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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

Coordination Proceeding Special Title (Rule 1550(b))	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4095
FIREARM CASES Including actions:	
People, etc., et al. v. Arcadia Machine & Tool, Inc., et al.	San Francisco Superior Court No. 303753
People, etc., et al. v. Arcadia Machine & Tool, Inc., et al.	Los Angeles Superior Court No. BC210894
People, etc., et al. v. Arcadia Machine & Tool, Inc., et al.	Los Angeles Superior Court No. BC214794

PLAINTIFFS' OPPOSITION TO DEMURRER AND MOTION TO STRIKE

DATE: September 15, 2000
TIME: 1:00 p.m.
DEPT: 65
JUDGE: Hon. Vincent P. DiFiglia

8/25

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INTRODUCTION

Plaintiffs, the People of the State of California, represented by and through 12 California cities and counties, allege, *inter alia*, that defendants design, promote and distribute firearms in such a way as to ensure their steady and widespread availability to unlawful users such as juveniles and convicted felons. This alleged conduct has undermined the public health and safety in cities and communities across the State. By their complaints, plaintiffs challenge such conduct as constituting a public nuisance under Civil Code sections 3479 and 3480, as well as a violation of the Unfair Competition Act ("UCA"), *codified at* Bus. & Prof. Code §§ 17200 *et seq.* and 17500 *et seq.*[1]

Both the public nuisance law and the UCA are extraordinarily broad, sweeping statutes intended to remedy a wide spectrum of harm visited upon the People of the State of California. Pursuant to these statutes, plaintiffs seek equitable relief in the form of abatement of the public nuisance, restitution and disgorgement of wrongfully obtained gun industry profits, and civil penalties.

In their demurrer, defendants ignore the broad scope of the statutes upon which plaintiffs rely, and, instead, focus on inapplicable statutes and misplaced constitutional arguments. For example, defendants rely heavily on Civil Code section 1714.4, which they argue immunizes them from liability for public nuisance. However, section 1714.4 applies exclusively to products liability claims, and narrowly at that, and is simply not implicated in these public nuisance and UCA actions.

Equally inappropriate are defendants' constitutional and so-called "abstention" arguments. For example, defendants essentially argue that courts may not order monetary or injunctive relief where a defendant's conduct involves interstate commerce and occurs outside the state, but causes injury to a plaintiff within the state. This argument is wrong for a myriad of reasons, not least of which is that its adoption would virtually immunize all out of state businesses that engage in interstate commerce from liability for any claims based on public nuisance, the UCA, and essentially the entirety of the civil law. Defendants' so-called "abstention" argument is also

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[1] *See generally*, Complaint by Plaintiffs City of Los Angeles, *et al.* ("LA City"), Complaint by Plaintiffs County of Los Angeles, *et al.* ("LA County"), and First Amended Complaint by Plaintiffs San Francisco, *et al.* ("SF").

without merit. Plaintiffs' claims, though they assuredly impact important public policy issues, are not inherently political issues outside the province of the courts. In this regard, plaintiffs allege that defendants' conduct violates statutes that expressly authorize city attorneys and county counsel to file suit on behalf of the People and the General Public of California.

To state a cause of action under California's public nuisance statute, plaintiffs need only allege that defendants' conduct is injurious to the health, safety or enjoyment of life or property of the residents of cities and counties across California. Civ. Code §§ 3479, 3480. Plaintiffs have sufficiently done so. For example, plaintiffs cite a host of distribution practices, such as multiple purchases, "straw purchasers" and "kitchen-table" sales that contribute to the widespread availability of firearms to juveniles and criminals throughout the State. Plaintiffs allege that this availability of guns has undermined the public health and safety, ravaged numerous communities, and has compromised the quality of life of the People of the State of California. Assuming plaintiffs' allegations to be true, as this Court must for purposes of this demurrer, plaintiffs readily meet the minimum pleading threshold.

Plaintiffs' allegations also are sufficient to state several causes of action under the UCA. The UCA's great breadth and scope – applying to any "unfair," "unlawful" or "deceptive" business practices – certainly is implicated here. For example, the "unfair" prong of the UCA proscribes any business activity that either offends public policy or results in harm to the public that outweighs its utility. Importantly, plaintiffs need only make a *prima facie* showing of harm under the UCA to survive demurrer. Again, plaintiffs have done so here. Even if the Court were, however, to engage in the balancing test regarding the defendants' total lack of oversight over the distribution and sale of their deadly products versus the utility of such neglect, the propriety of plaintiffs' claims becomes very clear.

Finally, defendants move to strike plaintiffs' request for restitution under the UCA. However, section 17203 of the UCA expressly provides that restitution is the appropriate remedy for unfair competition. Defendants rely on *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal. 4th 116, to support their argument. However, *Kraus* applied to a private enforcement action, and does not alter the remedies available in this public enforcement action.

For these reasons, and for the many others set forth below, plaintiffs respectfully request that the Court overrule defendants' demurrer and deny their motion to strike.

SUMMARY OF FACTS

The prevalence of guns in illegal hands across California is staggering. Every year, police and sheriff departments across the state respond to innumerable crimes perpetrated by unlawful possessors of firearms. (LA City ¶¶ 7-9; LA County ¶¶ 7-9; SF ¶¶ 17-19). Many guns are seized from juveniles and felons in unlawful possession of the weapons. (LA City ¶ 10; LA County ¶ 8; SF ¶ 20). Plaintiffs bear enormous costs due to increased crime, death, injuries and destruction of property occurring each year at the hands of unlawful possessors of guns. Furthermore, to respond to gun crime and violence perpetrated against their citizens and their property, plaintiffs are forced to increase expenditures for additional police, security, medical care and other services and facilities. This violence has traumatized and injured citizens statewide. (LA City ¶ 141; LA County ¶ 132; SF ¶ 74).

Defendants are aware that a substantial percentage of the firearms they manufacture and distribute are ultimately unlawfully purchased by persons such as juveniles and convicted felons. (LA City ¶ 81; LA County ¶ 70; SF ¶ 20). This secondary market constitutes a substantial percentage of defendants' sales. (LA City ¶ 92; LA County ¶ 81; SF ¶ 24). To sustain this profitable market, defendants engage in business practices calculated to create and promote the secondary market, such as oversaturating the market, encouraging uncontrolled distribution, facilitating multiple purchases and "straw purchases," selling to "kitchen table" dealers, and designing weapons without simple features that would discourage unauthorized use. (LA City ¶¶ 91-109; LA County ¶¶ 80-100; SF ¶¶ 23-41).

To oversaturate the market, defendants produce, market, and distribute far more handguns than reasonably could be sold to legal purchasers. (LA City ¶ 93, LA County ¶ 82; SF ¶ 25). There are approximately 65 million handguns in the United States today and an additional 2.5 million are sold each year.

Defendants overlook, and even encourage, uncontrolled distribution of firearms. (LA City ¶¶ 95, 105; LA County ¶¶ 84, 94; SF ¶¶ 27, 37). The only supervisory roles defendants have

assumed with regard to their distributors relate to profitability. (LA City ¶ 96; LA County ¶ 85; SF ¶ 28). Defendants have neglected to instruct and educate their dealers on the prevention of illegal gun sales or to require any safety training of purchasers. (LA City ¶ 97; LA County ¶ 86; SF ¶ 29). Defendants do not track or screen their sales, as many manufacturers of other dangerous products do, and generally refuse to take any responsibility for the uncontrolled distribution of their products that each day place more and more Californians at risk. (LA City ¶¶ 99, 100; LA County ¶¶ 88, 89; SF ¶¶ 31, 32).

Defendants also make no attempt to prevent "straw purchases" or limit the number or frequency of handgun purchases, nor have they promoted policies that seek to limit illegal possession of such guns. (LA City ¶¶ 101, 102; LA County ¶¶ 90, 91; SF ¶¶ 33, 34). Straw purchasers are "dummy" purchasers who buy guns on behalf of someone else not entitled to lawfully possess a gun. More than half the guns subject to firearm trafficking investigations are purchased in this manner. Multiple purchases have also been widespread throughout California and were a frequent source of guns for the illegal secondary market. (LA City ¶¶ 103, 104; LA County ¶¶ 92, 93; SF ¶¶ 35,36).[2]

Not only do manufacturer defendants fail to control their established distributors' behavior, but they knowingly sell thousands of guns to "kitchen table" dealers, who operate in any number of informal settings including gun shows, out of the trunk of a car or even on the street. These dealers are known to be frequently in violation of zoning and licensing laws and partake in corrupt practices such as failing to limit the number of guns sold or conduct background checks, obliterating serial numbers, and destroying and falsifying records. (LA City ¶ 106; LA County ¶ 95; SF ¶ 38).

Defendants have also designed guns to encourage unauthorized use and meet illegal demands. (LA City ¶¶ 109-110; LA County ¶¶ 100-101; SF ¶¶ 41- 42). For example, defendants have not taken steps to implement features that would assist gun tracing. (LA City ¶ 108; LA County ¶ 99; SF ¶ 40). Moreover, defendants have changed design features to make their guns more

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[2] Defendants erroneously contend that multiple sales are legal. Defs. Mem. at 16. In fact, multiple sales of concealable weapons are expressly prohibited under California law. Penal Code § 12072(a)(9).

amenable to criminals, such as making guns that are easier to conceal. (LA City ¶ 112; LA County ¶ 103; SF ¶ 44). To meet the demand they have created, defendants have increased the production of guns that are most popular with criminals. (LA City ¶ 113; LA County ¶ 104; SF ¶ 45).

