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

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

13 FIREARM CASES )

14 Coordinated actions: )

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

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, by and through San )  
28 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  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
SPECIAL MOTION TO STRIKE  
PURSUANT TO CAL. CODE OF CIVIL  
PROCEDURE §425.16**

Date:  
Time:  
Dept. 65  
Hon. Vincent. P. DiFiglia

6/27/07

## MEMORANDUM OF POINTS AND AUTHORITIES

### **1. INTRODUCTION**

Eleven plaintiffs<sup>1</sup> in this coordinated action brought false advertising claims, pursuant to California Business and Professions Code §§ 17500 et seq. ("Section 17500"), against some or all defendants herein seeking declaratory and injunctive relief, in addition to restitution and civil penalties. Five of those plaintiffs (the Los Angeles County Suit plaintiffs, listed in footnote 1) named Andrews Sporting Goods, Inc. dba Turners Outdoorsman ("ASG") and S.G. Distributing, Inc. ("SGD"), as defendants.<sup>2</sup> Plaintiffs' claims are based on their general allegation that defendants falsely state or imply in "advertisements and other statements" that ownership of firearms will improve home security. Plaintiffs rely on several questionable studies in concluding that firearms possession endangers home occupants rather than (or more than) protecting them, thus rendering defendants' statements false. That is Plaintiffs' opinion.

Defendants can cite competing studies (see Section 5, below), and conclude that responsible use of firearms can enhance home security. That is Defendants' opinion. The issue here, however, is not whether Defendants' opinion is supported by criminologists or questioned by academics, or whether Defendants' opinion is a majority opinion or a minority opinion. What matters is that it is a protected opinion—protected by the California and United States Constitution. What Plaintiffs attempt to do here is repackage in the guise of a fraud claim their arguments against the self-defense value of firearms. Further, they seek to gain an advantage in this ongoing public debate by silencing opposing viewpoints and, in the process, infringe upon Defendants'

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<sup>1</sup> Plaintiffs County of Los Angeles, et al., Complaint was brought on behalf of the "People of the State of California, *ex rel* the County of Los Angeles, County of Los Angeles on behalf of itself and the general public, and Gloria Molina, Zev Yaroslavsky, and Yvonne Brathwaite Burke, Supervisors of Los Angeles County, on behalf of the general public...pursuant to Business and Professions Code sections ...17535." (County of Los Angeles, et al., Complaint ¶ 12) (hereinafter, the "Los Angeles County Suit").

Plaintiffs City of San Francisco, et al., brought their First Amended Complaint: "...on behalf of the People of the State of California by San Francisco City Attorney Louise H. Renne, Berkeley City Attorney Manuela Alburquerque, Sacramento City Attorney Samuel L. Jackson, San Mateo County Counsel Thomas F. Casey, III, Alameda County Counsel Richard E. Winnie, and Oakland City Attorney Jayne W. Williams, pursuant to ... California Business and Professions Code section 17535. (City of San Francisco, et al., First Amended Complaint ¶ 4) (hereinafter, the "San Francisco City Suit").

<sup>2</sup> The San Francisco City Suit does not name ASG and SGD as defendants, but out of an abundance of caution, and without waiving their rights to object to any attempt by the San Francisco City plaintiffs to belatedly add defendants to their action, defendants include them in the analysis under the instant motion.

1 constitutional rights to freedom of speech. Specifically, Plaintiffs seek to impose civil penalties  
2 on Defendants and seize their profits based on past speech, and enjoin future speech. Moreover,  
3 Plaintiffs' false advertising claims against SGD are particularly offensive because SGD does not  
4 advertise. (See "Declaration of Shirley Andrews in Support of Andrew's Sporting Goods, Inc.'s  
5 and SG Distributing, Inc.'s Special Motion to Strike Pursuant to Cal. Code of Civil Proc.  
6 § 425.16." filed herewith.)

7 Accordingly, Defendants bring this Special Motion to Strike ("anti-SLAPP" motion)  
8 pursuant to Code of Civil Procedure section 425.16 ("Section 425.16"), which was enacted by the  
9 legislature to prohibit such attacks on freedom of speech. Although certain Plaintiffs have  
10 immunity from such motions, i.e., public prosecutors bringing "enforcement actions" in the name  
11 of the people of the State of California, that does not insulate the remaining Plaintiffs from proper  
12 application of the law. Where a statute is broadly construed, exceptions to it are to be narrowly  
13 construed. (*People v. Stritzinger* (1983) 34 Cal. 3d 505, 512.) Thus, the immunity provisions  
14 should be strictly limited to those parties named in Section 425.16(d).<sup>3</sup>

15 **2. THE COURT CAN AND SHOULD EXERCISE ITS DISCRETION TO HEAR**  
16 **DEFENDANTS' MOTION GIVEN THE CONSTITUTIONAL RIGHTS AT ISSUE.**

