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

Coordination Proceeding  
Special Title (Rule 1550 (b))

FIREARMS CASE

Including actions:

People, et al. v. Arcadia Machine & Tool,  
Inc., et al.,

People, et al. v. Arcadia Machine & Tool,  
Inc., et al.,

People, et al. v. Arcadia Machine & Tool,  
Inc., et al.,

JUDICIAL COUNCIL COORDINATION  
PROCEEDING NO. 4095

San Francisco Superior Court No. 303753  
Los Angeles Superior Court No. BC210894  
Los Angeles Superior Court No. BC214794

**CERTAIN DEFENDANTS' MOTION FOR  
AN ORDER PRECLUDING EVIDENCE  
THAT DEFENDANTS' ALLEGED  
CONDUCT HAS CAUSED ACQUISITION  
OF FIREARMS BY CRIMINALS AND  
OTHER PROHIBITED PERSONS**

DATE: July 19, 2002  
TIME: 8:30 a.m.  
DEPT.: 65

Hon. Vincent P. DiFiglia

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CERTAIN DEFENDANTS' MOTION FOR AN ORDER PRECLUDING EVIDENCE THAT DEFENDANTS' ALLEGED  
CONDUCT HAS CAUSED ACQUISITION OF FIREARMS BY CRIMINALS AND OTHER PROHIBITED PERSONS

6/28/2002

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1 Beretta U.S.A. Corp., Fabbrica d'Armi Pietro Beretta S.p.A., Browning Arms Company,  
2 Colt's Manufacturing Company, Inc., Glock, Inc., Heckler & Koch, Inc., H&R 1871, Inc.,  
3 Beemiller, Inc. dba Hi-Point Firearms, Kel-Tec CNC Industries, Sigarms, Inc., Smith & Wesson  
4 Corp., Sturm, Ruger & Company, Inc., Taurus International Manufacturing, Inc. and Forjas  
5 Taurus S.A. ("defendants") move this Court for an evidence preclusion order based on plaintiffs'  
6 failure to produce factual evidence in compliance with this Court's orders dated March 26, 2001,  
7 July 13, 2001, July 26, 2001, November 20, 2001, January 28, 2002 and March 26, 2002. These  
8 orders required plaintiffs to produce documents and information relevant and fundamental to their  
9 sales and distribution claims against defendant manufacturers. Plaintiffs have failed to do so. As  
10 a result, plaintiffs' allegation that criminal acquisition of firearms is causally related to the sales  
11 and distribution practices of defendant manufacturers remains factually unsubstantiated. Plaintiffs  
12 should not be permitted to proceed on those claims in the absence of factual support.

13 As these cases move beyond the time allotted for fact discovery and into expert discovery  
14 on August 9, 2002, entry of an order precluding factually unsupported claims is justified under this  
15 Court's inherent power to control and manage this case and its broad authority over the admission  
16 of evidence. An evidence preclusion order is also appropriate under California Rule of Court  
17 1541(b), which states that "[t]he coordination trial judge shall assume an active role in managing  
18 all steps of the pretrial, discovery and trial proceedings to expedite the just determination of the  
19 coordinated actions without delay." The Court also has authority to address plaintiffs' failure of  
20 proof through imposition of issue and evidence sanctions under Code of Civil Procedure § 2023.  
21 By narrowing plaintiffs' claims through an appropriate court order, expert discovery, dispositive  
22 motions and, if necessary, trial will be correspondingly narrowed to issues on which there may be  
23 a factual dispute. The paramount goal of guiding these cases toward just resolution will be served.