Defendants undermine and subvert state and federal law. On occasion, certain defendants have even calculated their actions to go so far as to circumvent specific state and federal law. (LA City ¶ 115; LA County ¶ 106; SF ¶ 47). For example, these defendants design and sell firearms that are similar or identical to ones that are banned by statute, advertise certain types of guns in violation of state law, and continue to manufacture and distribute "junk guns" covered by "Saturday Night Special" ordinances. (LA City ¶¶ 115, 116, 118; LA County ¶¶ 106, 107, 109; SF ¶¶ 47, 48, 52, 53).

Despite the fact that thousands of lives could be saved by implementing existing safety technology, defendants have failed to do so. Among the available safety precautions and mechanisms available are adequate warning instructions, including information regarding proper storage or use, safety locks and personalized safety features. (LA City ¶¶ 111, 113, 123; LA County ¶¶ 111, 113, 123; SF ¶¶ 54, 55, 65). Defendants are aware that these safety features and warnings would substantially decrease the risk of serious injury and death caused by firearms, but refuse to implement them. As a result, defendants' products are unreasonably dangerous. (LA City ¶ 131; LA County ¶ 122; SF ¶ 64).

Defendants also engage in deceptive and/or misleading advertising. Through advertising and promotion defendants falsely claim that firearm ownership increases the safety of one's home. (LA City ¶ 135; LA County ¶ 126; SF ¶ 68). Research clearly demonstrates, however, that possession of a firearm in the home substantially *increases* risk of intentional and unintentional injury, homicide and death. (LA City ¶¶ 135, 136; LA County ¶¶ 126, 127; SF ¶¶ 68, 69). Moreover, defendants fail to include warnings regarding the relative risks involved in owning a firearm. (LA City ¶ 137; LA County ¶ 128; SF ¶ 70).

The above-described promotion and distribution techniques have proven profitable. The firearm industry enjoys $2-$3 billion in sales per year. (LA City ¶ 141; LA County ¶ 132; SF ¶

74). Defendants' unlawful, unfair and deceptive practices have cost California residents dearly in the form of deaths, injury, daily from heightened criminal activity and violence, and increased law enforcement and medical costs. (LA City ¶ 141; LA County ¶ 132; SF ¶ 74).

STANDARDS OF REVIEW

A demurrer tests the legal sufficiency of plaintiffs' complaint. Code Civ. Proc. §§ 422.10, 589. Demurrers are generally disfavored; the plaintiff's pleadings are construed liberally, and all material facts set forth in the pleadings must be taken as true. *Serrano v. Priest* (1971) 5 Cal.3d 584, 591, 96 Cal.Rptr. 601, 605; *Gressley v. Williams* (1961) 193 Cal.App.2d 636, 639, 14 Cal.Rptr. 496, 498. Thus, to survive demurrer, a complaint need only "set forth the ultimate facts constituting the cause of action, not the evidence by which plaintiff proposes to prove these facts." *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 212.

In addition to demurring to plaintiffs' claims, defendants also move to strike plaintiffs' demand for restitution. A motion to strike addresses defects or objections to the pleadings and must be evaluated on the face of the complaint. Code Civ. Proc. § 435 (a)(2). Similar to a demurrer, motions to strike are disfavored and the pleadings shall be construed liberally "with a view to substantial justice." Code Civ. Proc. § 452. No part of a pleading will be stricken unless it is "irrelevant, false, or improper matter," or was "not drawn in conformity with the law of this state, a court rule or order of the court." Code Civ. Proc. § 436. To strike plaintiffs' demand for restitutionary relief, defendants must therefore establish that the demand is entirely unsupported by the allegations in the complaints. Code Civ. Proc. § 431.10 (b). Defendants have not met this burden.

ARGUMENT

I. PLAINTIFFS HAVE STATED AN ACTIONABLE PUBLIC NUISANCE CLAIM UNDER CALIFORNIA LAW.

Public nuisance law has its origins in broad equitable doctrines that allow the government to enjoin private conduct that causes, contributes to or fails to prevent any unreasonable interference with public rights, such as the right to health, peace and safety. The complaints at issue

here adequately set forth allegations describing defendants' conduct with respect to their design and distribution practices and the resulting injuries to the public. Defendants' demurrer as to this cause of action must be overruled.

A. California Public Nuisance Law Is Broad and Encompasses Plaintiffs' Cause of Action.

California public nuisance law, which aims to abate and prevent harm to the public, has been broadly defined to include "[a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." Civ. Code § 3479. A public nuisance is one which affects "an entire community or neighborhood, or any considerable number of persons." Civ. Code § 3480.

For more than a century, the essence of public nuisance liability has been the creation and maintenance of conditions that interfere with the interests of the community. *People v. Truckee Lbr. Co.* (1897) 116 Cal. 397; *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116. Indeed, "the touchstone of the public nuisance doctrine" is the "community and its collective values." *Ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109. Examples of public nuisance include fire hazard [*San Diego County v. Carlstrom* (1961) 196 Cal.App.2d 485]; pestilence [*LA County v. Spencer* (1899) 126 C 670; *Skinner v. Coy* (1939) 13 Cal.2d 407]; unruly crowds [*People v. Montoya* (1934) 137 Cal.App. Supp 784, *People v. Lim* (1941) 18 C2d 872]; the criminal behavior of patrons [*Sunset Amusement v. Board of Police Commissioners of the City of Los Angeles* (1972) 7 Cal.3d 64, *appeal dismissed* (1973) 409 U.S. 1121]; and gang violence [*Gallo*, 14 Cal.4th 1090].

The California Supreme Court recently described public nuisance jurisprudence as including any unreasonable interference with the "five general categories of 'public rights': . . . the public health, the public safety, the public peace, the public comfort or the public convenience." *Gallo*, 14 Cal.4th at 1104 *citing* the *Restatement (Second) of Torts* §821B. "[T]he availability of equitable relief to counter public nuisances is an expression of 'the interest of the public in the quality of life and the total community environment.'" *Id.* at 1007, *citing ex rel. Bush v. Projection Room Theater* (1976) 17 Cal.3d 42, 52.

Contrary to defendants' misrepresentation of California law, liability for public nuisance arises from the defendant's creation of, or contribution to, the nuisance or its ability to abate the nuisance, not whether the conduct was criminal, reckless, or negligent. "[I]t is immaterial whether the acts be considered willful or negligent; the essential fact is that, whatever be the cause, the result is a nuisance." *Snow v. Marian Realty* (1931) 212 Cal. 622, 625. This critical distinction, which defendants fail to appreciate, derives from the fact that public nuisance jurisprudence is concerned with stopping the public injury, rather than the nature of underlying conduct.

As shown below, the allegations of the complaints sufficiently show how defendants' practices have contributed to creating and maintaining a public nuisance that significantly interferes with public health and safety. (LA City ¶¶ 142-50; LA County ¶¶ 133-41; SF ¶¶ 75-82). Plaintiffs properly seek to enjoin defendants from perpetuating this nuisance.

B. Plaintiffs Have Pleaded Sufficient Facts to State a Public Nuisance Claim.

As set out in the complaints, defendants have both directly and indirectly provided a steady flow of guns to the illegal secondary gun market and have facilitated the easy access of guns for criminal purposes, including access by convicted criminals, juveniles and others prohibited from purchasing or possessing guns under state or federal law. Moreover, defendants have continually engaged in reckless, harmful conduct for years, despite receiving continual notice from Bureau of Alcohol, Tobacco & Firearms ("ATF") crime-gun trace requests and various other well-documented sources, of the disastrous, continuing and long-lasting effects of their conduct on plaintiffs. (LA City ¶¶ 88-92; LA County ¶¶ 77-81; SF ¶¶ 20-24).

The complaints contain detailed allegations about how the defendants' conduct substantially interferes with life, health and use of property in California communities. The facts alleged by plaintiffs amply show that defendants' actions have created or maintained a public nuisance, including the extent of defendants' interference with public interests, that defendants' conduct is of a continuing nature and produces long-lasting harmful consequences, and that the conduct is inconsistent with laws or regulations. *See Restatement (Second) of Torts* § 821B. In short, plaintiffs allege both substantial interference with public rights and defendants' role in causing, contributing to and failing to alleviate this interference.

The natural results of defendants' practices with respect to gun distribution and design have been gun-related deaths, injuries, crimes and substantial interference with public rights. (LA City ¶¶ 144-50; LA County ¶¶ 135-41; SF ¶¶ 77-82). These harmful consequences affect the public as a whole, not merely isolated individuals, subjecting everyone who resides, works, or travels in the affected communities and neighborhoods to danger and fear.

Finally, defendants' conduct also severely undermines local, California and federal laws restricting and regulating gun sales including, but not limited to, United States Penal Code sections 921-930 (Firearms) and California Penal Code sections 12020-12040 *et seq.* (Unlawful Carrying and Possession of a Weapon); sections 12050 - 12054 *et seq.* (Licenses to Carry Pistols and Revolvers); sections 12070-12085, *et seq.* (Sale of Firearms)[3]; sections 12200-12250, *et seq.* (Machine Guns); sections 12270-12290, *et seq.* (Prohibition of Sale or Transfer of Concealable Firearm to Minors). (LA City ¶¶ 87-92; LA County ¶¶ 76-81; SF ¶¶ 24-39, 47-53). The complaints properly allege a public nuisance claim under California law by asserting that defendants' conduct with respect to distribution interferes with public health and safety. (LA City ¶¶ 142-50; LA County ¶¶ 133-41; SF ¶¶ 75-82).