17 Under Section 425.16, an anti-SLAPP special motion to strike *may* be filed within 60 days  
18 of the service of the complaint. The court, however, has discretion to hear such motions at any  
19 later time upon terms it deems proper. (*Lam v. Ngo* (App. 4 Dist. 2001) 91 Cal.App.4th 832.) As  
20 the court in *Lam* noted, "[t]he nonjurisdictional nature of the time limit is also emphasized by the  
21 permissive "may" in the setting forth of the time limit." (*Id.* at 840.) In addition, the court held  
22 that trial courts *must* hear anti-SLAPP motions if filed within 60 days of an amended complaint.  
23 (*Ibid.*) In the instant case, Defendants anticipate that some Plaintiffs will seek to amend their

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25 <sup>3</sup> Plaintiffs Gloria Molina, Zev Yaroslavsky, and Yvonne Brathwaite-Burke on behalf of the general public;  
26 the County of Los Angeles on behalf of the State, itself and the general public; and San Mateo and  
27 Alameda counties on behalf of the People of the State of California are not exempt from this Special  
28 Motion to Strike since they are not among the parties provided immunity pursuant to Section 425.16(d),  
which states: "[t]his section shall not apply to any enforcement action brought in the name of the people of  
the State of California by the Attorney General, district attorney, or city attorney, acting as a public  
prosecutor."

1 complaints shortly in an effort to satisfy statutory standing requirements, and otherwise “clean up”  
2 the pleadings before this case proceeds to trial. If Plaintiffs obtain this court’s leave to amend  
3 their complaints, then the anti-SLAPP motion must be heard as to those Plaintiffs who do not  
4 have immunity under Section 425.16(d).

5 In either event, the motion warrants consideration due to the First Amendment implications;  
6 Plaintiffs are, after all, seeking a declaration that statements of opinion by Defendants about the  
7 potential benefits of gun ownership are illegal. Thus, Plaintiffs seek to do more than “chill”  
8 certain speech based on its content. They seek to outlaw it, as seen in their request for relief:

9 159. Plaintiffs seek an order of this Court: (1) enjoining defendants from continuing to issue  
10 unfair, deceptive, untrue or misleading statements and advertising; (2) ordering defendants  
11 to undertake a corrective advertising campaign warning consumers of the dangers associated  
12 with owning a gun in the home and instruct hand gun owners of the proper way to store  
13 handguns in the home; (3) ordering restitution to the public for all funds unfairly obtained  
14 by defendants as a result of their violation of Business and Professions Code §§ 17500 *et*  
15 *seq.*; 4) ordering defendants to disgorge all revenues and profits acquired as a result of their  
16 violation of Business and Professions Code §§ 17500 *et seq.*; and (5) ordering Defendants to  
17 pay civil penalties as a result of their violation of Business and Professions Code §§ 17500  
18 *et seq.* (See LA County Complaint ¶ 159)

15 Such relief goes far beyond ‘chilling’ Defendants’ right to speak. They want to fine them,  
16 take their profits, and silence them—except for the mandatory “anti-gun” campaign Plaintiffs seek  
17 to impose on defendants. In short, the Section 17500 causes of action are aimed squarely at  
18 defendants’ opinions and the expression thereof, i.e., the Defendants’ constitutional right to  
19 freedom of speech. Consequently, a review of Plaintiffs’ claims under Section 425.16 is  
20 warranted.

21 **3. THE CALIFORNIA ANTI-SLAPP LAW WAS ENACTED TO PROTECT THE**  
22 **FUNDAMENTAL CONSTITUTIONAL RIGHTS OF FREE SPEECH AND IS TO**  
23 **BE CONSTRUED BROADLY.**

23 California Code of Civil Procedure section 425.16(a) provides that:

24 “The legislature finds and declares that there has been a disturbing increase in  
25 lawsuits brought *primarily to chill the valid exercise* of the constitutional rights of  
26 freedom of speech and petition for the redress of grievances. The legislature finds  
27 and declares that it is in the public interest to encourage continued participation in  
28 *matters of public significance*, and that this participation should not be chilled  
through *abuse of the judicial process*.” To this end, this section shall be *construed*  
*broadly*. (Emphasis added.)

28 The legislature has provided an expedited procedure to counteract the “disturbing increase” of

1 these types of lawsuits. Specifically, the defendant can file a “special motion to strike” which  
2 “shall” be granted unless the plaintiff can demonstrate that “there is a probability that the plaintiff  
3 will prevail on the claim.” (C.C.P. § 425.16(b)(1).)

