to the claim under the unfair competition statute.

IV

[6] Although, where removal is predicated on federal question jurisdiction, removal is permitted even where a "non-removable" claim is joined with the removable claim, see 28 U.S.C. § 1441(c), no such exception exists for diversity-based removals. *87 In the latter case, the entire action must be removable. Since the entire case is not removable, even assuming that a removable diversity claim was separately stated, it cannot be removed.

V

[7] Plaintiff seeks its attorney's fees in opposing removal under 28 U.S.C. § 1447(c). It contends that the claimed grounds for removal were "tenuous." See *Samura v. Kaiser Found. Health Plan, Inc.*, 715 F.Supp. 970, 972 (N.D.Cal.1989). The grant of attorney's fees on removal and remand is a matter which rests within the sound discretion of the trial court. In this case, defendant's arguments for removal jurisdiction, while novel, are at least colorable. See *Hom v. Service Merchandise Co.*, 727 F.Supp. 1343, 1345 (N.D.Cal.1990). Under these circumstances, the court declines to exercise its discretion in favor of

granting attorney's fees.

VI

[8] Finally, defendant has "conditionally" applied for a certification of an interlocutory appeal, "if the Court determines that it lacks diversity jurisdiction." It cites *National Audubon Soc'y v. Department of Water & Power*, 858 F.2d 1409 (9th Cir.1988), in support of its application. The citation is inapposite. *National Audubon* did not involve an appeal from an order of remand. The governing statute is clear:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise....

28 U.S.C. § 1447(d). This case does not fit within the narrow exception to the statute's prohibition against appellate review of remand orders. See, e.g., *Clorox Co. v. United States Dist. Court*, 779 F.2d 517 (9th Cir.1985). It is true that the interlocutory appeal statute states that it applies to orders "not otherwise appealable under this section," 28 U.S.C. § 1292(b), and an order of remand is not appealable under § 1292. The court concludes, however, that § 1292(b) was never intended to apply to remand orders in the face of the clear and direct prohibition against appellate review of such orders in 28 U.S.C. § 1447(d). This

construction of § 1292(b) is supported by the Ninth Circuit's treatment of remand orders as final orders under 28 U.S.C. § 1291. *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 278 (9th Cir.1984). If they are final orders under § 1291, remand orders cannot also be interlocutory orders under § 1292. Thus, the application must be denied.

VII

IT IS ORDERED:

1. This action, having been removed improvidently and without jurisdiction, hereby is REMANDED to the Superior Court of the State of California for the County of Los Angeles. 28 U.S.C. § 1447(c).

2. Plaintiff's request for attorney's fees is DENIED. Each party shall bear its own costs and attorney's fees on removal and remand. 28 U.S.C. § 1447(c).

3. Defendant's application that this order be certified for an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), is DENIED. 28 U.S.C. §§ 1291 & 1447(d).

792 F.Supp. 84, 1992-2 Trade Cases P 69,978

END OF DOCUMENT

5

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

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

FIREARMS CASES

Coordinated actions:

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

v.

ARCADIA MACHINE & TOOL, et al.,

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

v.

ARCADIA MACHINE & TOOL, et al.,

--[caption continues on next page]--

J.C.C.P. No. 4095

Superior Court of California, City and County
of San Francisco No. 303753

Superior Court of California, County of
Los Angeles No. BC 210894

Superior Court of California, County of
Los Angeles No. BC 214794

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
ANDREWS' MOTION FOR JUDGMENT
ON THE PLEADINGS**

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

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1 **I. INTRODUCTION**

2 Defendant Andrews Sporting Goods, Inc., dba Turner Outdoorsman (“Andrews”)
3 has moved for judgment on the pleadings on several of the claims brought against Andrews. In
4 essence, Andrews argues that only certain persons and governmental entities and/or certain
5 attorneys for such governmental entities are authorized to bring actions on behalf of the people of
6 the State of California, whether in the context of a public nuisance action or Business &
7 Professions Code claim. For example, Andrews argues that only city attorneys and district
8 attorneys, as opposed to county counsel, may bring public nuisance abatement actions on behalf
9 of the people. Andrews also argues that certain public officials such as mayors and board of
10 supervisor members are not natural persons and so are somehow barred from bringing an action
11 on behalf of the general public under the Business & Professions Code.