#### 24 I.

#### 25 BACKGROUND

26 On March 20, 2001, defendant manufacturers moved for an order compelling plaintiffs to  
27 disclose facts and documents relating to the acquisitional history of firearms recovered by  
28 plaintiffs in their law enforcement capacities. Defendants sought this evidence in discovery to test

1 plaintiffs' allegation that manufacturers' distribution policies and practices "facilitate, promote and  
2 yield . . . widespread availability and easy access" to firearms<sup>1</sup> through straw purchases,<sup>2</sup> illegal  
3 sales by federally licensed retail dealers,<sup>3</sup> gun show sales,<sup>4</sup> so-called kitchen-table dealer sales<sup>5</sup>  
4 and theft.<sup>6</sup>

5 At the March 20, 2001 hearing on defendants' motion to compel, plaintiffs acknowledged  
6 the relevancy of the evidence requested by defendants. (Transcript of March 20, 2001 hearing, p.  
7 266 attached to the Notice of Lodgment ("NOL") as Exhibit 1). Plaintiffs, however, expressed  
8 uncertainty over the types of documents they were obligated to produce. This Court eliminated  
9 plaintiffs' confusion by stating that plaintiffs were required to produce documents

10 which indicate[] how criminals and others acquired the guns and  
11 whether the manner of acquisition had any factual nexus to  
12 defendants . . . It is a causation issue, and whether causation is  
demonstrated by a witness statement in one instance, or, you know,  
a police officer's investigation in another instance.

13 The Court is not ruling that you have to give everything. You have  
14 to give the information that is responsive to that request.

15 (NOL Exhibit 1, p. 270).

16 The March 26, 2001 order on defendants' motion to compel reflected the Court's ruling:

17 Plaintiffs San Francisco, Oakland, Sacramento, Berkeley, East Palo  
18 Alto, San Mateo County, Alameda County, Inglewood and Compton  
19 are ordered to disclose documents in their possession responsive to  
20 Sturm, Ruger Requests for Production 1, 3 and 4 which reflect how  
21 criminals and others acquired the firearms manufactured and/or sold  
22 by defendants and previously identified by plaintiffs and whether the  
manner of acquisition has a factual nexus to defendants' alleged  
conduct.

23 <sup>1</sup> Los Angeles County Complaint, BC 214794, ¶ 80. The allegations of the three complaints in this  
24 coordinated proceeding are largely identical. For ease of reference, description of those allegations in this  
memorandum will be based on the allegations made in the Los Angeles County Complaint (hereafter  
"Complaint").

25 <sup>2</sup> Complaint, ¶¶ 90-94.

26 <sup>3</sup> Complaint, ¶ 144.

27 <sup>4</sup> Complaint, ¶¶ 97-98.

28 <sup>5</sup> Complaint, ¶ 120.

<sup>6</sup> Complaint, ¶ 120.

1 (March 26, 2001 order attached to NOL as Exhibit 2). The hearing transcript and the Court's  
2 order clearly reflected plaintiffs' obligation to produce documents reflecting specific and  
3 fundamental factual information.

4 As of June 19, 2001, plaintiffs had produced very few documents in response to the  
5 Court's order. Defendant manufacturers therefore moved for an order compelling compliance.  
6 The motion resulted in entry of Case Management Order No. 3 which obligated San Francisco,  
7 Oakland, Sacramento, Berkeley, East Palo Alto, San Mateo County, Alameda County, Inglewood  
8 and Compton to complete their productions by July 31, 2001. (July 26, 2001 Case Management  
9 Order No. 3 attached to NOL as Exhibit 3). Defendants' motion also resulted in entry of a  
10 July 13, 2001 Stipulation and Order governing Los Angeles County's and the City of  
11 Los Angeles' production. (July 13, 2001 Stipulation and Order attached to NOL as Exhibit 4).

12 On November 20, 2001, defendant manufacturers again moved to compel San Francisco's  
13 compliance with this Court's March 26, 2001 Order. As a result of defendants' motion,  
14 San Francisco was ordered to complete its production by November 30, 2001. (November 20,  
15 2001 Order attached to NOL as Exhibit 5).

16 On January 15, 2002, defendant manufacturers moved for issue and evidence sanctions  
17 against Los Angeles County and the City of Los Angeles based on their failure to complete their  
18 productions under the March 26, 2001 Order and Case Management Order No. 3. This Court  
19 declined to sanction plaintiffs and instead gave plaintiffs an extension of time in which to  
20 assemble and produce their documents. Defendants' motion resulted in entry of Case  
21 Management Order No. 4, obligating the County of Los Angeles and the City of Los Angeles to  
22 complete their document production by March 22, 2002. (January 28, 2002 Case Management  
23 Order No. 4 attached to NOL as Exhibit 6).