4 This statute was drafted by the legislature *very broadly* so as to include “any act of [a]  
5 person in furtherance of the person’s right of petition or free speech under the United States or  
6 California Constitution in connection with a public issue.” (C.C.P. § 425.16(b)(1); *see Averil v.*  
7 *Superior Court* (1996) 42 Cal.App.4th 1170, 1176 [the court held that given the “stated purpose of  
8 the statute....the legislature intended the statute to have broad application.”].) Indeed, though  
9 some cases narrowly construed the statute, the legislature specifically amended Section 425.16 in  
10 1997 to make clear and ensure that the statute “shall be construed broadly.”<sup>4</sup> Moreover, in *Briggs*  
11 *v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, the California Supreme Court  
12 noted that the 1997 amendment to Section 425.16 was not “surprising since the ‘stated purpose of  
13 the [anti-SLAPP] statute...includes protection of not only the Constitutional right to petition for  
14 the redress of grievance, but the broader Constitutional right of freedom of speech.’” (*Id.* at 1119.)

15 In sum, under Section 425.16, Defendants must show that the acts challenged by Plaintiffs’  
16 false advertising claims were in furtherance of their right of free speech in connection with a  
17 public issue. The burden then shifts to Plaintiffs to demonstrate that there is a probability they  
18 will prevail on their claims.

19 **4. SECTION 425.16 APPLIES BECAUSE THE ALLEGATIONS OF THE**  
20 **COMPLAINT ARISE FROM DEFENDANTS’ ALLEGED ACTS IN**  
21 **FURTHERANCE OF THEIR FIRST AMENDMENT RIGHTS TO SPEAK OUT**  
22 **ON PUBLIC ISSUES.**

23 As noted above, all the that is required to invoke the protection of California’s SLAPP  
24 statute is that the challenged lawsuit or claim arose from an act on the part of Defendants in  
25 furtherance of their right of petition or free speech. (C.C.P. § 425.16 (b)(1); *Fox Searchlight*  
26 *Pictures, Inc. v. Paladino* (App. 2 Dist. 2001) 89 Cal.App.4th 294, 306.) An act in furtherance of  
27 a person's right of petition or free speech under the United States or California Constitution in  
28 connection with a public issue includes:

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28 <sup>4</sup> The legislature placed such importance on this motion that it made the *denial* of a special motion to strike  
an appealable order. (*See* C.C.P., §425.16 (j).)

1 ...any written or oral statement or writing made in a place open to the public or a public  
2 forum in connection with an issue of public interest; or any other conduct in furtherance of  
3 the exercise of the constitutional right of petition or the constitutional right of free speech  
4 in connection with a public issue or an issue of public interest. (C.C.P. § 425.16 (e)(3)-  
5 (4).)

6 A defendant moving to strike a Strategic Lawsuit Against Public Participation is not required to  
7 show the plaintiff intended to chill the defendant's exercise of First Amendment rights or that the  
8 suit had such an effect. (*Id.* at 307.)

9 Here, Plaintiffs have alleged, without *any* supporting evidence, that Defendants made false  
10 and/or misleading statements in connection with the distribution and sale of firearms.  
11 Specifically, Plaintiffs claim that:

12 Defendants...have made unfair, deceptive, untrue or misleading statements and  
13 advertisements in connection with the marketing and sale of firearms... includ[ing]...  
14 engaging in a campaign of deception and misrepresentation concerning the dangers of their  
15 firearms by disseminating *advertisements and other statements* which falsely state or  
16 imply that ownership of guns will increase home safety or security. (San Francisco et. al.  
17 First Amended Complaint ¶84; Los Angeles County et. al. Complaint ¶159.)(emphasis  
18 added)

19 To support these allegations, Plaintiffs state:

20 To increase sales and profits, Defendants have falsely deceptively claimed through  
21 advertising and promotion of their firearms that the ownership and possession of firearms  
22 in the home increases one's security. For example handgun manufacturers have promoted  
23 firearms with slogans such as "homeowner's insurance," "tip the odds in your favor," and  
24 "your safest choice for personal protection." Research demonstrates that, to the contrary,  
25 possession of firearms actually increases the risk and incidence of homicide, and suicide  
26 and intentional and unintentional injuries to gun owners and their families and  
27 friends...Defendants' advertising and promotion deceptively conveys the message that  
28 possession of a firearm and that the enhanced lethality of particular features and guns will  
increase the personal safety of the owner and owner's household....Defendants fail to  
include any information or warning about the relative risk of keeping a firearm in the  
home...[and] is therefore likely to mislead the public. (San Francisco et al. First Amended  
Complaint ¶68) (*See also*, Los Angeles County et. al. Complaint ¶126-131)

These alleged false and misleading advertisements and statements, and the "proof" thereof,  
are the subject of an ongoing national public debate regarding firearm safety and gun control, thus  
bringing Plaintiffs' claims within the purview of Section 425.16 (e)(3)-(4). Firearm safety and  
gun control are "public issues." Defendants have a right to speak about them in their  
"advertisements and other statements" to which Plaintiffs object, without the threat of fines,  
disgorgement of profits or expensive and protracted litigation.