12 Andrews arguments are without merit. First, Andrews has no standing to object to
13 any claims by any plaintiffs in the San Francisco action, *People of the State of California, et al. v.*
14 *Arcadia Machine & Tool, et al.*, No. 303753 (San Francisco Superior Court), because Andrews is
15 not a party to that action. Second, counties, and their county counsel, may properly bring public
16 nuisance claims. Third, public officials are not barred from bringing Business & Professions
17 Code claims on behalf of the general public, and have previously done so. Fourth, to the extent
18 that consent of the district attorney is required for certain city attorneys to file suit under
19 section 17200 of the Business & Professions Code, such consent either exists or is forthcoming.
20 As a result, there is no basis to grant any part of Andrews’ motion for judgment on the pleadings,
21 and plaintiffs respectfully request that the Court deny the motion.

22 **II. ARGUMENT**

23 A. **Andrews Lacks Standing To Object To Any Of The Claims Brought In The**
24 **San Francisco Complaint**

25 Andrews lacks standing to object to any claims brought in the action on behalf of
26 the northern California plaintiffs because Andrews is not named as a party in that complaint.
27 *People of the State of California, et al. v. Arcadia Machine & Tool, et al.*, No. 303753 (San
28 Francisco Superior Court) (the “San Francisco complaint”). Andrews apparently is aware of its

1 obvious lack of standing, but attempts to gloss over that fatal fact. *See* Andrews' Memorandum,
2 at 1, n.1. Andrews acknowledges that it is not named in the San Francisco complaint, but vaguely
3 states that "San Francisco nonetheless has treated ANDREWS as though it were part of its
4 lawsuit. . . ." Then Andrews seems to advise that "[r]egardless" of its lack of standing, it will
5 include the San Francisco plaintiffs in its analysis. *Id.*

6 Because Andrews was not named in the San Francisco complaint, it lacks standing
7 to challenge the pleadings filed in that action. As a result, Andrews' motion as it relates to any of
8 the Northern California plaintiffs must be denied.¹

9 **B. The County Counsel of the County of Los Angeles May Bring a Public**
10 **Nuisance Claim on Behalf of the People**

11 As to the public nuisance claim, Andrews appears only to challenge the ability of
12 the County Counsel of the County of Los Angeles to bring a public nuisance action on behalf of
13 the people of the State of California. Andrews does not challenge the standing of any of the city
14 attorneys in the Los Angeles complaint, No. BC 210894 (Los Angeles Superior Court), to bring a
15 public nuisance claim. As to the County of Los Angeles' action, No. BC 213794 (Los Angeles
16 Superior Court), Andrews does not contest the standing of the County of Los Angeles to bring a
17 public nuisance action. Its objection is exclusively limited to whether the County Counsel of the
18 County of Los Angeles, as opposed to the Los Angeles District Attorney, is an appropriate office
19 to bring such an action. Andrews bases its argument that only the Los Angeles District Attorney
20 may bring such an action on Code of Civil Procedure section 731, which states that a public
21 nuisance action "*may* be brought" by the district attorney for the county. The question presented
22 by Andrews' motion is whether section 731 actually *precludes* Los Angeles County Counsel from
23 bringing such an action even when directed by the Board of Supervisors to do so. Plaintiffs
24 respectfully submit that it does not.

25
26
27 ¹ Although plaintiffs will not, in connection with this opposition memorandum, address specific issues relating to the
28 Northern California plaintiffs because of Andrews' lack of standing to challenge the San Francisco pleadings, the
reasoning set forth herein relating to the standing of government entities and offices applies with equal force to the
various Northern California plaintiffs.