24 Failing to meet that deadline, Los Angeles County moved for an extension of time to  
25 June 10, 2002 to complete its document production under the March 26, 2001 Order. Plaintiffs'  
26 motion resulted in entry of Case Management Order No. 5 which imposed a May 17, 2002 final  
27 deadline for complete production. (March 26, 2002 Case Management Order No. 5 attached to  
28 NOL as Exhibit 7).

1 Plaintiffs' counsel informed defense counsel on May 24, 2002 that all plaintiffs had  
2 completed their production under the March 26, 2001 Order. The deadline to complete factual  
3 discovery is August 9, 2002.

4 II.

5 **PLAINTIFFS HAVE FAILED TO PRODUCE DOCUMENTS**  
6 **REFLECTING THE FACTUAL INFORMATION**  
7 **THIS COURT ORDERED DISCLOSED IN ITS MARCH 26, 2001 ORDER.**

8 Despite entry of six Court orders addressing plaintiffs' production of the fundamental  
9 factual information required to support their sale and distribution claims and despite being  
10 afforded 15 months to assemble and produce the evidence they possess, plaintiffs have produced  
11 virtually no evidence describing the acquisition of firearms recovered in California and no  
12 evidence at all demonstrating the required factual nexus between criminal acquisition and  
13 manufacturer conduct.<sup>7</sup> The Declarations submitted with this motion attest to plaintiffs' failure to  
14 comply with this Court's March 26, 2001 Order.<sup>8</sup>

15 A. **Evidence Demonstrating the Factual Circumstances Under Which Criminals and**  
16 **Other Prohibited Persons Have Acquired Firearms Manufactured by Defendants Is**  
17 **the Fundamental Factual Predicate to Plaintiffs' Sales and Distribution Claims.**

18 Plaintiffs' theory that firearm manufacturers bear responsibility for illegal acquisition of  
19 firearms at the retail level and thereafter in secondary market transactions is a theory which must  
20 be supported by factual evidence describing the circumstances of those events. Only through  
21 factual evidence can the Court begin an analysis of whether any individual defendant, usually at  
22 least two steps away in the chain of product distribution, caused the illegal transaction to occur.  
23 Without such evidence, plaintiffs' theory is nothing more than an unsubstantiated argument on  
24 which liability could never be justly imposed.

25 <sup>7</sup> Plaintiffs have had nearly three years, since the filing of these cases, to gather documents to support their  
26 claims. They had 15 months following entry of the March 26, 2001 Order to produce their documents.

27 <sup>8</sup> Defendants also unsuccessfully attempted to discover plaintiffs' evidence of criminal firearms acquisition  
28 through Code of Civil Procedure § 2025 person "most qualified to testify" deposition notices. Defendants'  
notices, served on each of the plaintiffs, obligated plaintiffs to produce witnesses to testify on straw  
purchasing, kitchen-table dealer, gun show and federal firearms licensee investigations (April 2, 2001  
Notice of Deposition attached to NOL as Exhibit 8). Defendants have deposed more than 25 witnesses  
designated by plaintiffs on the subject matters of the notice and 11 more witnesses in their individual  
capacities.