1       **5. THE ALLEGED FALSE AND MISLEADING ADVERTISEMENTS AND**  
2       **PUBLIC STATEMENTS CONCERN PUBLIC ISSUES AND ARE PROTECTED**  
3       **FREE SPEECH.**

4       California courts have found that alleged false and misleading advertisements and public  
5       statements concerning important public issues constitute protected free speech, subject to analysis  
6       under Section 425.16. For example, in Dupont Merck Pharmaceutical Company v. The Superior  
7       Court of Orange County (2000) 78 Cal.App.4th 562, the plaintiff through a Section 17500 cause  
8       of action claimed that a pharmaceutical company's allegedly "false, deceptive, and misleading  
9       statements are not protected by the right of free speech." (*Id.* at 566) However, the Court held:

10       "this may be true, at least as far as false advertising is concerned. However, in  
11       making this argument, plaintiffs are placing the cart before the horse. The  
12       allegation in the unverified complaint that the statements were false may or may  
13       not be true. Whether or not they were true should be considered in the second part  
14       of the [Section 425.16] analysis; whether there is a probability plaintiffs will  
15       prevail. In determining whether the alleged conduct is constitutionally protected it  
16       is sufficient to determine the conduct constituted speech protected by the First  
17       Amendment." (*Ibid.*)

18       The court there found that the pharmaceutical company's advertising and promotions were  
19       of public interest and constitutionally protected, given the seriousness of the issue and the number  
20       of people affected. (*Id.* at 567 ["Both the number of persons allegedly affected and the  
21       seriousness of the conditions treated establish the issue as one of public interest."].) Accordingly,  
22       the court held that defendant had met the threshold burden under its anti-SLAPP motion, i.e., that  
23       the allegedly false advertisements and promotions constituted acts in furtherance of its right of  
24       petition or free speech under the United States or California Constitution in connection with a  
25       public issue. It was then incumbent upon plaintiffs to establish that there was a probability they  
26       would prevail on their claims. (*Ibid.*)

27       Similarly, in this case, Plaintiffs alleged generally that Defendants made false and  
28       misleading statements in their advertisements and other communications. As in *Dupont*, such  
29       statements concern serious issues (gun control and self-defense rights, in this case) that are of  
30       public interest. Thus, such statements should also come under the protection of California's  
31       SLAPP legislation.

1 ~~California's SLAPP legislation has also been applied where speech was indirectly~~  
2 ~~impacted by a legislative ban on specific conduct.~~ (See *Nordyke v County of Santa Clara* (2000)  
3 933 F.Supp 903.) In *Nordyke*, the County of Santa Clara attempted to prohibit gun shows on  
4 county property. The defendants brought an anti-SLAPP motion against the County, claiming that  
5 the injunction violated their right of free speech regarding firearms. In granting defendants'  
6 motion, the court found that the gun shows "permit a forum for the exchange and debate of ideas  
7 regarding guns and gun control and offer an opportunity for candidates for political office to  
8 express their views on these *important social issues*." (*Id.* at 906)(emphasis added.) The court  
9 further held that "the speech which occurs at plaintiffs' gun show sales constitutes [protected]  
10 commercial speech." (*Id.* at 907.)

11 Here, Plaintiffs would be hard pressed to argue that the communications *attendant* to the  
12 sale of firearms at gun shows deserves any more protection than *direct* communications from  
13 Defendants to consumers. The advertisements and statements at issue in this case are at the center  
14 of the "exchange and debate of ideas regarding gun control." Thus, as in *Nordyke*, Defendants'  
15 advertisements and other statements constitute, at the very least, expressions of protected  
16 commercial speech.

17 Unlike the plaintiffs in *Nordyke*, however, Plaintiffs here seek to penalize and enjoin any  
18 "advertisements or other statements" addressing the value of firearm ownership as it relates to  
19 self-defense and home security. Such speech is "inextricably intertwined" in the gun control  
20 debate which is core political speech and, as such, should not to be tested as commercial speech  
21 but rather as fully protected core speech. Hoffman v. Capitol Cities/ABC, Inc. 255 F.3d 1180,  
22 1185-86 (9th Cir. 2001). Plaintiffs seek to suppress political ideas which, even when expressed in  
23 commercial advertising, have lost their "commercial character [by being] inextricably intertwined  
24 with otherwise fully protected speech." Riley v. National Federation of the Blind (1988) 487 U.S.  
25 781, 796.

26 Plaintiffs actually make this point in their request for relief. Plaintiffs seek an order that  
27 would force defendants to "undertake a corrective advertising campaign warning consumers of the  
28 dangers associated with owning a gun in the home and instruct hand gun owners of the proper way



1 to store handguns in the home.” (See LA County Complaint ¶ 159) Such a “corrective” campaign  
2 regarding the danger of firearms would be clearly and inextricably intertwined with core political  
3 speech—as are Defendants’ advertisements and statements regarding the value of firearms  
4 ownership. In short, by requesting such relief, Plaintiffs acknowledge that they are engaged in a  
5 public and political debate about firearms ownership. Plaintiffs’ attempt, under the guise of their  
6 false advertising claim, to silence one side of that debate reveals the true nature of the political  
7 battle that underlies all Plaintiffs’ claims.