1 1. County Counsel Have Authority to Bring All Civil Actions Concerning
2 the County, Including Public Nuisance Actions.

3 In its motion, Andrews virtually ignores the relationship between county counsel
4 and the counties they represent. In fact, Government Code section 26529 makes clear that county
5 counsel are directed to prosecute “*all* civil actions and proceedings in which the county . . . is
6 concerned or is a party.” This general authority is supplemented by Government Code
7 section 27642, which provides that the county counsel “shall discharge all the duties vested by
8 law in the district attorney other than those of a public prosecutor.”

9 This authority is consistent with the Los Angeles County charter, which invests the
10 Los Angeles County Counsel with the “exclusive charge and control of all civil actions and
11 proceedings in which the county or any officer thereof is a party.” (Los Angeles County Charter,
12 section 21; Stats 1913, p. 1484.)

13 Although Government Code section 26528, like Code of Civil Procedure 731,
14 provides that district attorneys *may* bring public nuisance actions on behalf of the people, that
15 language clearly is not mandatory nor exclusive. The only way all of these statutes, as well as the
16 Los Angeles County Charter, can be harmonized is to conclude that county counsel and district
17 attorneys may each prosecute public nuisance actions concerning the county on behalf of the
18 people. This interpretation is further reinforced by the mandatory language that is contained in
19 the last clause of Code of Civil Procedure section 731, wherein the section explicitly provides that
20 the district attorney “*must* bring such action whenever directed by the board of supervisors of
21 such county” to do so. Absent such explicit direction from the board of supervisors, however,
22 county counsel, which have authority to prosecute all civil actions, may bring such a claim.

23 Here, the Los Angeles Board of Supervisors directed its County Counsel, and not
24 its District Attorney, to prosecute this nuisance action. *See* Exhibit A to Request for Judicial
25 Notice. Because the Los Angeles County Counsel is vested with the authority to pursue all civil
26 actions on behalf of or concerning the County, and because this nuisance action concerns the
27 County, the Los Angeles Board of Supervisors properly directed its County Counsel to pursue
28 this public nuisance action.

Further support for plaintiffs' position can be found in an Attorney General Opinion, attached as Exhibit B to Request for Judicial Notice, in which the Attorney General was asked by the Los Angeles District Attorney whether the District Attorney, as opposed to the Los Angeles County Counsel, was the proper officer to bring public nuisance actions on behalf of the people. 15 Ops. AG 231. The Attorney General concluded that the County Counsel was the proper party. In so finding, the Attorney General adopted the analysis set forth above. For example, the Attorney General first observed that the Los Angeles County Counsel was created by charter, and the charter expressly provides that the County Counsel shall have exclusive control and jurisdiction over all civil actions. Additionally, the Attorney General relied on Government Code section 26529, which makes clear that in counties having county counsel, such counsel perform *all* of the legal functions except to act as public prosecutor. As a result, the Attorney General concluded that the Los Angeles County Counsel had the authority to bring public nuisance actions on behalf of the people.

2. Simpson is Readily Distinguishable.

In support of its argument, Andrews relies heavily on *Board of Supervisors of Los Angeles County v. Simpson* (1951) 36 Cal.2d 671. In *Simpson*, the Court considered whether the Los Angeles District Attorney or Los Angeles County Counsel was the more appropriate office to abate a nuisance caused by a house of prostitution. Unlike here, however, the Los Angeles Board of Supervisors in *Simpson* had directed the Los Angeles District Attorney to bring the claim, and ultimately sought a writ to compel the District Attorney to bring suit. This fact is critical, as section 731 specifically provides that the district attorney "*must* bring such [public nuisance] action whenever directed by the board of supervisors to do so." As a result, the Court in *Simpson* simply followed the mandatory language in Code of Civil Procedure section 731. Here, however the Board of Supervisors directed County Counsel, and not the District Attorney, to bring suit. As a result, *Simpson* is readily distinguishable and certainly not controlling here.