1        Among plaintiffs' claims against the defendant manufacturers is the allegation that  
2 manufacturers bear responsibility for straw purchases from independent licensed retail dealers. A  
3 straw purchase occurs when a criminal or other prohibited purchaser enlists the help of a lawful  
4 purchaser to buy a firearm on the criminal's behalf, submit to a criminal background check and  
5 register the firearm in the straw purchaser's name with the California Department of Justice.  
6 Plaintiffs have identified only nine instances in which a firearm manufactured by a defendant and  
7 recovered by plaintiffs' law enforcement agencies may have been acquired by a straw purchaser.  
8 Even if one assumed that these were in fact straw purchases, the scant information produced by  
9 plaintiffs sheds no light on the fundamental factual question of whether the retail dealer was  
10 complicit in the straw purchaser's fraud and the substantial legal question of whether a  
11 manufacturer of a lawful product could ever be liable for intentional criminal or improper conduct  
12 by unrelated downstream sellers. Any evidentiary analysis must first focus on what transpired at  
13 the time of the sale. Who was the retail seller? Did the straw purchaser reveal his or her criminal  
14 intentions to the retail seller? Did the retail seller knowingly make the illegal sale with knowledge  
15 of the consequences of his criminal act? Or, was the retail seller deceived by the straw purchaser  
16 and did he sell the firearm only after the California Department of Justice approved the sale?  
17 Answers to these and other case specific questions must be available before a factual analysis of  
18 retailer liability for straw purchasing can even begin. These questions cannot be answered by  
19 plaintiffs' evidence. Without such evidence, there is no conceivable basis to even consider  
20 manufacturer liability for straw purchasing at the retail level wholly outside the manufacturer's  
21 presence.

22        Plaintiffs' evidence is similarly silent on whether manufacturers bear legal responsibility  
23 for illegal sales of firearms by third parties at gun shows. Plaintiffs have identified only eight  
24 isolated instances in which recovered firearms, manufactured by some but not all defendants, may  
25 have been sold by a third party at a gun show, flea market or swap meet at some time in the  
26 firearm's history. Plaintiff's evidence does not demonstrate whether those firearms were sold as  
27 new or used firearms. Their evidence does not reveal whether those firearms were sold by private  
28 unlicensed persons. Plaintiffs have not revealed the identity of any licensed retail dealer who may

1 have been involved in those sales. In some instances, plaintiffs do not reveal whether the sales  
2 were made in compliance with the law or in violation of the law.<sup>9</sup> Plaintiffs' documents only  
3 reveal that a small number of firearms recovered by law enforcement have had some imprecise  
4 and unknown connection to a gun show.

5 Plaintiffs have failed to produce any documents which reflect the sale of recovered  
6 firearms by so-called "kitchen-table" dealers to criminals, juveniles or other prohibited purchasers.  
7 Plaintiffs' failure to produce such evidence may be because "kitchen-table" dealers have largely  
8 been regulated, licensed and zoned out of existence in California and elsewhere. Or it may be that  
9 plaintiffs simply do not have supporting evidence. Either way, the complete lack of evidence  
10 demonstrating that recovered firearms were sold by licensed retail dealers operating without  
11 traditional business premises is fatal to plaintiffs' claim.

12 **B. Factual Evidence Disclosed By Plaintiffs Must Reveal an Admissible Evidentiary**  
13 **Basis on Which to Conclude That Criminal Firearms Acquisition Has a Factual**  
14 **Nexus to a Defendant's Alleged Conduct**

15 Although plaintiffs identified a small number of instances in which licensed retail dealers  
16 have acted criminally - and have been convicted for their crimes - there is no evidence that any  
17 manufacturer knew of a dealer's intent to commit a criminal act or was otherwise complicit in the  
18 criminal conduct. In the absence of knowledge or complicity on the part of a manufacturer, there  
19 can be no basis on which to conclude that acquisition of firearms from criminal sellers, intent on  
20 breaking the law and presumably intent on hiding their criminal activities, was caused by a  
21 manufacturer's conduct. Detection of covert criminal behavior poses significant challenges to law  
22 enforcement even with its authority, resources and presence in the community. Imposition of an  
23 obligation on a geographically distant product manufacturer to discover a third party's  
24 surreptitious criminal intent to sell products in violation of the law would create a duty carrying  
25 limitless liability.

26 <sup>9</sup> Under California law, sales made by a licensed retail dealer at a gun show are subject to the same  
27 criminal background check, waiting period and registration requirements as sales on the dealer's business  
28 premises. California Penal Code § 12070. Gun show transactions between unlicensed private parties are  
subject to the same requirements by virtue of Penal Code § 12082 which requires that the private party  
transaction be completed through a licensed retail dealer.