Recognizing the foregoing, it is not surprising that several courts in other states have now ruled that these same defendants can be held liable for creating and maintaining a public nuisance.[4] *City of Boston v. Smith & Wesson Corp.* (Mass. Super. Ct. July 13, 2000) No. 1999-02590 at 30-32, *see* Declaration of Jennie Lee Anderson in Support of Plaintiffs' Opposition to Demurrer and Motion to Strike ("Anderson Decl."), Exh. A; *Archer v. Arms Technology, Inc.* (Mich. Cir. Ct. May 16, 2000) No. 99-912662 NZ at 8-13, Anderson Decl., Ex. B; *White v. Smith & Wesson*

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[3] Defendants boldly proclaim that multiple sales of firearms are legal. Defs. Mem. at 16. Under California law, however, multiple sales of concealable firearms are clearly illegal. Penal Code § 12072(a)(9) (prohibiting the sale of more than one concealable weapon within a 30-day period).

[4] Defendants cite two cases to support their contention that public nuisance claims against firearm defendants impermissibly expand existing public nuisance law. Defs. Mem. at 12, *citing City of Cincinnati v. Beretta U.S.A.* (Ohio Com. Pl. Oct. 7, 1999) 1999 WL 809838 *aff'd* (Ohio App. 1 Dist. Aug. 11, 2000); *Penelas v. Arms Tech., Inc.* (Fla. Cir. Ct. 1999) 1999 WL 1204353, *appeal pending*. These cases did not interpret California public nuisance law, however, and California public nuisance law is different from, and much broader than, for example, Ohio public nuisance law. One reason that California law is broader than other state's federal nuisance law is that recovery of damages is not warranted under California law.

Corp. (N.D. Ohio 2000) 97 F. Supp. 2d 816, 829; *Ceriale v. Smith & Wesson Corp.* (Cir. Ct. Cook County, Ill. Nov. 30, 1999) No. 99L5628, *motion for reconsideration denied* (Ill. Cir. Ct. May 11, 2000) (shooting victims and their families allege that defendants are liable for public nuisance arising from irresponsible distribution systems funneling thousands of guns to juveniles in Chicago).[5]

C. Defendants Exercise Control Over the Creation and Maintenance of This Public Nuisance.

Defendants seek to avoid public nuisance liability by erroneously contending that public nuisance law requires that defendants exercise direct control over the negligent and criminal activities of others. Defs. Mem. at 14. Under California law, however, defendants are liable for any public nuisance to which they contribute or set in motion. Here, defendants have both contributed to and set in motion the public nuisance described in the complaints.

Liability for a public nuisance extends to all who contribute to the creation or maintenance of the nuisance. *See Hardin v. Sin Claire* (1896) 115 Cal. 460, 463; *Shurpin v. Elmhirst* (1983) 148 Cal.App.3d 94, 101; *Boston*, at 31; *Restatement (Second) of Torts* § 834. This is so even where a nuisance is exacerbated by the negligent or criminal acts of another. *See Sunset Amusement*, 7 Cal.3d at 84-85 (criminal acts encouraged or assisted by defendants' methods of operation "may be said to lie within their reasonable control"); *Osmose v. Selma Pressure Treating Co., Inc.* (1990) 221 Cal.App.3d at 1601, 1624 (rejecting manufacturers' argument that nuisance is inapplicable because illegal behavior of product user is superseding cause of harm beyond manufacturer's control); *Montoya*, 137 Cal.App.Supp. 784 (dismissing alcohol seller's claim that nuisance cannot apply because customers' illegal and disorderly acts occurred outside business premises and beyond its control). As a California appeals court framed the inquiry: "If the defendant voluntarily raised the storm . . . it is no excuse for him that he could not afterwards quell it." *Montoya*, 137 Cal.App.Supp. at 786, *citing Cable v. State* (1847) 8 Blackf. (Ind) 531. The law of public nuisance in California does not permit defendants to facilitate and profit from severely

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[5] Anderson Decl., Ex. C.

harmful activity they set in motion, while disavowing responsibility because they do not possess a gun or control its user at the moment the weapon fires.

By arguing that they lack control over the use of guns by criminals, defendants ignore the fact that they not only contribute to whether and how criminals obtain guns, but knowingly market and distribute guns in a manner that facilitates the criminal element in obtaining them. *See* LA City ¶¶ 95-107; LA County ¶¶ 84-98; SF ¶¶ 27-39; *see also Boston*, at 32 n.62 (defendants' argument that they would have to identify and disarm criminals in order to exercise control over the alleged nuisance "misses the point of Plaintiff's allegations. To exercise control to abate the alleged nuisance, Defendants would have to cease maintaining the illegal, secondary market"). Improperly allowing an irresponsible person to obtain control of a dangerous weapon is a basis for liability, not a basis for immunity.

Moreover, it is disingenuous for defendants to assert that they have no control over the growing epidemic of gun violence. At least one defendant, Smith & Wesson Corp., has acknowledged through its historic agreement with the Federal Government and numerous states, cities and counties, that there are a number of steps that each gun manufacturer can and should take to control its distribution of guns so as to reduce the ability of criminals and juveniles to obtain firearms. *See* Smith & Wesson Corp. Agreement (Mar. 17, 2000) (wherein, for example, defendant agreed to train and monitor all downstream distributors and dealers, and not to distribute to dealers whose guns are disproportionately traced to crime, or who refuse to meet stringent distribution standards), Anderson Decl., Ex. D. Further, the complaints set out specific measures completely within the control of defendants that would eliminate or reduce the harmful effects of their conduct on the public, including limiting multiple sales, using the gun-trace information supplied by the ATF to monitor and supervise their distributors and dealers, and refusing to sell through gun shows and "kitchen table" dealers.[6] (LA City ¶¶ 95-107; LA County ¶¶ 84-98; SF ¶¶ 27-39).

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[6] As courts have recognized, gun manufacturers exercise control over how their products are attained and used through the manner in which they distribute them. *See Hamilton v. Accu-Tek* (E.D.N.Y. 1999) 62 F.Supp.2d 802, 820 (gun manufacturers' "ongoing close relationship with downstream distributors and retailers putting new guns into consumers' hands provided them with appreciable control over the ultimate use of their products"), *questions certified* (2d Cir. August 16, 2000) Nos. 99-7753, 99-7785, 99-7787; *Boston*, at 32 n.62.

Finally, defendants cite no authority indicating that the degree of control required to plead a public nuisance claim demands any more than alleging facts that demonstrate defendants contributed to the creation or maintenance of a public nuisance. Instead, defendants cite irrelevant cases where courts merely reached the conclusion that a party who did not participate in creating or maintaining a nuisance could not abate it. Defs. Mem. at 14-15. Defendants even cite to a line of cases that directly contradicts their argument. *See, e.g.*, *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1137 (holding it is immaterial that "defendant allegedly created the nuisance at some time in the past but does not currently have a possessory interest in the property"); *see also Mangini v. Aerojet-General* (1996) 12 Cal.4th 1087, 1093 (citing prior *Mangini* decision and cited by defendants in their Memorandum).[7]

D. Plaintiffs' Nuisance Claims are Not Based on Product Liability or Negligence.

1. Section 1714.4 Does Not Apply.

In an attempt to impose impermissible limits on plaintiffs' claims, defendants mischaracterize plaintiffs' public nuisance cause of action as a product liability claim to fit it within a narrow exemption to liability set forth in Civil Code section 1714.4. Defs. Mem. at 8-11.

Section 1714.4 provides: "In a *products liability action,* no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the production do not outweigh the risk of injury posed by its potential to cause serious injury, damage or death when discharged." Civ. Code § 1714.4(a) (emphasis added). As this section clearly provides, alleging that a gun is defective because of its inherent danger is barred. The statute expressly allows products liability actions based on the improper selection of design alternatives, however. Civ. Code § 1714.4(c).

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[7] Defendants also rely on *Martinez v. Pacific Bell* (1990) 225 Cal.App.3d 1557 and *Longfellow v. County of San Luis Obispo* (1983) 144 Cal.App.3d 379. Both are clearly distinguishable. The *Martinez* court held that a shooting victim could not recover damages from the telephone company merely by claiming that the shooting "occurred in the vicinity of – or might have some tangential connection to – a public telephone." *Id.* at 1559. In *Longfellow*, the court ruled that a nuisance claim against the county for an injury that occurred on property previously owned by the county was barred by Civil Code § 3482 and by common law rules concerning injuries sustained on transferred property. The connection between defendants' conduct and the resulting public nuisance here is not "tangential," but direct. Nor does this case concern injuries sustained on transferred property.

Furthermore, nothing in section 1714.4 limits causes of action relating to the manner in which firearms are distributed and promoted. In fact, the Legislature specifically excluded from the statute reference to the "furnishing" of firearms. *See* Senate Judiciary Comm. Rep. on Judiciary Assem. Bill No. 75 (1983-84).

The only allegation in plaintiffs' complaints that is remotely related to section 1714.4 is the contention that defendants should design safer guns. Such allegations would be explicitly permitted under section 1714.4 (c) had plaintiffs proffered this type of products liability cause of action in their complaints. Because they have not alleged a products liability claim, however, section 1714.4 is inapplicable.