Simpson is also readily distinguishable because the public nuisance in that case involved exclusively criminal conduct. In concluding that the District Attorney in *Simpson* should prosecute the nuisance claim, the Court relied heavily on the fact that houses of

1 prostitution are declared public nuisances and abatable by action of the district attorney by the
2 California penal statute known as the Red Light Abatement Act, Penal Code § 11226. The Court
3 found that “[t]he abatement of places under the Red Light Abatement Act is more appropriately
4 the duty of the district attorney since it is compatible with his duties as a public prosecutor.” *Id.*
5 at 674. The Court opined:

6 While actions to abate nuisances are considered civil in nature, the
7 abatement of houses of prostitution is in aid of and auxiliary to the
8 enforcement of the criminal law. . . . Each and every day a public
9 nuisance is maintained is a separate offense and is a misdemeanor
 which it is the duty of the district attorney to prosecute by
 continuous prosecutions.

10 *Id.* at 674-75.

11 The Court’s analysis therefore hinged on the fact that the nuisance to be abated
12 exclusively involved exclusively criminal conduct and that the nuisance action was “in aid of and
13 auxiliary to” the enforcement of the criminal law. In this regard, the Court extensively relied on
14 *People v. Barbieri* (1917) 33 Cal. App. 770, which it quoted at length:

15 ‘The [Red Light Abatement] act, in other words, represents only the
16 concrete application of the state’s power of police, and, preferably
17 to the courts of criminal jurisdiction, invokes the aid of the civil
18 courts as the most certain instrumentality for the suppression of an
 evil which has been by the legislature deemed of so pernicious a
 nature, in its effect upon society, as to have actuated that body in
 denouncing its practice as a public crime.’

19 *Simpson, supra*, at 675.

20 After so quoting *Barbieri*, the Court concluded: “It follows from the foregoing
21 that it is the duty of the district attorney rather than the county counsel to prosecute actions for
22 abatement of houses of prosecution.” *Id.* at 675.

23 *Simpson* therefore stands for the extremely limited proposition that the district
24 attorney, rather than county counsel, is the proper office to prosecute public nuisance actions
25 pursuant to the Red Light Abatement Act — when the board of supervisors has directed that the
26 district attorney prosecute the action. *Simpson* does not stand for the far broader proposition that
27 all public nuisances *must* be prosecuted *exclusively* by district attorneys, irrespective of whether
28 the board of supervisors has directed the county counsel to act and irrespective of whether the

1 public nuisance involves conduct that is not exclusively criminal in nature. *See, e.g., Rauber v.*
2 *Herman* (1991) 229 Cal.App.3d 942, 948 (“Primary responsibility for [prosecuting] non-criminal
3 actions or proceedings [between the district attorney and county counsel] turns on whether they
4 would be in aid of and auxiliary to the criminal law.”). Not surprisingly, the court in *Rauber*
5 described the holding of *Simpson* as being limited to the district attorney having “the
6 responsibility to bring civil red-light abatement actions.” 229 Cal.App. at 948.

7 *Simpson* is therefore readily distinguishable from the facts at issue here because in
8 *Simpson* the Los Angeles Board of Supervisors had directed the District Attorney to act; the
9 District Attorney declined to act; and the nuisance to be abated involved exclusively criminal
10 conduct and therefore was in aid of and auxiliary to the criminal law. The Court’s opinion was
11 narrowly drawn, limited exclusively to nuisances under the Red Light Abatement Act and the
12 Court essentially concluded only that the Los Angeles District Attorney lacked the discretion not
13 to bring such a public nuisance action when directed by the Board of Supervisors to do so.