8 Finally, Plaintiffs allege that statements such as “homeowner’s insurance,” “tip the odds in  
9 your favor,” and “your safest choice for personal protection” are misleading because they convey  
10 the message that a firearm will increase one’s personal safety. Again, whether one’s safety is  
11 increased by the use or possession of firearms is a matter of national public debate. For example,  
12 Plaintiffs challenge Defendants’ alleged statements on the basis of studies that supposedly  
13 “demonstrate that the presence of handguns in the home increase [sic] the risk of harm to firearm  
14 owners and their families,” and that “Studies that control for the relevant variables have  
15 demonstrated that the homicide of a household member is almost three times more likely in homes  
16 with guns than in homes without them.” See e.g., LA County, ¶¶ 127-129, 158; LA City, ¶¶ 136-  
17 138, 162; SF, ¶¶ 69-71, 84.)

18 This court may take judicial notice of the fact that this issue has been the subject of  
19 extensive public debate in which several researchers have expressed a different view of the utility  
20 of firearms, particularly possession of a firearm for lawful self-defense purposes. (See, e.g. John  
21 R. Lott, Jr., More Guns Less Crime; Understanding Crime and Gun Control (1998); Gary Kleck,  
22 Targeting Guns: Firearms and Their Control (1997).) **[need full cites, here]**

23 Furthermore, Plaintiffs’ arguments against defensive gun ownership are based on articles  
24 that Plaintiffs fail to cite. It appears from some of the allegations that one such “study” was  
25 conducted by authors whose sole qualification for statistical evaluation is that they are doctors.<sup>5</sup>  
26 This doctors’ article has been denounced as wholly unreliable in a responding article co-authored  
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28 <sup>5</sup> Arthur L. Kellermann, M.D., M.P.H., et al., “Gun Ownership as a Risk Factor for Homicide in the Home,”  
39 New England Journal of Medicine, pages 1084-1091 (1993).

1 by a statistics professor, a criminologist and three professors from Harvard and Columbia Medical  
2 schools. They assert the doctors' article "would be more appropriately cited in a statistics text as a  
3 cautionary example of multiple statistical errors."<sup>6</sup> In addition, both these evaluators and others  
4 have suggested that none of these doctors' work is entitled to credence since, in violation of the  
5 normal standards of academic discourse, the doctors refuse to provide their underlying data to  
6 those seeking to evaluate it.<sup>7</sup>

7 This refusal is particularly troublesome as to a highly questionable claim plaintiffs rely on  
8 and state as fact: that "homicide of a household member is almost three times more likely in  
9 homes with guns than in homes without them." Though the doctors refused to provide Prof.  
10 Kleck their underlying data, he was able to at least partially ferret it out from another of their  
11 "studies." These data erode the point the doctors make and upon which plaintiffs rely. For they  
12 show that the victims of the murders in the doctors' article were criminals (drug dealers), **not**  
13 ordinary people like those to whom the gun industry advertises. And, more important, they were  
14 not killed with **their own** guns but with guns brought into their home by the killer.<sup>8</sup>

15 In other words, the doctors' "study" does not prove anything about the dangers of gun  
16 ownership by ordinary people. What it proves, if anything, is that drug dealers who invite other  
17 criminal into their homes to purchase drugs often find the invitees include violent robbers and/or  
18 rival drug dealers. In this connection reference should be made to another of Prof. Kleck's  
19 findings: based on national data it turns out that killings between acquaintances in the home rarely  
20 involve ordinary, law abiding people shooting each other in a temporary fit of anger growing out  
21 of an ordinary argument. Rather the largest proportion of home handgun killings were "between  
22 persons involved in drug dealing, where *both parties were criminals who knew one another*

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25 <sup>6</sup> Don B. Kates, Henry E. Schaffer, et al., "Guns and Public Health: Epidemic of Violence or Pandemic of  
26 Propaganda", 62 TENN. L. REV. 513-596 (1995) at 585; see their detailed examination of the doctors'  
27 article at pp. 584-595.

28 <sup>7</sup> Daniel D. Polsby, "Firearms Costs, Firearms Benefits and the Limits of Knowledge," 86 J. CRIM L. &  
CRIMINOL. 207, 210-11 (1995).

<sup>8</sup> Gary Kleck, Can Owning a Gun Really Triple the Owner's Chances of Being Murdered: The Anatomy of  
an Implausible Causal Mechanism," 5 HOMICIDE STUDIES 64-77 (2001).

1 *because of prior illegal transactions.*"<sup>9</sup>

2 It bears emphasis that Defendants are not asking this court to accept these negative  
3 evaluations of the article on which Plaintiffs rely so heavily. The point is simply that the ideas  
4 Defendants are accused of espousing are not (as Plaintiffs seek to represent them) deceptions.  
5 Rather, they are opinions regarding issues in an on-going national debate—issues which it is the  
6 province of legislatures to resolve, not courts.