2. Plaintiffs Do Not Allege a Negligence Cause of Action.

Defendants also rely on an unpublished federal decision regarding negligence, not the causes of action alleged here, for the premise that firearm manufacturers are immune from liability in this case. Defs. Mem. at 8, *citing Casillas v. Auto-Ordinance Corp.* (N.D. Cal. 1996) 1996 WL 276830 (applying section 1714.4 policies to bar plaintiffs' negligence claims). The *Casillas* decision, however, is based on an overly expansive reading of section 1714.4, which has just been discredited by a California appellate court. *See Whitfield v. Heckler & Koch, Inc.*, (2000 Cal.App. 2 Dist.) 2000 WL 1723608 (applying section 1714.4 exclusively to products liability claims in a case alleging both products liability and negligence causes of action).[8] The *Casillas* case also involved completely different facts. The plaintiffs in *Casillas* made no allegations that defendants distributed guns in a manner that enabled convicted criminals, juveniles or other prohibited purchasers to obtain them. Thus, *Casillas* indicates nothing about whether gun manufacturers can be held liable for distributing guns in a manner that circumvents legal restrictions, let alone whether these plaintiffs have stated public nuisance claims.

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[8] If defendants attempt to rely on *Whitfield* in their reply to argue that it rejects negligent distribution claims, they would misread the case. Although general language in the Whitfield complaint discussed the negligent ways in which guns may be distributed, the court never addressed those allegations, rejecting instead the plaintiffs' core allegations that the gun manufacturer could be liable merely for producing a "potentially dangerous" product. 98 Cal.Rptr.2d at 833. *Whitfield* is thus factually distinct from this case, and did not involve the public nuisance or UCA claims asserted here, for which the Legislature has defined the requirements and standards of liability.

The other cases cited by defendants are equally irrelevant. *See Moore v. R.G. Industries* (9th Cir. 1986) 789 F.2d 1326 (addressing only theories of strict or per se liability); *Holmes v. J.C. Penney* (1982) 133 Cal.App.3d 216 (declining to hold manufacturer liable for sale of CO2 cartridges to minor, because such cartridges are useful for a variety of things including powering toys, airbrushes, and seltzer bottles); *Bojorquez v. House of Toys, Inc.* (1976) 62 Cal.App.3d 930 (declining to hold manufacturer liable for sale of slingshots, a toy which can be acquired legally even by juveniles, convicted felons, and others prohibited from obtaining guns). In each such case, the facts were limited to product liability claims.

E. California Public Nuisance Law Contains No Exemptions or Limitations.

Defendants contend that a variety of limitations drastically narrow the range of matters that can constitute a public nuisance. No precedent or policy supports defendants' position.

1. A Public Nuisance Claim Need Not Involve Either Unreasonable Use of or Effect on Real Property or Violation of a Law.

Despite their purported review of "over 900 California state court decisions stretching back to 1851," defendants do not cite a single opinion supporting their assertion that public nuisance law is limited to situations involving "a defendant's use of or effect on real property" or "specific violations of statute or ordinance." Defs. Mem. at 9-10.

Defendants' contentions regarding the significance of real property confuse public nuisance with *private* nuisance, a different cause of action not at issue here. While public nuisance "extend[s] to virtually any form of annoyance or inconvenience interfering with common public rights," private nuisance is traditionally "restricted to the invasion of interests in the use or enjoyment of land." W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 86, at 618 (5th ed. 1984); *Restatement* § 821B cmt. h ("unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land").[9] Courts have already established

[9] Even if public nuisance did require a connection to real property, that element would be satisfied here. Plaintiffs allege that defendants' conduct has a severely harmful effect on use of real property, causing injuries and danger and jeopardizing the safe use of streets, sidewalks, parks, schools, homes, businesses and other property throughout plaintiffs' communities.

that these defendants cannot defeat public nuisance claims by invoking rules applicable only to private nuisance actions. *See Boston*, at 31; *Archer*, at 11 & n.6.

Defendants' argument that their conduct must violate a statute or ordinance to constitute a public nuisance is equally flawed. The Supreme Court recently reaffirmed that the nuisance-creating activity need not be independently illegal for public nuisance law to apply. *Gallo*, 14 Cal. 4th at 1109; *see also Reid & Sibell, Inc. v. Gilmore & Edwards Co.* (1955) 134 Cal.App.2d 60; *O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151, 163-164. Authorities on public nuisance law indicate that whether a defendant's conduct is inconsistent with statutes or ordinances is merely one among many circumstances that may support a finding that defendant created a public nuisance. *See* Civ. Code § 3479; *Restatement (Second) of Torts* § 821B. Accordingly, plaintiffs' public nuisance claims need not be based on a direct violation of statute or ordinance.

2. California's Public Nuisance Statute Does Not Contain a Special Exemption for Manufacturers of Products.

Defendants improperly assert that product manufacturers are exempt from public nuisance law under California's statutes and judicial decisions. In fact, product manufacturers are subject to the same legal standards that govern everyone else. Indeed, California courts have specifically *rejected* the notion that any rules of law or precedents relieve manufacturers of products from liability for nuisance. *Selma Pressure*, 221 Cal.App.3d at 1619 n.7.

Defendants rely principally on a series of cases in which plaintiffs sought to save time-barred products liability claims against asbestos manufacturers by asserting them under the label of public nuisance. *See, e.g., City of San Diego v. United States Gypsum Co.* (1994) 30 Cal.App.4th 575, 585; *County of Johnson v. United States Gypsum Co.* (E.D. Tenn. 1984) 580 F. Supp. 284, 294. Defendants also try to find support from cases in which the claims against asbestos manufacturers were for private nuisance, not public nuisance, and failed for reasons that are specific to private nuisance law. *See Tioga Pub. Sch. Dist. No. 15 of Williams County v. United States Gypsum Co.* (8th Cir. 1993) 984 F.2d 915, 920 (rejecting claim under North Dakota statute that restricted liability to "a landowner or other person in control of property conducting an activity on

his land in such a manner as to interfere with the property rights of a neighbor"); *Detroit Bd. of Educ. v. Celotex Corp.* (Mich. Ct. App. 1994) 493 N.W.2d 513, 521 (rejecting plaintiffs' attempt to convert defective product claims into private nuisance claims in order to circumvent expiration of statute of limitations).[10]

In *Selma*, however, the court unequivocally rejected the same argument defendants proffer here: "We do not find the [asbestos] cases categorically relieve manufacturers or suppliers of goods from liability for nuisance." *Selma Pressure*, 221 Cal.App.3d at 1619 n.7.

3. Public Nuisance Claims Do Not Require an Underlying Tort.

Public nuisance is an independent cause of action, not a subsidiary theory dependent on the establishment of liability on a separate ground. Defendants provide no authority for their argument that a public nuisance claim can be brought only if the plaintiff first establishes that the defendant is liable for a separate "underlying" tort.

Although a public nuisance claim may be based on allegations of negligent, reckless, or intentional conduct [*Restatement (Second) of Torts* § 821B], a public nuisance claim based on such conduct need not satisfy the elements of a negligent, reckless or intentional tort cause of action. *Snow*, 212 Cal. at 626. Parties are responsible for their nuisance-causing conduct, even if not negligent. *Id.* at 625 ("Conceding that the defendant . . . was itself guilty of no acts of negligence, it was nevertheless guilty of maintaining and permitting on its premises and for its use a nuisance which caused injury to the plaintiffs").

F. No Legislature Has Authorized Defendants To Distribute Guns in the Manner Alleged Here.

Defendants argue that the Legislature has shielded them from liability because the nuisance statute states that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." Civ. Code § 3482. As a preliminary matter, this provision applies only to authority provided by state statutes and not acts of Congress. *Woodruff v. North*

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[10] The cases cited by defendants that do not involve asbestos only further support plaintiffs' claims. *See, e.g., Bloomington v. Westinghouse Elec. Corp.* (7th Cir. 1989) 891 F.2d 611, 614 (concluding that manufacturer *can* be liable if it "participated in carrying on the nuisance" by selling hazardous product without taking care to avoid harm, but that defendant in this case "made every effort" to assure its distribution of its product did not cause harm).

Bloomfield Gravel Min. Co. (D. Cal. 1884) 18 F. 753, 770-71. California never elected to let the federal government authorize public nuisances within the state. *Id.* Defendants cite only federal laws and regulations throughout their argument on this point (see Defs. Brief, at 16-17), and every one of those citations is irrelevant. No statute – state or federal – authorizes the wrongdoing alleged here.

Defendants do not mention any of the caselaw construing section 3482, because it all refutes their argument. The Supreme Court of California has "consistently applied a narrow construction to section 3482." *Greater Westchester Homeowners Ass'n v. City of Los Angeles* (1979) 26 Cal.3d 86, 100. To foreclose plaintiffs' public nuisance claims on this ground, defendants must show that the Legislature "contemplated the doing of the very act which occasions the injury." *Hassell v. San Francisco* (1938) 11 Cal.2d 168, 171; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 938. This means that the statute must demonstrate actual "unequivocal legislative intent to sanction a nuisance." *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291.

The fact that a business is legal and its activities are regulated merely means that the business cannot be a nuisance *per se* and does not bar defendants from being held liable where the public nuisance results from the manner in which they conduct the business. *See Greater Westchester*, 26 Cal.3d at 101; *Orpheum Building Co. v. San Francisco Bay Area Rapid Transit Dist.* (1978) 80 Cal.App.3d 863, 875; *Venuto*, 22 Cal.App.3d 116 at 128-29. Just because a law permits defendants to manufacture and sell guns does not mean they are authorized to do so in any manner they choose with immunity from the law of public nuisance. Defendants concede this very point, acknowledging that "an activity, legislatively authorized, can still constitute a nuisance based on the manner of performance." Defs. Mem. at 17.