14 Andrews therefore seeks to read too much into the *Simpson* decision, basically
15 ignoring the facts and the Court’s analysis — as well as subsequent courts’ interpretations — but
16 instead only focusing on *Simpson*’s conclusion. Plaintiffs are not aware of any case that has ever
17 held that county counsel cannot abate a public nuisance. For example, *People v. Parmar* (2001)
18 86 Cal.App.4th 781, the other case upon which Andrews relies, involves only the question
19 whether a particular prosecutor can be disqualified in a criminal action, and is of no relevance
20 here.

21 Plaintiffs have the better argument: either the district attorney or the county
22 counsel may bring public nuisance actions on behalf of the people. Only where the board of
23 supervisors directs the district attorney to do so — as in *Simpson* — must the district attorney do
24 so, as set forth in Code of Civil Procedure section 731. And even in that context, when the
25 district attorney is directed to bring such a claim, the Court’s reasoning in *Simpson* would limit
26 the exclusivity of the district attorney’s obligation only to the abatement of nuisances that involve
27 entirely criminal acts. *Simpson* therefore does not speak to the instant situation, where the Board
28 directed County Counsel to act, and where the nuisance does not involve exclusively criminal

1 conduct. Here, the Government Code and Los Angeles Charter make clear County County's
2 ability to prosecute a public nuisance claim on behalf of the people, particularly when directed by
3 the Board of Supervisors to take such action, as was the case here.

4 For these reasons, plaintiffs respectfully submit that Los Angeles County Counsel
5 may bring this public nuisance abatement action.

6 **C. Plaintiffs Have Properly Pleaded Their Standing To Pursue Claims Pursuant**
7 **To The Business & Professions Code**

8 Andrews next argues that certain government officials and cities and counties
9 named in the various complaints may not properly bring claims pursuant to Business &
10 Professions Code section 17200 *et seq.* and section 17500 *et seq.* As to the section 17200 cause
11 of action, Andrews' principal complaint is that persons who hold political office (whether as
12 mayor, or a member of the board of supervisors) may not bring an action on behalf of the general
13 public. Again, Andrews does not and cannot cite to a single case that stands for the proposition
14 that someone who holds political office does not constitute a "person" under the Business &
15 Professions Code. In fact, the common and accepted practice in California is that public
16 officials, as persons, routinely bring actions on behalf of the general public.

17 City attorneys from the smaller cities concede that they need the consent of the
18 district attorney to bring a section 17200 claim on behalf of the people of the State of California.
19 Such formal approval either exists or is forthcoming. There is no question but that all city
20 attorneys and county counsel may prosecute section 17500 claims, as section 17535 expressly
21 provides for their standing to bring such claims.

22 **1. Public Officials are "Persons"**

23 Business & Professions Code section 17204 provides that "any person acting for
24 the interests of itself, its members or the general public" may bring suit under the Unfair
25 Competition Law. Section 17201 defines "person" to include "natural persons, corporations,
26 firms, partnerships, joint stock companies, associations, and other organizations of persons." In
27 the Los Angeles County action, No. BC 214794, three Los Angeles County Supervisors seek to
28 bring the action on behalf of the general public. In the City of Los Angeles action, No. BC

1 210894, the mayors of West Hollywood and Inglewood also seek to bring suit on behalf of the
2 general public.

3 Plaintiffs submit that the inclusion of these public officials as persons who may
4 bring claims on behalf of the general public is consistent with the plain language of
5 sections 17201 and 17204, which speak in terms of any “natural persons” being able to bring
6 such a claim. Andrews seeks to invent a bar against such public officials bringing claims on
7 behalf of the general public. But there is no such bar. Andrews purports to object to these
8 persons (*e.g.*, mayors, members of boards of supervisors) filing suit on behalf of the general
9 public because they are not expressly listed under section 17204 as among the public officials
10 who may bring a claim “on behalf of the people of the State of California. However, claims on
11 behalf of the “people” are admittedly different from claims brought on behalf of the “general
12 public.” Plaintiffs concede that mayors and board of supervisor members may not bring claims
13 on behalf of “the people.” The list of legal officers who may bring actions on behalf of “the
14 people,” as opposed to the “general public,” includes only those *legal offices* that are able to
15 prosecute legal claims, such as the office of the Attorney General, as well as the offices of the city
16 attorney, county counsel, city prosecutor and district attorney. However, this listing of public
17 legal offices with the ability to bring public lawsuits on behalf of the “people” does not speak to
18 who is a proper “person” able to bring suit on behalf of the “general public.”