7 In sum, the “advertisements and other statements” about firearms that Plaintiffs seek to  
8 penalize and enjoin clearly involve the exercise of Defendants’ free speech “in conjunction with a  
9 public issue” that is hotly debated, thereby bringing Plaintiffs false advertising claims within the  
10 purview of Section 425.16. Thus, the burden shifts to Plaintiffs to establish that there is a  
11 probability they will prevail on their false advertising claims, something they cannot do.

12 **6. PLAINTIFFS’ CANNOT DEMONSTRATE THE REQUISITE “LIKELIHOOD**  
13 **OF PUBLIC DECEPTION” REQUIRED UNDER SECTION 17500.**

14 To survive a Special Motion to Strike pursuant to Section 425.16, it is the burden of the  
15 plaintiffs to prove that they would prevail. (*Dupont Merck Pharmaceutical Company v. The*  
16 *Superior Court of Orange County* (2000) 78 Cal.App.4th 567.) Merely surviving a demurrer does  
17 not satisfy the requirement that the plaintiff would prevail; instead, “a plaintiff must provide the  
18 court with *sufficient evidence* to permit the court to determine whether there is a probability that  
19 the plaintiff will prevail on the claim.” (*Id.* at 568.)

20 It would defeat the obvious purposes of the anti-SLAPP statute if mere allegations in an  
21 unverified complaint would be sufficient to avoid an order to strike the complaint.  
22 Substantiation requires something more than that. Once the court determines the first  
23 prong of the statute has been met, a plaintiff must provide the court with sufficient  
24 evidence to permit the court to determine whether “there is a probability that the plaintiff  
25 will prevail on the claim.” (C.C.P. § 425.16(b)(1).)

26 To establish a “probability of prevailing on the claim,” as required for a plaintiff to  
27 withstand a special motion to strike under the anti-SLAPP statute, the plaintiff must demonstrate  
28 that the complaint is both legally sufficient and supported by a sufficient prima facie showing of

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<sup>9</sup> Gary Kleck, TARGETING GUNS: FIREARMS AND THEIR CONTROL 236 (1997) (emphasis added)  
based on U.S. Bureau of Justice Statistics data run on murder defendants being prosecuted in the 33 largest  
urban counties in 1988.

1 facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. (*Roseau*  
2 *v. Scherer* (App. 3 Dist. 2001) 88 Cal.App.4th 260, 274 as modified.) Significantly, unlike  
3 demurrers or motions to strike, which are designed to eliminate sham or facially meritless  
4 allegations at the pleading stage, a SLAPP motion, like a summary judgment motion, pierces the  
5 pleadings and requires an evidentiary showing. (*Simmons v. Allstate Ins. Co.* (App. 3 Dist. 2001)  
6 92 Cal.App.4th 1068, 1073.)

7 Plaintiffs cannot prevail on a Section 17500 (false and misleading advertising) cause of  
8 action against Defendants because they cannot demonstrate that a “reasonable consumer” is likely  
9 to be deceived by their advertisements (as noted above, SGD does not advertise at all).

10 **1. Elements of a Business and Professions Code Section 17500 Et. Seq. Cause of**  
11 **Action.**

12 Business and Professions Code section 17500 prohibits “untrue or misleading” advertising  
13 or statements in connection with the sale of property or services. To state a Section 17500 claim,  
14 plaintiffs must plead facts sufficient to show a “likelihood of public deception,” when considered  
15 from the perspective of a “reasonable consumer.” Otherwise, an allegation of misleading  
16 advertising may be dismissed. (See *Haskell v. Time, Inc.* (E.D. Cal. 1994) 857 F.Supp. 1392,  
17 1399.)

18 **2. Plaintiffs’ Vague and General Allegations Without Identifying A Specific**  
19 **Statement or Advertisement Fail to State a Valid Section 17500 Claim.**

20 As discussed above, in order to establish a claim for false or misleading advertising,  
21 Plaintiffs must show a “likelihood of public deception.” To prove a likelihood of public  
22 deception, Plaintiffs must first identify the advertising that is untrue or misleading. However,  
23 Plaintiffs have not identified a single advertisement or statement attributed to Defendants that they  
24 allege is false or misleading.