1       The absence of a factual nexus between the acts of illegal dealers and any manufacturer's  
2 business practices is readily apparent. In one instance, plaintiffs' evidence is that a licensed dealer  
3 was indicted and convicted for exporting firearms to Mexico without State Department approval.  
4 In another instance, a licensed retail dealer was charged and convicted for making false  
5 representations in his records regarding the identity of firearm purchasers. The remaining incident  
6 involves a former federal firearms licensee who submitted a forged license to wholesale  
7 distributors and illegally acquired a substantial number of firearms later recovered by law  
8 enforcement in Northern California.<sup>10</sup> None of the factual evidence disclosed by plaintiffs on  
9 these criminal cases reveals any direct or indirect factual connection to the conduct of a  
10 manufacturer. It merely reflects criminal conduct by a very small number of federal firearms  
11 licensees and an imposter whom law enforcement detected and addressed through successful  
12 prosecutions.<sup>11</sup>

13       Finally, the declarations submitted by counsel in support of this motion attest to plaintiffs'  
14 disclosure of evidence that a substantial number of firearms recovered by law enforcement in  
15 California were acquired through theft. The vast majority of thefts are disclosed in plaintiffs'  
16 documents without reference to any factual circumstance other than the geographic location of the  
17 crime. A substantial number of thefts occurred in residential burglaries. A significant number of  
18 firearms were reportedly stolen from law enforcement agencies or personnel. None of the thefts  
19 occurred under factual circumstances that could fairly be attributed to the manufacturer of the  
20 firearm.

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23     <sup>10</sup> Of the firearms illegally acquired by the former FFL, Sean Twomey, very few were manufactured by  
24 defendants in this case. All but a very few of the firearms illegally trafficked by Mr. Twomey were  
manufactured by a company no longer in the business of manufacturing firearms.

25     <sup>11</sup> Plaintiffs attempt to attribute other criminal acts of third parties to the defendant manufacturers through  
26 reference in interrogatory answers to newspaper articles and published court opinions describing arrests and  
27 prosecutions around the country. Besides being foundationally suspect as evidence, and inadmissible on  
28 that basis, these media and case reports are irrelevant to this case. None of the reports involves any  
criminal conduct which had any demonstrated impact in California. Moreover, there is no suggestion in  
these reports that any defendant manufacturer was in any way complicit in the crimes described or caused  
third parties to act criminally.

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III.

ARGUMENT

A. This Court Should Exercise Its Inherent and Statutory Powers and Exclude Evidence That Defendants' Alleged Conduct Has Caused Acquisition of Firearms by Criminals and Other Prohibited Persons

After nearly two years of fact discovery and steadfast efforts by defendants to discover plaintiffs' factual evidence linking criminal firearms acquisition to each defendant's alleged conduct, plaintiffs have revealed that they do not have facts to support their claims. Plaintiffs' failure to comply with the March 26, 2001 Order stands as their admission that they have no factual evidence demonstrating that criminal firearms acquisition is causally related to any defendant's alleged conduct. An evidence preclusion order is justified which bars evidence that any defendant's conduct has caused acquisition of firearms by criminals and other prohibited persons.<sup>12</sup>

It is well established that courts have fundamental and inherent equity, supervisory and administrative powers to control litigation before them. Rutherford v. Owens-Illinois, Inc., 16 Cal. 4th 953, 967 (1997). These inherent powers are derived from the state Constitution and are not confined by or dependent on statute. Walker v. Superior Court, 53 Cal. 3d 257, 267 (1991).