19 Andrews’ reference to the doctrine of *ejusdem generic* is therefore inappropriate.
20 In section 17204, the Legislature plainly referred to the legal offices able to prosecute public
21 lawsuits on behalf of the people. The Legislature also made explicit that persons could bring suit
22 on behalf of the general public, and could not have defined the term person more broadly.
23 Nowhere is person defined to exclude persons who hold an elected office.

24 As a result, it is not surprising that public officials have previously brought
25 section 17200 actions on behalf of the general public. For example, in the tobacco litigation,
26 then-Lieutenant Governor Gray Davis filed suit on behalf of the general public against the
27 tobacco companies. *See, e.g., Davis, et al v. R.J. Reynolds Company, et al.*, No. 00706458 (San
28 Diego Superior Court) (subsequently coordinated in *Tobacco Cases I*, J.C.C.P. No. 4041),

1 attached as Exhibit C to Request for Judicial Notice. Additionally, Board of Supervisors official
2 Zev Yaroslavsky, who seeks to serve as a plaintiff on behalf of the general public in the instant
3 case, also previously served as a plaintiff on behalf of the general public in a separate tobacco
4 action pursuant to sections 17200 and 17500. *See, e.g., County of Los Angeles, et al. v. R.J.*
5 *Reynolds Tobacco Company, et al.*, No. 707651 (San Diego Superior Court) (subsequently
6 coordinated in *Tobacco Cases I*, J.C.C.P. No. 4041), attached as Exhibit D to Request for Judicial
7 Notice. Here, the fact that the persons are members of a board of supervisors or serve as mayors
8 is not relevant to the claims being asserted, as they are not alleging an injury that is specific to
9 them in their official capacity. These people are bringing the action in their capacity as persons
10 under section 17204, and bring the action on behalf of the general public in the same way that any
11 private person may.

12 Andrews cannot cite to a single case that stands for the proposition that persons
13 who happen to hold public office do not constitute persons under section 17204 and are therefore
14 unable to bring suit on behalf of the general public. Andrews' citation to some loose language in
15 Witkin is misplaced, *see* Andrews Mem. at 13, as the cases upon Witkin relies either involve
16 whether public entities may be sued (as opposed to being able to sue) pursuant to 17203 or do not
17 address whether a public official may bring a claim on behalf of the general public, as opposed to
18 in the name of the people.

19 2. **Alternatively, Public Officials May Also Bring Suit On Behalf of the**
20 **General Public As "Officers"**

21 In addition to authorizing any "person" to bring an action on behalf of the general
22 public, section 17204 also authorizes any "officer" to bring such a claim. Section 17204
23 provides, "... or upon the complaint of any board, officer, person, corporation or association or
24 by any person acting for the interests of itself, its members or the general public." To the extent
25 that the term "person" somehow does not include those who hold elected office, then "officers"
26 would include such individuals. As this language cannot be read as mere surplusage, a fair
27 reading would include those publicly elected officers who seek to file suit on behalf of the general
28 public.

1 For this reason, too, therefore, plaintiffs are convinced that public officials may
2 bring suit on behalf of the general public. Andrews' reading of the statute ignores the plain
3 meaning of "person," and also ignores the inclusion of "officers." Andrews' motion as it relates
4 to the individuals who seek to file suit on behalf of the general public should be denied.

5 **3. Smaller Cities as well as Counties Must Obtain The Consent of the**
6 **District Attorney**

7 Plaintiffs concede that city attorneys of the cities of West Hollywood, Compton
8 and Inglewood do not have standing to bring an action under 17204 absent the agreement of the
9 district attorney of that city. West Hollywood has received such consent. *See* Exhibit E to
10 Request for Judicial Notice. The consent of the District Attorney for Compton and Inglewood is
11 being sought.