Defendants also insist that, even if their alleged wrongdoing has not been authorized, they should be able to avoid liability on the ground that their businesses are subject to "comprehensive" federal and state laws and regulations. Their argument is based entirely on a comment in the *Restatement* indicating that some courts "are slow to declare" a heavily-regulated activity to be a public nuisance. *Restatement (Second) of Torts* § 821B cmt. f. That comment does not reflect California law regarding the sale and distribution of firearms, however. *California*

Rifle & Pistol Assoc. v. City of West Hollywood (1998) 66 Cal.App.4th 1302, 1317. The State Legislature has not expressly or impliedly precluded cities and counties from pursuing civil suits regarding handgun sales or distribution. *Id.* Nor has the federal government declared that gun manufacturing and distribution are part of a "comprehensive" regulatory scheme. In fact, Congress has explicitly declared the opposite. 18 U.S.C. § 927. No authority cited by defendants indicates otherwise.

Plaintiffs have alleged their public nuisance claims with far more specificity than required to satisfy pleading requirements. The Court should, therefore, overrule defendants' demurrer on these claims.

II. PLAINTIFFS HAVE ALLEGED A VIABLE CLAIM UNDER BUSINESS AND PROFESSIONS CODE SECTIONS 17200 AND 17500

Plaintiffs assert that defendants' conduct is unlawful, unfair and deceptive, within the meaning of section 17200. In addition, plaintiffs allege that defendants' advertising and marketing practices violate both section 17200 and section 17500, which prohibits defendants from disseminating advertisements that they know, or should know, to be untrue or misleading. *Committee on Children's Television*, 35 Cal.3d at 210.[11] Defendants' attempts to rebut these claims is misguided.

Defendants argue that plaintiffs fail to plead their UCA causes of action with sufficient particularity because plaintiffs do not allege specific information including names, times and places. Defs. Mem. at 19, 24-26. However, the California Supreme Court has held that such

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[11] California courts have authorized claims alleging unfair and deceptive marketing and distribution practices under both sections 17200 and 17500. *See Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy* (1992) 4 Cal.App.4th 963. In that case, Alta-Dena manufactured and sold raw certified milk (RCM). To promote RCM, Alta-Dena ran advertisements stating that RCM was safer and more nutritious than regular pasteurized milk. However, these claims were false and thus, violated both sections 17200 and 17500. The trial court issued an injunction requiring Alta-Dena to place two warning labels on its RCM containers: the first warned that RCM may contain dangerous bacteria and certain groups of individuals faced higher risks; the second stated that there was no scientific evidence establishing that RCM was more nutritious than pasteurized milk. *Id.* at 971. The Court of Appeals upheld the authority of the trial court to mandate warning labels under the UCA statutes. *Id.* at 975.

specificity is not required to state a cause of action under the UCA. *See, e.g., Committee on Children's Television*, 35 Cal.3d at 212, *citing People v. Superior Court (Jayhill)* (1973) 9 Cal. 3d 283, 287-88; *Quelimane Co. v. Stewart Title Guar. Co.* (1988) 19 Cal.4th 26, 46-47 (noting that "contrary to the suggestion by *amicus curiae* that the court may require fact-specific pleading [in an UCA claim], the well-settled rule is otherwise"). Moreover, important policy considerations militate against requiring plaintiffs to plead the specific details of each unfair act. *Committee on Children's Television*, 35 Cal.3d at 214. Requiring such specificity would virtually eliminate UCA lawsuits as a practical remedy to redress the types of harm contemplated under the UCA and would immunize defendants from statutory remedies designed to protect the public. *Id.* at 222-23.

In a UCA action, the complaint need only "set forth the ultimate facts constituting the cause of action, *not the evidence* by which plaintiff proposes to prove those facts." *Id.* at 212 (emphasis added). To survive demurrer, plaintiffs need only state "a prima facie case of harm, having its genesis in an apparently unfair business practice" to satisfy their burden. *Motors, Inc. v. Times-Mirror Co.* (1980) 102 Cal.App.3d 735, 740. As the Supreme Court explained, "[i]f defendants require further specifics in order to prepare their defense, such matters may be the subject of discovery proceedings." *Committee on Children's Television*, 35 Cal.3d at 212.

Plaintiffs' complaints readily satisfy these pleading requirements. They describe the ultimate facts constituting the violations of the UCA and state their allegations in sufficient detail "to notify the defendants of the claim[s] made against them, and to frame the issues for litigation." *Committee on Children's Television*, 35 Cal.3d at 212-213; LA City ¶¶ 1-90, 1335-140; LA County ¶¶ 1-79, 126-131, 157-159; SF ¶¶1-22, 68-73 and 83-85. No more is warranted.

A. Plaintiffs Properly State a Claim Under Section 17200.

1. Plaintiffs Sufficiently State a Claim for "Unlawful" Business Practices under the UCA.

Plaintiffs' claim under section 17200 for "unlawful" business practices is sufficiently stated. An "unlawful" business practice includes "'anything that can properly be called a business practice and that at the same time is forbidden by law.'" *People v. McKale* (1979) 25 Cal.3d 626, 634, *quoting Barquis v. Merchants Collection Soc. of Oakland* (1972) 7 Cal.3d at 94; *Cel-Tech*

Comm., Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th at 180; *State Farm*, 45 Cal.App.4th at 1103.[12] Virtually any law – federal, state or local – can serve as a predicate for a section 17200 claim. *State Farm Fire & Cas. Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1102-03.

Federal, state and local laws have been enacted for the very purpose of reducing gun violence. (LA City ¶115; LA County ¶ 106; SF ¶ 47). Defendants' conduct ignores these policy goals and directly undermines the laws and regulations designed to further them. *Id.* By identifying the laws that are undermined by defendants' activities, the complaints explicitly allege that defendants' business practices frustrate California law. (LA City ¶¶ 91-109, 115-118, 151-166; LA County ¶¶ 80-100, 106-110, 142-16; SF ¶¶ 23-41, 47-53 and 86-88).

For example, plaintiffs allege that defendants have created a public nuisance in violation of California Code of Civil Procedure section 731 and Civil Code section 3480 and describe in detail how defendants created and maintained an illegitimate secondary market that allows criminals and juveniles to unlawfully obtain firearms and oversaturates the market. (LA City ¶¶ 93-95, 101-114, 119-134; LA County ¶¶ 82-96, 99-105, 111-125; SF ¶¶ 25-46, 54-67, 87). Further, plaintiffs allege that defendants distribute handguns without adequate control, facilitate "straw purchases," sell firearms to "kitchen table" dealers and design firearms to appeal to criminals. *Id.*[13]

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[12] Defendants' reliance on *McKale* is clearly misplaced. Defs. Mem. at 18-20. In *McKale*, the Supreme Court noted that the definition of unfair competition under the UCA should be given a broad interpretation. 25 Cal.3d at 632. Further, the *McKale* Court concluded that the Legislature enacted section 17200 to permit courts to enjoin on-going wrongful business conduct in any context. *Id.* Plaintiffs have met the *McKale* standards because their allegations are not limited to conclusory statements, but instead describe defendants' unlawful activity with detail.

Defendants' reliance on *Klein v. Earth Elements, Inc.* (1997) 59 Cal.App.4th 965 is equally unfounded. Defs. Mem. at 19. In *Klein*, the court merely held that "the unintentional distribution of [contaminated pet food] is beyond the scope . . . of the "unlawful" prong of § 17200" because defendants had not "broke[n] any law by unwittingly distributing [the] contaminated pet food." *Id.* at 969. Here, plaintiffs have alleged that defendants have consciously and intentionally undermined specific statutes and ordinances. Their conduct has not been "unwitting."

[13] The United States Supreme Court has even upheld criminal liability for manufacturers who have engaged in remarkably similar conduct to that alleged here. *See Direct Sales Co. v. United States* (1943) 319 U.S. 703 (unanimously affirming the criminal conspiracy conviction of pharmaceutical manufacturer that technically complied with all legal requirements, but sold

Plaintiffs also allege that defendants market and sell firearms banned by the Roberti-Roos Assault Weapons Act and the assault weapons advertising ban, and that defendants made minor modifications or renamed the banned assault weapons in order to avoid application of these laws. (LA City ¶¶ 116-117; LA County ¶¶ 107-108; SF ¶¶ 48-51). These allegations are pleaded with sufficient specificity to warrant overruling demurrer.

2. Plaintiffs Sufficiently State a Claim for "Unfair" Business Practices Under Section 17200.

Plaintiffs have also sufficiently stated a cause of action under section 17200 by alleging that defendants engage in "unfair" business practices. "Unfair" is broader in scope than "unlawful" and may prohibit activity that may otherwise be legal. *State Farm*, 45 Cal.App.4th at 1103; *see also Cel-Tech*, 20 Cal.4th at 180.[14] Section 17200 is intentionally sweeping and allows "courts maximum discretion to prohibit new schemes to defraud." *Id.* (*citing Motors*, 102 Cal. App. 3d at 740). As a result, there are literally countless circumstances where a business practice could qualify as "unfair" under the UCA.

Courts may evaluate whether a business practice is "unfair" either on public policy grounds, or by balancing the utility of defendants' conduct against the gravity of harm to plaintiffs. *State Farm*, 45 Cal.App.4th at 1104; *Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 332, *citing Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 839. Under either method, plaintiffs prevail.