In addition to its inherent authority, this Court has the very specific statutory authority under California Rule of Court 1541(b), as the coordination trial judge, to "assume an active role in managing all steps of the pretrial, discovery and trial proceedings." Defendants ask this Court to use its inherent and statutory powers and enter an evidence exclusion order narrowing the issues in dispute and the claims on which expert discovery, dispositive motions and, if necessary, trial will focus.<sup>13</sup>

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<sup>12</sup> The Court has stated that plaintiffs will be held to their burden of coming forward with factual support for their claims. On April 19, 2002, the Court heard argument on Defendant Manufacturers' *Ex Parte* Motion to Compel Further Responses to Requests for Admission and Interrogatories. The discovery which was the subject of that motion sought, in part, factual evidence on specific instances of criminal firearms acquisition. At the hearing, the Court stated: "Now, from day one in this litigation the Court has indicated to plaintiffs, and made no bones about it, that at some point you're going to have to tell us what this case is about, and that time is now, and in the event that the answers are not responsive, then the next step is, as we suggested earlier, is we may be talking about issue sanctions and issue preclusion . . . ." (Transcript of April 19, 2002 hearing attached to NOL as Exhibit 9).

<sup>13</sup> Code of Civil Procedure § 128 confers on this Court the authority to use "all the means necessary" in

1 An evidence exclusion order narrowing the issues and claims in dispute was entered by the  
2 trial court in Cottle v. Superior Court, 3 Cal. App. 4th 1367 (1992). The order precluded toxic tort  
3 plaintiffs from offering evidence that a hazardous material caused or exacerbated any physical  
4 injury or illness. Id. at 1375. The exclusion order was based on the plaintiffs' failure to comply  
5 with the court's case management order which required each plaintiff to identify the toxic  
6 substance to which each plaintiff was exposed, the date of exposure, the method of exposure, the  
7 nature of the physical injury and the identity of the medical expert who would support the claim.  
8 The appellate court held that the trial court properly exercised its authority to exclude evidence  
9 because plaintiffs were unable to establish a prima facie case prior to trial. Id. at 1381. The  
10 sources of the trial court's authority were its inherent constitutional and statutory powers to  
11 manage litigation and its obligation to rule on the admissibility of evidence.<sup>14</sup> Id. at 1376-1379;  
12 see also Peat, Marwick v. Superior Court, 200 Cal. App. 3d 272 (1988) (trial court has the inherent  
13 power to enter evidence exclusion order precluding evidence relating to standard of care,  
14 negligence and damages).

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17 exercise of the court's jurisdiction, including "any suitable process or mode of proceeding" which is  
18 "conformable to the spirit of the Code." In addition to this general statutory authority, trial courts have been  
19 vested with more specific powers to manage litigation. For example, the Judicial Council has adopted  
20 suggested procedures for managing complex civil cases. Cal. Standards Jud. Admin., § 19. These  
21 procedures are intended to facilitate pretrial resolution of evidentiary issues and to minimize the time and  
22 expense of lengthy trials. Asbestos Claims Facility v. Berry & Berry, 219 Cal. App. 3d 9, 14 (1990).  
23 Utilization of these powers is critical to prevent complex litigation "from monopolizing the services of the  
24 court to the exclusion of other litigants." Id. at 20.

25 In addition, the Evidence Code confers broad authority in the trial court over the admission of evidence. 3  
26 Witkin Cal. Evidence (3d ed. 1986) § 1707, p. 1667. Under Evidence Code sections 310 and 402, the court  
27 is to decide "issues of fact preliminary to the admission of evidence." The court also has the authority  
28 under Evidence Code section 320 to regulate the order of proof and to exclude prejudicial, confusing and  
unduly time-consuming evidence under Evidence Code section 352.

<sup>14</sup> The nature of the evidence which the trial court in Cottle required plaintiffs to disclose under its case  
management order was inextricably bound to expert medical testimony and the timing of the exclusion  
order – after expert witness designation – was an important factor justifying entry of the order. In this case,  
the court-ordered evidence demonstrating the circumstances surrounding straw purchases, gun show sales,  
kitchen-table dealer sales, illegal sales by licensed dealers and theft is purely factual. Its absence cannot  
later be cured by expert testimony. In fact, the absence of factual evidence proves fatal to any attempt by  
plaintiffs to present expert witness testimony on these subject matters at all. Expert opinions cannot create  
or establish the facts. See Andres v. Barker Bros., 267 Cal. App. 2d 530 (1968); Kahn v. East Side Union  
High School District, 96 Cal. App. 4th 781 (2002).