12 **D. Plaintiffs Have Sought Statutory Penalties under Section 17200 Only On**
13 **Behalf of the Cities of Los Angeles and San Francisco.**

14 Plaintiffs concede that only the cities of Los Angeles and San Francisco have
15 standing to pursue penalties under 17200. The complaints are properly pleaded in this regard.

16 **E. Plaintiffs Have Properly Pleaded Their Standing to Pursue Claims Pursuant**
17 **to Section 17500.**

18 The standing requirements for those who may bring claims on behalf of the people
19 of the State of California is broader under section 17500 than under section 17200. For example,
20 section 17535 makes clear that "[a]ctions for injunction under this section may be prosecuted by
21 the Attorney General or any district attorney, county counsel city attorney or city prosecutor in
22 this state in the name of the people of the State of California." As a result, each of the named
23 county counsel and city attorneys may bring an action for injunctive relief under 17500.
24 Additionally, although the same "persons" or "officers" that may bring an action on behalf of the
25 general public under 17200 may also bring such an action under 17500, the mayors and board of
26 supervisor members do not purport to bring such claims in the governing complaints.

27 Section 17536 makes clear that city attorneys and county counsel also may seek
28 civil penalties for a violation of the statute.

1 As a result, the entities that seek to plead a claim under section 17500 — *i.e.*, the
2 city attorneys in the City of Los Angeles action, No. BC 210894, and the County Counsel in the
3 County of Los Angeles action, have standing to bring this action on behalf of the people of the
4 State of California.

5 **III. CONCLUSION**

6 County Counsel of the County of Los Angeles, which has been directed by its
7 Board of Supervisors to prosecute this action, has standing to do so. Public office holders such
8 as mayors and supervisors constitute “persons” and/or “officers” who may bring actions pursuant
9 to section 17204 on behalf of the general public. The standing requirements of section 17500 are
10 also met. For these reasons, and as set forth more fully above, plaintiffs respectfully request that
11 the Court deny Andrews’ motion for judgment on the pleadings.

12 DATED: January 29, 2003

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

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

FIREARMS CASES

Coordinated actions:

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

v.

ARCADIA MACHINE & TOOL, et al.,

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

v.

ARCADIA MACHINE & TOOL, et al.,

--[caption continues on next page]--

J.C.C.P. No. 4095

Superior Court of California, City and County
of San Francisco No. 303753

Superior Court of California, County of
Los Angeles No. BC 210894

Superior Court of California, County of
Los Angeles No. BC 214794

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO ANDREWS' MOTION
FOR JUDGMENT ON THE PLEADINGS**

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

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PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Haydee Villegas, declare:

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

On April 23, 2003, I served the foregoing document(s) described as **SUPPORTING DOCUMENTS TO PETITION FOR WRIT OF MANDATE/PROHIBITION OR OTHER EXTRAORDINARY RELIEF VOLUME I, (00001-00110)** on the interested parties in this action by JusticeLink Electronic filing on all persons appearing on JusticeLink's Service List.

Additionally, on April 24, 2003, I caused the above referenced document, enclosed in a sealed envelope to be delivered by hand to the offices of the following parties:

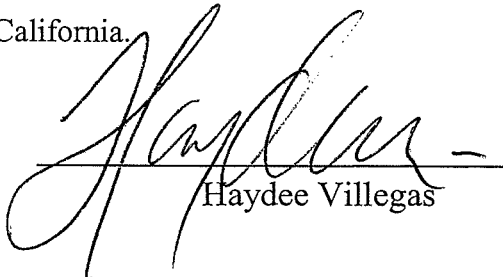
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I declare under penalty that the foregoing is true and correct. Executed this 23rd day of April, 2003 at San Pedro, California.


Haydee Villegas