A business practice is patently unfair on policy grounds if it "'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *State Farm*, 45 Cal.App.4th at 1104, *quoting People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 530. Plaintiffs allege that defendants distribute firearms in a manner that assists criminals and juveniles in illegally obtaining guns;

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controlled substance to physician in such quantities that it must have known or been willfully blind to the fact that he was dispensing it illegally).

[14] Defendants erroneously read *Cel-Tech* as limiting unfair competitor claims under the UCA to those that are tethered to some legislative policy. Defs. Mem. at 20. However, that discussion was expressly *limited* to actions *between competitors* alleging anticompetitive practices. 20 Cal.4th at 186-87. That limitation is inapplicable here because this case does not involve an action between competitors.

mislead the public regarding safety of firearms by promoting gun ownership as increasing home safety; fail to warn consumers of the dangers associated with firearm ownership; and refuse to implement existing safety devices and precautions to lessen the dangers associated with their products. (LA City ¶¶ 95-105, ; LA County ¶¶ 84-94, 111-125, 126-131; SF ¶¶ 27-37, 54-67, 68-73, 86-88). The consequences of these activities include increases in gun-related injury, death and crime. This conduct and its harmful consequences are plainly and substantially injurious to People of this State, and are otherwise offensive to established public policy. Accordingly, plaintiffs have sufficiently stated their unfair business practices claim on policy grounds.

A business practice may also be unfair if the gravity of the harm suffered by the People of the State of California outweighs its utility. *Day*, 63 Cal.App.4th at 332; *State Farm*, 45 Cal.App.4th at 1103-04. As noted above, the complaints properly allege that defendants' unfair business practices continue to inflict consistent, irreparable harm on the People of California in the form of death, injury, fear and destruction of property. (LA City ¶¶ 6, 82-85, 144-150; LA County ¶¶ 6, 71-74, 135-141; SF ¶¶ 2, 17-18, 77-82). Accordingly, plaintiffs have sufficiently pleaded the gravity of the harm they suffer as a consequence of defendants' collectively unfair business practices.

Plaintiffs cannot be expected to plead facts in support of defendants' practices. Whether defendants can set forth any proof of utility is a question of fact, making it "quite impossible . . . to determine the issue of unfairness on demurrer." *Motors, Inc. v. Times-Mirror Co.* (1980) 102 Cal.App.3d 735,740. Therefore, because plaintiffs' complaints state a *prima facie* case of harm, their cause of action for unfair business practices must survive demurrer. *Id.*

3. Plaintiffs Have Alleged a Viable Claim for "Deceptive" Business Practices Under Section 17200.

Plaintiffs' claim for "deceptive" business practices also survives demurrer. Plaintiffs need only allege facts indicating that defendants' conduct is "likely to deceive" the public to sufficiently state a cause of action. *State Farm*, 45 Cal.App.4th at 1105, *citing Committee on Children's Television*, 35 Cal.3d at 211; *see also Day*, 63 Cal.App.4th at 332 (same test). "Likely to be deceived" has been afforded a very liberal interpretation by California courts.

"Allegations of actual deception, reasonable reliance, and damages are unnecessary" under the UCA. *Committee on Children's Television*, 35 Cal.3d at 211. Moreover, what is "'likely to deceive' has no relationship to the concept of common law fraud, which . . . must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. *None of these elements are required to state a claim under section 17200 or 17500.*" *Day*, 63 Cal.App.4th at 332 (emphasis added).

Instead, violations of the UCA for fraudulent business practices, or false and misleading advertising, include a "wide spectrum" of activity. "Advertising," under section 17500 or section 17200 is virtually any statement made by a manufacturer about a product. *See, e.g., Chern v. Bank of America* (1976) 15 C.3d 866, 975-76. In fact, an advertisement need not even be made in a business context. *Pines v. Tomson,* 160 Cal.App.3d 370, 386. "By their breadth, the statutes encompass not only those advertisements which have deceived or misled because they are untrue, but also those which may be accurate on some level, but will nonetheless tend to mislead or deceive . . . ." *Id.* at 332-33. Failure to disclose "relevant information" is also actionable under these sections. *Id.*

Here, plaintiffs argue that defendants' conduct was calculated to mislead consumers. Plaintiffs allege that defendants made misleading and deceptive statements to convince the public that owning firearms will make their homes safer when in fact, the opposite is true. (LA City ¶¶ 135-140; LA County ¶¶ 126-131, 157-159; SF ¶¶ 68-73, 83-85). Plaintiffs further contend that defendants failed to provide consumers with information or warnings regarding the relative risk of keeping a firearm in the home. *Id.* These allegations are alleged with sufficient particularity to state a cause of action for deceptive business practices under section 17200.

B. <u>Plaintiffs Have Adequately Pleaded A Cause of Action for False and Misleading Advertising Under Section 17500.</u>

Defendants also assert that plaintiffs' cause of action for false and misleading advertising should be dismissed because no "reasonable consumer" could be deceived by this advertising. Defs. Mem. at 22-23. However, no California court has adopted this standard, and the California Supreme Court, in *Committee on Children's Television*, specifically endorses an "unsophisticated consumer" standard. 35 Cal.3d. at 214. *See also People v. Wahl* (1940) 39

Cal.App.2d Supp. 771,774 (these statutes "protect the general public who read advertisements and are likely to know nothing of the facts, not the dealers who publish them. . . .") (emphasis added).[15]

In any event, plaintiffs have sufficiently pleaded likelihood of public deception under either standard. *Committee on Children's Television*, 35 Cal.3d at 214. For example, plaintiffs allege that defendants promote their firearms as "homeowner's insurance" and tell consumers that a firearm is "your safest choice for personal safety," ignoring statistics and research that indicate the contrary. (LA City ¶¶ 135, 137; LA County ¶¶ 126, 128; SF ¶¶ 68, 70.)

Even "[t]he reasonable consumer may well be unwary." *Haskell v. Time Inc.* (E.D. Cal. 1994) 857 F.Supp.1392, 1399 n.10. The average gun consumer may believe he can protect his home with a firearm in some circumstances, but, at the same time may be "unwary" about the concomitant risks, due to defendants failure to properly warn. (LA City ¶ 137; LA County ¶ 128; SF ¶ 70.)

Therefore, plaintiffs' complaints properly allege that defendants' statements are likely to deceive the public in violation of section 17500.

C. Plaintiffs' UCA Claims Do Not Violate Defendants' First Amendment Right.

Finally, defendants turn to the First Amendment of the United States Constitution in an ill-fated attempt to evade liability under the UCA. However, the preeminent secondary authority on the UCA unequivocally states: "Sections 17200 and 17500 have withstood every first amendment challenge that has been reported in a published opinion." Stern, *Unfair Business Practices and False Advertising Bus. & Prof Code § 17200*, at 107 (TRG 1999).

Defendants' First Amendment argument fails because false, deceptive or misleading commercial speech is not protected by the First Amendment. *See, e.g., People v. Morse* (1993) 21 Cal.App.4th 259,265-69; *People v. Superior Court (Olson)* (1979) 96 Cal.App.3d 181, 191-95;

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[15] The *only* California authority defendants cite to support application of the "reasonable consumer" standard is *State Board of Funeral Directors & Embalmers v. Mortuary* (1969) 271 Cal.App.2d 638. Defs. Mem. at 22. Not only is this case factually distinguishable, but to the extent it posits a different standard than the "unsophisticated consumer," it is at odds with the California Supreme Court's more recent and controlling decision in *Committee on Children's Television.*

People v. Columbia Research Corp. (1977) 71 Cal.App.3d 607, 614.[16] Seeking to confuse the issues, defendants mischaracterize their statements as "opinions on . . . important public issues" and try to place self-serving statements about their products on par with the editorials transmitted on non-commercial educational broadcast facilities at issue in *FCC v. League of Women Voters* (1984) 468 U.S. 364, 381. Defs. Mem. at 27.

The definition of advertising under the UCA is broad enough to include the speech at issue here. *See Chern*, 15 Cal.3d at 975-76 (virtually any statement made about a product by the manufacturer is advertising); *Pines,* 160 Cal.App.3d at 386 (under the UCA, an advertisement need not be made in a business context). Accordingly, defendants' demurrer on First Amendment grounds should be overruled.

III. PLAINTIFFS' CLAIMS DO NOT OTHERWISE VIOLATE THE CONSTITUTION.

Defendants also insist that all of plaintiffs' claims are unconstitutional because they seek to affect commerce in states other than California. Defendants advance an invalid basis for demurrer, and their constitutional arguments are wholly without merit.

Objections to the scope of relief sought provide no basis to sustain defendants' demurrer. Defendants' constitutional argument addresses only *how much or what type* of relief plaintiffs should be able to obtain, not *whether* plaintiffs are entitled to any relief. If defendants' argument were correct, courts would be unable to rule on a substantial portion of the cases before them, because most civil claims and rules of law affect interstate commerce in some way.