25  
26 Plaintiffs are required to provide *some* evidentiary basis that Defendants were in violation  
27 of Section 17500 to bring such a claim. A plaintiff alleging unfair business practices under these  
28 statutes must state with reasonable particularity the facts supporting the statutory elements of the

1 violation. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619; *Perdue v.*  
2 *Crocker National Bank* (1985) 38 Cal.3d 913, 929; see *Committee on Children's Television, Inc.*  
3 *v. General Foods Corp.*, (1983) 35 Cal.3d 197, 213-214; *G.H.I.I. v. MTS, Inc.* (1983) 147  
4 Cal.App.3d 256, 270-275; *Lutz v. De Laurentiis* (1989) 211 Cal.App.3d 1317, 1323-1324.) The  
5 court in *Khoury* sustained defendant's demurrer "because the second amended complaint ...  
6 fail[ed]... to describe with any reasonable particularity the facts supporting violation....the  
7 complaint refers to an 'effect' of 'misleading' appellant's customers, but the facts clearly do not  
8 involve deceptive advertising." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th at  
9 619.)  
10

11 Similarly, Plaintiffs Section 17500 claims here fail. The complaints do not satisfy even the  
12 most liberal interpretation of notice pleading. There are forty four defendants in this case, yet  
13 Plaintiffs have allegedly only three allegedly deceptive slogans. (See, e.g., LA County, ¶126; LA  
14 City, ¶ 135; SF, ¶68.) Plaintiffs do not specify which, if any, of these statements were used by  
15 ASG. The mere conclusion that ASG violated Section 17500 without a single identifiable piece  
16 of supporting factual allegations is wholly insufficient to meet Plaintiffs' burden to prove that they  
17 would prevail to survive this special motion to strike pursuant to Section 425.16. (See *Dupont*  
18 *Merck Pharmaceutical Company v. The Superior Court of Orange County* (2000) 78 Cal.App.4th  
19 567.)  
20  
21

22 Plaintiffs failure to expressly identify a single specific advertisement or statement by  
23 Defendants that they allege is false or misleading is no mere technical defect. Even after ASG has  
24 produced over 825 advertisements and Plaintiffs have had a reasonable opportunity to review the  
25 documents, they have not identified any advertisements attributed to ASG that are alleged to be  
26 "false or misleading." This is because Defendants have not made any false or misleading  
27 advertisements or statements. (See Declaration of C. D. Michel in Support of Andrew's Sporting  
28

1 Goods, Inc.'s and S.G. Distributing, Inc.'s Special Motion to Strike Pursuant to Cal. Code of Civil  
2 Proc. § 425, filed herewith) Consequently, Plaintiffs have failed to state a valid Section 17500  
3 cause of action.

4 **3. A Reasonable Consumer Could Not Be Misled by the Alleged Statements**

5 Plaintiffs allege only that unspecified firearm manufacturers have “promoted handguns  
6 with slogans such as ‘homeowner’s insurance,’ ‘tip the odds in your favor,’ and ‘your safest  
7 choice for personal protection.’” (See LA County Complaint ¶¶126; LA City Complaint ¶¶135;  
8 San Francisco Complaint ¶¶68.) Even if Plaintiff provided evidence that Defendants made such  
9 advertisements, promotions or other statements, no reasonable consumer could conclude from  
10 these slogans that guns pose no potential risk.  
11

12 It is common knowledge that a gun has the potential to cause serious injury or death. The  
13 general public is aware and understands that gun-related accidents and injuries from careless  
14 handling and misuse can occur. (See, e.g., Mavilia v. Stoeger Industries (D. Mass. 1983) 574  
15 F.Supp. 107, 111 [“common sense requires the Court to find that the risks involved in marketing  
16 handguns for sale to the general public are not greater than reasonable consumers expect. Every  
17 reasonable consumer that purchases a handgun knows that the product can be used as a murder  
18 weapon.... [T]hat death may result from careless handling of firearms is known by all Americans  
19 from an early age.”]; Holmes v. J.C. Penny Co. (1982) 133 Cal.App.3d 216, 220 [holding dangers  
20 of pellet gun powered by carbon dioxide cartridges generally known]; Bojorzque v. House of Toys,  
21 62 Cal.App.3d 930, 934 [“ever since David slew Goliath young and old alike have known that  
22 slingshots can be dangerous and deadly. (Citation omitted) There is no need to include [such] a  
23 warning....”]; see also 6 Within, SUMMARY OF CALIFORNIA LAW 301-02 [no duty to warn  
24 of obvious dangers].)

25 The premise of Plaintiffs’ Section 17500 claim – that the challenged advertising “slogans”  
26  
27  
28

1 cause “reasonable” consumers to ignore specific warnings and forsake the basic understanding  
2 that guns can be dangerous – is simply untenable. No reasonable consumer could conclude that  
3 such an instrument, lethal to intruders by design, somehow poses no potential danger to its owner  
4 or other household residents. Moreover, “[any ambiguity that [plaintiff] would read into any  
5 particular statement is dispelled by the promotion as a whole.” See Freeman v. Time, Inc. (9<sup>th</sup>  
6 Cal. 1995) 68 F.3d 285, 290.)