1 This Court possesses the inherent and statutory authority to examine the multiple claims  
2 made by plaintiffs, touching on virtually every aspect of each defendant's business practices, and  
3 to narrow those claims to those on which there exists factual evidence. Plaintiffs' claim that  
4 defendants have caused criminals and other prohibited persons to acquire firearms is a claim  
5 which should not survive. Plaintiffs have failed to come forward with factual evidence describing  
6 the circumstances surrounding such alleged acquisition, despite being ordered to do so. Plaintiffs'  
7 failure to produce this threshold factual evidence effectively precludes any analysis as to whether  
8 those circumstances can or should be attributed to a defendant. The defendants are left merely  
9 with plaintiffs' allegations that criminals acquire firearms in certain ways and no ability to counter  
10 those bare-boned allegations through cross-examination or evidence demonstrating that the  
11 circumstances of such acquisitions have no factual nexus to the firearm's manufacturer. After  
12 nearly two years of fact discovery, plaintiffs have not shed any evidentiary light on their  
13 allegations. The factual support for plaintiffs' sales and distribution claims is no different or  
14 greater now than the day defendants' demurrers were overruled.

15 **B. This Court Also Has the Authority to Impose Issue and Evidence Sanctions Under**  
16 **Code of Civil Procedure Section 2023**

17 Code of Civil Procedure §§ 2023 and 2031(n) allow a trial court to impose issue and  
18 evidence sanctions for failure to obey a discovery order. The court has broad discretion in  
19 imposing discovery sanctions, subject to reversal only for arbitrary, capricious or whimsical  
20 action. Kahn v. Kahn, 68 Cal. App. 3d 372, 380-81 (1977). Where a party has refused to supply  
21 information relevant to a particular claim, an order precluding that claim is an appropriate  
22 sanction. Deyo v. Kilbourne, 84 Cal. App. 3d 771 (1978).

23 In Sauer v. Superior Court, 195 Cal. App. 3d 213 (1987), the court affirmed imposition of  
24 issue preclusion sanctions against the plaintiff based on his failure to produce personal financial  
25 records. The trial court record showed that the plaintiff, like the plaintiffs in this case, had many  
26 opportunities to comply with the court's discovery order or seek to clarify its provisions, but failed  
27 to do so. The plaintiff protested imposition of the issue preclusion sanction – exclusion of all  
28 evidence of economic loss – because he had produced "extensive information about his economic

1 loss through his deposition and that of his expert witness and through production of substantial  
2 documentation." 195 Cal. App. 3d at 229. The court rejected the plaintiff's argument that he had  
3 made a good faith effort to comply and reasoned:

4 [The defendant] was entitled to documentary support to  
5 independently evaluate the accuracy of the testimony and other  
6 information provided . . . [The plaintiff's] cooperation in producing  
7 voluminous discovery materials documents does not excuse his  
8 failure to produce those items specifically requested . . . and  
9 required by the court's order.

10 Id.

11 The Sauer court went on to hold that wrongful intent is not required to conclude that a  
12 party has willfully failed to comply with a discovery order. "A conscious or intentional failure to  
13 act, as distinguished from accidental or involuntary noncompliance, is sufficient to invoke a  
14 penalty." 195 Cal. App. 3d at 228. In this case, plaintiffs' failure to comply with the Court's  
15 orders is plainly conscious and intentional and not accidental. Plaintiffs unilaterally chose the  
16 documents they produced while acknowledging they were not responsive.<sup>15</sup>

17 The decision in Juarez v. Boy Scouts of America, 81 Cal. App. 4th 377 (2000), also  
18 supports imposition of issue and evidence sanctions in this case. In Juarez, the defendant was  
19 accused of negligently hiring a scoutmaster, who had allegedly abused a child. In discovery, the  
20 defendant requested from the plaintiff evidence of complaints made about the scoutmaster and

21 <sup>15</sup> Less than three months following entry of the March 26, 2001 order, plaintiffs' counsel admitted that the  
22 documents plaintiffs had unilaterally chosen to produce were non-responsive:

23 I think the Court is familiar enough with police reports to know there is not  
24 much information about acquisition history of guns. All the material they  
25 get between now and December 31 is going to be make work. I really  
26 believe that personally, but I understand it is a case; they are entitled to  
27 discovery; the Court made a ruling, and we'll comply with it.