According to defendants, the complaints run afoul of constitutional limits because they are too "broadly drafted" and the "regulatory ambitions" presented by them are too great. Defs. Brief at 27. California law expressly recognizes eight grounds on which a demurrer can be sustained, and the scope of relief requested is not among them. Code Civ. Proc. § 430.10. Even if plaintiffs have asked for relief beyond what the court may award them, this "does not detract from

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[16] Defendants' reliance on *Blatty v. New York Times Co.* (1986) 42 Cal.3d.1033 to argue that plaintiffs' claims are "absolutely barred" under the First Amendment is as misleading as it is irrelevant. Defs. Mem. at 26. There, the Court determined that under the First Amendment plaintiff bears the burden of proving that the statement was false and that it was "of and concerning" the plaintiff. *Id.* at 1042. In *Blatty*, the Court found an "absolute bar" to liability only because the plaintiff was unable to satisfy these requirements. *Id.* at 1041, 1048.

the sufficiency of the complaint to state a cause of action, for we may not assume that the trial court will grant relief beyond that which it is authorized to give." *People v. City of Los Angeles* (1958) 160 Cal.App.2d 494, 510; *Mangini*, 230 Cal.App.3d at 1147-48 ("validity of a demurrer is determined with reference to the pleaded facts alleged to constitute a wrong, not the prayer for relief"); *Franchise Tax Bd. v. Firestone Tire & Rubber Co.* (1978) 87 Cal.App.3d 878, 885 (demurrer cannot be sustained on ground that plaintiff demands relief to which it is not entitled); *Colvig v. RKO General, Inc.* (1965) 232 Cal.App.2d 56, 66 (same); *Woodley v. Woodley* (1941) 47 Cal.App.2d 188, 190-91 (same). Regardless of whether plaintiffs seek relief that would exceed constitutional bounds, defendants cannot demur on that basis.

Assuming, *arguendo*, that scope of relief was ground for a demurrer, defendants are far from showing that no relief sought here would be constitutional. Defendants' demurrer addresses only the most far-reaching type of injunctive relief that could possibly be entered, contending that plaintiffs' claims "can only be read to mean that plaintiffs seek to abate the lawful manufacture, distribution, and sale of the defendant manufacturers' anywhere in the United States or, indeed, the world." Defs. Brief at 28. Defendants cannot reasonably dispute that more limited relief could be entered without even arguably infringing any constitutional limits. Defendants' all-or-nothing approach is dramatic but is not a basis on which their demurrer can be sustained. Courts applying equivalent procedural rules in other states have reached this very conclusion. *See, e.g., Boston*, at 29 ("[a]ll I now decide is a motion to dismiss for failure to state a claim. The scope and constitutionality of any remedy, should Plaintiffs succeed at trial, is appropriately left to the judge who will have the benefit of a full factual record").

Moreover, defendants' constitutional arguments are simply wrong. While defendants mention a litany of constitutional provisions including the Interstate Commerce Clause, the Foreign Commerce Clause, the Supremacy Clause, the Import/Export Clause, and the Due Process Clause, their argument essentially boils down to the notion that courts cannot award any monetary or injunctive relief where a defendant's conduct involves interstate commerce and occurs outside the state but causes injury to a plaintiff within the state. That is not so. *See Boston*, at 27 (Supreme

Court has established that "state civil suits may proceed even though the result may be to effect a change in out-of-state practices"); *White*, 97 F. Supp. 2d at 829-30.

Few principles of law are more firmly established than the principle that a court with jurisdiction over an out-of-state actor can protect those within the state from injuries inflicted by that actor. *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286; *Young v. Masci* (1933) 289 U.S. 253, 258-59 ("The cases are many in which a person acting outside the State may be held responsible according to the law of the State for injurious consequences within it"). California's long-arm rule expressly allows adjudication of tort claims against out-of-state defendants who cause injury within the state. California Trial Procedure Rule 4.4. Defendants insist that they are not challenging the Court's jurisdiction, but they cannot avoid the clash between their argument and these precedents and rules. While defendants admit that courts can have jurisdiction over out-of-state tortfeasors, they insist that courts cannot exercise that jurisdiction in any case where the relief awarded would affect interstate commerce. Such a limitation would swallow the entire rule. If defendants were correct, California's long-arm rule would result in a violation of the Commerce Clause every time a court exercised its jurisdiction to award damages or injunctive relief against an out-of-state tortfeasor.

Defendants' argument leads to these untenable conclusions because it is based on erroneous notions about the Commerce Clause. Defendants do not cite any case in which the Commerce Clause precluded an injured plaintiff from obtaining relief for harm it suffered. The cases cited by defendants instead establish that "the Commerce Clause protects against inconsistent legislation arising from the projection of one State's regulatory regime into the jurisdiction of another state." *Healy v. Beer Inst.* (1989) 491 U.S. 324, 336. This means that a state cannot impose its regulatory schemes on out-of-state commerce merely because it affects in-state commerce. *Id.* at 335-36; *Edgar v. MITE Corp.* (1982) 457 U.S. 624, 642-43. The cases defendants cite did not involve civil claims by injured plaintiffs, however, and, contrary to defendants' suggestions, they do not eviscerate the well-established power of courts to adjudicate claims and grant relief where the conduct that causes injury inside a state involves commerce and occurs outside the state.

While there are limits on extraterritorial application of state law to award relief to injured plaintiffs, they are not infringed here. Along with important restrictions imposed by personal jurisdiction and conflicts of law principles, the Supreme Court has established that courts cannot punish conduct for violation of state tort law that occurs wholly outside the state *and has no effect on anyone within the state*. *See, e.g., BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 573 (reversing award of punitive damages in Alabama based on out-of-state conduct "that had no impact on Alabama or its residents"). That rule is irrelevant here, however, because plaintiffs allege that defendants' conduct caused and continues to cause injury within California.

The Due Process Clause also does not bar any of the claims or relief sought here. Defendants argue that plaintiffs attempt to impermissibly punish defendants with the intent to deter lawful, out-of-state conduct rather than to advance "the State's interest in protecting its own consumers and its own economy." *BMW*, 517 U.S. 572-73. This rule is not grounds for demurrer to any claim asserted here. Plaintiffs contend that defendants' conduct is in violation of California law. A central purpose of the provisions of California law on which plaintiffs rely, and on which relief is sought, is to protect California, its citizens, and its economy. *See Boston*, at 29-30 (refusing to find that intent of remedies sought by city against these defendants is to punish defendants for out-of-state conduct rather than to protect city's residents). Therefore, defendants' reliance on the constitution is entirely misplaced.

IV. THIS COURT HAS AUTHORITY TO ADJUDICATE PLAINTIFFS' CLAIMS.

Judges are obligated to exercise jurisdiction over the cases before them unless they are disqualified from doing so. Code Civ. Proc. § 170; *see also Cahill v. Superior Court* (1904) 194 Cal. 42, 46, 78 P. 467; *Great West Life Assur. Co. v. Superior Court* (1969) 271 Cal.App. 2d 124, 128; *Burnett v. Superior Court* (1974) 12 Cal.3d 865, 869; *San Diego v. Municipal Court* (1980) 102 Cal.App.3d 775, 778. The power to interpret laws and determine the rights and liabilities of parties lies exclusively with the courts, and courts are only precluded from exercising power that is specifically granted to another branch of government. Cal. Const. Art. 3, § 3; *Marin Water & Power Co. v. Railroad Comm.* (1916) 171 Cal. 706, 711.

These principles are particularly instructive here because plaintiffs' claims are based on statutes that specifically call on the courts to interpret them. For example, the UCA is intentionally broad and designed to "permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur." *Cel-Tech*, 20 Cal.4th at 181; *see also Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1153. Recognizing the impossibility of identifying every type of unlawful and unfair business practice prohibited under the statute, lawmakers have called on the courts' interpretive skills to determine what behavior is prohibited under the Act by using sweeping language in the statutes. *Id.*, *citing American Philatelic Soc. v. Claiborne* (1935) 3 Cal.2d 689,698, 46 P.2d 135. In fact, trial courts have a mandatory duty to impose civil penalties in cases involving violations of the UCA. Bus. & Prof. Code § 17206 (courts "shall impose a civil penalty for each violation of this chapter"); *People v. Custom Craft Carpets, Inc.* (1984) 159 Cal.App.3d 676, 686 ("the court simply lacks any discretion under these sections to not impose a penalty").

Similarly, the Legislature has specifically authorized courts to determine what constitutes a public nuisance. Civ. Code § 3491. City attorneys and county counsel are directed to initiate civil actions to abate public nuisances. Code Civ. Proc. § 731; *People v. McCue* (1907) 150 Cal. 195, 88 P. 899. This court plainly has the authority, indeed the duty, to adjudicate plaintiffs' claims.

In an ill-fated attempt to misrepresent the law regarding abstention, defendants argue that this Court should ignore all authority to the contrary and decline jurisdiction over these claims because doing so would amount to impermissible "microeconomic managing." Defs. Mem. at 4-5. To support their argument, defendants cite cases that were not decided on abstention grounds and are distinguishable on their facts.[17]

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[17] None of the cases defendants cite even suggests that this Court should abstain from hearing plaintiffs' claims. In each case, courts heard the claims and decided them on the merits. *See, e.g., Lazar v. Hertz Corp.* (1999) 69 Cal.App. 4th 1494 (plaintiffs did not state a cause of action under the Unruh Civil Rights Act (Civ. Code §§ 51 and 52) where the challenged conduct, a minimum age requirement to rent a car, was authorized by statute); *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121 (no private right to sue under the Insurance Code); *Wolfe v. State Farm Fire & Casualty Insurance Co.* (1996) 46 Cal.App.4th 554, 565 (refusing to offer earthquake insurance does not violate section 17200 because insurers are not obligated by the Insurance Code to offer such insurance); *Grocers Ass'n, Inc. v. Bank of America* (1994) 22 Cal.App.4th 205, (overruling the lower courts judgment regarding bank fees because the fees were not unconscionable); *Harris v. Capital*

In fact, the abstention doctrine is entirely inapplicable here. Abstentions generally involve federal courts declining jurisdiction to defer to a state court. *See, e.g., Burford v. Sun Oil Co.* (1943) 319 U.S. 315. While federal and state courts can and should abstain from adjudicating "political questions," these cases are narrowly construed and must involve *exclusively* political issues. *See, e.g., Baker v. Carr* (1962) 369 U.S. 186. This court is clearly competent to hear causes of action arising from these state statutes and this litigation does not directly or exclusively involve the political process.