8 Further, the statements alleged in the Complaints to be “misleading” are “non-actionable  
9 expressions of opinion.” See Committee on Children’s Television v. General Foods Corp.  
10 supra, 35 Cal.3d at 213 n.15. Plaintiffs’ Section 17500 claims fail for this reason alone. Such  
11 statements are statements of opinion that cannot be proven false because it is an expression of  
12 Defendant’s subjective judgment. See Moyer v. Amador Valley Joint Union High School District  
13 (1990) 225 Cal.App.3d 720, 725 (calling high school teacher a “babbler” and “the worst teacher at  
14 [school]” was protected statement of opinion); Milkovich v. Lorain (1990) 497 U.S. 1, 20  
15 (“opinions relating to matters of public concern which do not contain a probably false factual  
16 connotation will receive full constitutional protection” under the first amendment.”)

18 Plaintiffs’ non-disclosure theory also is fraught with problems. For example, although the  
19 general risk inherent in owning a firearm is well known, the individual risks involved are too  
20 highly variable to require disclosure. The risks of defensive firearms ownership vary in relation to  
21 the buyer’s circumstances. Writing at a time when data supporting the defense value of firearms  
22 was much less developed than it is now, an eminent criminologist began by noting that some  
23 homes are in high crime areas, others are not; some have children, others do not; etc. Professor  
24 Wright continued:  
25

27 In owning a gun for protection (or for any other reason), a homeowner runs some  
28 risk that the weapon will be involved in an accident or will be involved in a “heat  
of the moment” shooting.... By the same token, in choosing not to own a weapon

1 for protection, the homeowner runs some risk [of not being able to resist criminals]  
2 .... In general, both costs and benefits are too variable across households with  
3 varying characteristics to allow one to say in some general and all-embracing way  
4 whether families "should" or "should not" keep guns for protection in the home.<sup>10</sup>

5 We underscore the last sentence because it both refutes the entire non-disclosure argument  
6 and shows why the issues here need to be determined through free and open debate rather than by  
7 suppressing one side in that debate.

## 8 **7. CONCLUSION**

9 Plaintiffs' Section 17500 claims are subject to Defendants' anti-SLAPP motion because  
10 they seek to penalize and enjoin protected speech, and "chill" Defendants' constitutional rights to  
11 speak on a matter of national public debate and concern. Defendants motion should be granted  
12 because Plaintiffs cannot provide this court with sufficient evidence to permit the court to  
13 determine whether "there is a probability that the plaintiff will prevail" on the false advertising  
14 claim, as required under Section 425.16 (b)(1). Further, given that SGD does not advertise,  
15 Plaintiffs claims against it should be stricken, summarily.

16 For the reasons stated above, this Court should strike the Business and Professions Code  
17 section 17500 et seq. causes of actions for the following Plaintiffs:

- 18 1. Los Angeles County suing on behalf of itself and the general public.
- 19 2. Los Angeles County suing in the name of the People of the State of California.
- 20 3. Supervisor Gloria Molina suing on behalf of the general public.
- 21 4. Supervisor Zev Yaravslavsky suing on behalf of the general public.
- 22 5. Supervisor Yvonne Brathwaite Burke suing on behalf of the general public.
- 23 6. County Counsel for San Mateo suing in the name of the People of the State of
- 24 California.

25  
26  
27  
28 <sup>10</sup> James D. Wright, "Firearms Ownership for Self-Defense" in + Kates (ed.), FIREARMS AND  
VIOLENCE: ISSUES OF PUBLIC POLICY (1984), p. 327.



7. County Counsel for Alameda suing in the name of the People of the State of California.

In addition, depending on whether the court grants, in whole or in part, Defendants' Motion for Judgment on the Pleadings (addressing various plaintiffs' lack of standing), filed [date], several plaintiffs no longer have any valid claims in these coordinated Firearms Cases, and should be dismissed. Defendants have attached a "Combined Standing and SLAPP Chart" for the court's convenience, illustrating which plaintiffs remain in this action depending on how the court rules on these two motions. If the court eliminates those plaintiffs who lack standing and/or who's claims should be stricken under Section 425.16, the number of plaintiffs in this coordinated case will have been reduced from 23 to 9.

Defendants urge this court to enforce the statutory restrictions raised by their “standing” and “anti-SLAPP” motions and eliminate 14 plaintiffs from the Firearms Cases. As a practical matter, to the extent that any claims survive summary judgment, the nine remaining plaintiffs are capable of fully litigating those claims. As a matter of law, the 14 plaintiffs that would be eliminated, should be. They have no legal basis for bringing their claims in the first instance.

Dated: December 16, 2002

TRUTANICH • MICHEL, LLP

C. D. Michel

C. D. Michel,  
Attorney for Defendants  
Andrew's Sporting Goods, Inc.  
dba Turner's Outdoorsman, and S.G.  
Distributing, Inc.

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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 June 27, 2001, I served the foregoing document(s) described as **PRELIMINARY DESIGNATION OF FACT WITNESSES BY DEFENDANT B&B GROUP, INC.** 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 27<sup>th</sup> day of June, 2001, at San Pedro, California.

Haydee Villegas

Haydee Villegas