28 (Transcript of June 19, 2001 hearing, p. 273 attached to NOL as Exhibit 10).

One month later, plaintiffs made the opposite representation and held out the promise that their production  
of documents would be factually responsive: "*It is anticipated that . . . review of the large volume of  
incident reports at issue in this case will supply additional facts supporting plaintiffs' belief*" that firearms  
have been criminally acquired in the ways alleged. (Plaintiffs' Supplemental Responses to Sturm, Ruger &  
Company, Inc.'s Second Set of Form Interrogatories Nos. 14, 16, 21, 22, 36 and 37 attached to NOL as  
Exhibit 11). Ultimately, plaintiffs' initial prediction that the order created "make work" and that they could  
not comply proved to be accurate. Even though a party may believe a court order is a "waste of time . . . he  
disregards it at his own peril." Sauer 195 Cal. App. 3d at 229.

1 evidence supporting the claim that the defendant should have known of prior instances of abuse.  
2 The plaintiff's initial discovery responses "consisted of objections, non-specific incorporation of  
3 other information and a long ephemeral statement simply reiterating the allegations made in the  
4 complaint." 81 Cal. App. 4th at 387. Court-ordered supplemental discovery responses were also  
5 inadequate. Because the plaintiff failed to produce fundamental evidence in support of a key  
6 element of his case, the trial court imposed issue and evidence sanctions. The following specific  
7 facts were "conclusively established" in the case: no reports of child abuse had been made against  
8 the scoutmaster and no information was available to the defendant that would cause it to suspect a  
9 propensity to abuse children. 81 Cal. App. 4th at 386.

10 The appellate court in Juarez affirmed the imposition of discovery sanctions by the trial  
11 court. The court held that "a persistent refusal to comply with a court order for production of  
12 evidence is tantamount to an admission that the disobedient party really has no meritorious claim."  
13 81 Cal. App. 4th at 390 (citing Kahn v. Kahn, supra). The court further held that "the appropriate  
14 sanction when a party repeatedly and willfully fails to provide certain evidence to the opposing  
15 party as required by the discovery rules is preclusion of that evidence from the trial – even if such  
16 a sanction proves determinative in terminating plaintiff's case. Id.

17 Plaintiffs' failure to produce the factual evidence required by the March 26, 2001 order is  
18 an admission that they do not have a meritorious claim that defendants' sales and distribution  
19 practices have caused criminal acquisition of firearms. The record in this case strongly justifies  
20 imposition of issue and evidence sanctions against plaintiffs.

#### 21 IV.

#### 22 **REQUEST FOR RELIEF**

23 For the foregoing reasons, defendant manufacturers respectfully request an evidence  
24 preclusion order which precludes plaintiffs from submitting evidence at trial suggesting that the  
25 conduct of any defendant has caused firearm acquisition by criminals or other prohibited persons  
26 in California.

27 Alternatively, defendant manufacturers respectfully request an order imposing issue and  
28 evidence sanctions against the plaintiffs, which conclusively establishes the following facts:



1 There is no evidence demonstrating that the manner in which  
2 criminals or other persons acquired any firearm manufactured or  
3 sold by a defendant in this case was caused by the conduct of any  
4 defendant manufacturer or seller.

5 Defendant manufacturers further request any additional relief the Court deems just and  
6 proper.

7  
8 DATED: June 28, 2002

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

9  
10 By: Lawrence J. Kouns

Lawrence J. Kouns

Co-Liaison Counsel for Defendant Manufacturers

11  
12 DATED: June 28, 2002

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