Moreover, contrary to defendants' arguments, the Legislature has in no way immunized defendants from liability or otherwise indicated that the courts should not decide these issues. While the Legislature may limit a court's power by explicitly permitting certain conduct, it has not done so here. *See Cel-Tech*, 20 Cal.4th at 163. These "safe harbor" laws must specifically authorize the conduct in question to bar a suit. In any event, "the Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair." *Id.* at 184. Defendants argue that Civil Code section 1714.4 immunizes them from liability for public nuisance and violations of sections 17200 and 17500. As demonstrated above, however, section 1714.4 applies *exclusively* to products liability claims and is inapplicable here. *See* Part I.D., *supra*.

Growth Investors (1991) 52 Cal.3d 1142 (plaintiffs failed to state a cause of action for economic discrimination under Unruh Act because the Act does not proscribe such discrimination); *Holmes*, 133 Cal.App.3d at 216 (retailers have no duty to prevent the sale of CO_2 cartridge to minors where such activity is legal and CO_2 cartridge a may be used for a variety of purposes); *Borjorquez*, 62 Cal.App.3d at 930 (defendant was not liable for selling slingshot to a child where children are the intended users of slingshots). Any language defendants cite for the premise that this Court is not competent to adjudicate plaintiffs' claims is dicta.

The firearms-related cases defendants cite are equally uninstructive regarding abstention. Defs. Mem. at 4. These cases involve negligence and product liability causes of action. *See McCarthy v. Sturm Ruger & Co.* (S.D.N.Y. 1996) 916 F.Supp. 366 (rejecting plaintiffs' negligence cause of action because an extraordinary act broke the chain of causation and plaintiffs' strict liability claim because the qualities of the bullets complained of were a functional element of the design and did not constitute a defect); *Patterson v. Rohm Gesellschaft* (1985) 608 F.Supp. 1206 (holding that a gunshot victim's mother did not establish products liability claim under Texas law); *Forni v. Ferguson* (N.Y. Supp. Ct. Aug. 2, 1996) No. 1329, 94/94 (rejecting victim's negligence and product liability claims). Again, the language defendants cite is mere dicta. Moreover, *McCarthy* and *Forni* do not even preclude negligence claims against gun manufacturers under New York law, let alone bar claims under the California statutes asserted here. *See Hamilton*, 2000 WL 1160699, at *6-9.

Nor do plaintiffs' claims conflict with existing legislation regarding firearms. Most of the firearms legislation is in the Penal Code. Courts have long recognized that compliance with a penal code or regulatory statute does not preclude civil liability. *See, e.g., Grand Trunk Railway* (1982) 144 U.S. 408, 12 S.Ct. 69; *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 407, 185 Cal.Rptr. 654. In any event, plaintiffs do not seek to expand the criminal law, but ask the court to apply existing civil law to defendants' conduct.

As set forth above, this case involves the issues of whether defendants' conduct violates California law governing public nuisance, unfair competition and deceptive advertising. Plaintiffs do not seek to compel or create legislation, but to apply existing law to defendants' conduct. Defendants have not demonstrated why courts should depart from basic traditional principles and refuse to adjudicate these claims.

The mere fact that the subject matter of the case is also the subject of legislation or political controversy is certainly not ground for declining jurisdiction over a claim. *See Roskind v. Morgan Stanley Dean Witter Co.* (2000) 80 Cal.App.4th 345 (Federal Securities Exchange Act does not bar the court from adjudicating section 17200 claims in state court); *Cel-Tech*, 20 Cal.4th at 187; *see also Japan Whaling Ass'n v. American Cetacean Soc.* (1986) 478 U.S. 221, 230 (adjudicating claims that involved highly politicized subject matter); *Klinghoffer v. S.N.C. Achille Lauro* (2d Cir. 1991) 937 F.2d 44, 49 (same). Indeed, courts frequently adjudicate claims that are the subject of legislation or political debate. The very fact that courts must interpret and apply statutory and common law necessitates adjudication of claims based in statute and implicating controversial matters. Accordingly, state and federal courts have properly grappled with controversial issues such as tobacco, medicine, schools, employment, antitrust and public safety. Many courts are properly adjudicating similar claims against the firearms industry across the nation. *See Boston*, at 30-32; *Archer*, at 8-13; *White*, 97 F. Supp. 2d at 829; *Ceriale*. This case is no exception. Plaintiffs have properly asked this Court to determine the rights and civil liabilities of the parties under state law, and adjudicating these claims is entirely appropriate.

V. PLAINTIFFS' REQUEST FOR RESTITUTION AND DISGORGEMENT IS SUPPORTED BY LAW AND SHOULD NOT BE STRICKEN

Defendants also move to strike plaintiffs' claims for restitution and disgorgement of wrongfully obtained monies pursuant to Business & Professions Code sections 17203 and 17535. Motions to strike may only be granted when requests for relief are entirely unsupported by the allegations of the complaint. Code Civ. Proc. § 431.10. Since restitution and disgorgement are both expressly authorized as remedies under the UCA, defendants' motion to strike should be denied.

A. Plaintiffs' Claim for Restitution Under the UCA Is Appropriate.

As set forth in Part II of this opposition, plaintiffs have sufficiently stated a cause of action for unlawful business practices and false and misleading advertising under the UCA. Section 17203 of the Business and Professions Code expressly grants this Court the power "to restore to any person" all funds unfairly obtained by defendants as a result of their violations of the UCA.[18] Defendants' effort to restrict the nature and extent of remedies available under the UCA is inappropriate, particularly at the pleadings stage. Accordingly, their motion to strike must fail.

B. Plaintiffs' Claim for Disgorgement of Profits Should Be Upheld.

Section 17203 also authorizes this Court to "make such orders or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition . . . ." California courts have repeatedly recognized that this section authorizes courts to order complete disgorgement of all profits obtained in violation of the UCA, in order to deter future violations of the Act. *See, e.g., Fletcher v. Security Pacific Nat'l Bank* (1979) 23 Cal.3d 442, 451 (court authorized to order a defendant to disgorge all money obtained through illegal practices); *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267 (disgorgement orders are appropriate "to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains").

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[18] Defendants misconstrue plaintiffs' claim for restitution as one seeking damages for law enforcement costs, medical costs, emergency response costs and expenses for loss of life and personal injury resulting from defendants' conduct. Plaintiffs in fact do not seek such relief. Instead, plaintiffs simply seek to recover "restitution for the public for all funds unfairly obtained by defendants as a result of their violation of Business and Professions Code §17200 *et seq.*" LA City ¶ 166.

Defendants argue that the recent decision in *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, implicitly overruled this long-established rule. In fact, *Kraus* merely holds that disgorgement of profits into a fluid recovery fund is not an appropriate remedy in a private representative action, unless the private plaintiff certifies a class. *Id.* at 121. This narrow holding provides no comfort to defendants in this case for four reasons.

First, *Kraus* explicitly confirms that disgorgement remains an available remedy under the UCA in appropriate cases. The *Kraus* Court stated, "§17203 grants the courts the power to make orders *necessary to prevent the use of unfair business practices*. Such orders may encompass broader restitutionary relief, *including disgorgement* of all money so obtained, even when it may not be possible to restore all of that money to direct victims of the practice." *Id.* at 129 (emphasis added). "Orders for disgorgement may have deterrent force beyond that of injunctions coupled with restitutionary orders and in some cases might therefore be deemed necessary to prevent the use . . . of any practice which constitutes unfair competition." *Id.* at 135. *Kraus* merely dealt with the question of how to distribute disgorged funds in private representative actions.

Second, although the *Kraus* court rejected disgorgement into a fluid recovery fund on the facts of that case, it also rejected the notion that "defendants may retain the funds improperly taken" as a result of UCA violations. *Id.* at 138. The Court stated that, on remand, the trial court should use the disgorged funds "to ensure that all reasonable means are used to comply with the Court's directives." *Id.* Similarly, the Court here can order defendants to use disgorged funds to comply with the mandatory injunctive relief requested by plaintiffs. Such a disgorgement order would not even raise the issue of fluid recovery.

Third, the Supreme Court repeatedly limited the scope of its holding in *Kraus* to private representative actions. Nowhere in the opinion did the Court limit the use of fluid recovery funds in actions brought by public officials. Instead, the Supreme Court took pains to limit its decision to the issue of "whether in an action that is not certified as a class action, but is brought on behalf of absent persons by a *private* party under the [UCA], the court may order disgorgement into a fluid recovery fund." *Id.* at 121 (emphasis added). The Court specifically excluded public actions from any limitation on the remedy of disgorgement. *See id.* at 126 n.10.

Finally, the *Kraus* opinion does not prevent even private plaintiffs from obtaining fluid recoveries. It merely concludes that, pursuant to Code of Civil Procedure section 384, private plaintiffs must invoke class action procedures to obtain fluid recoveries on behalf of non-parties. This rationale does not apply to public prosecutors, who traditionally represent the interest of the general public without complying with class certification procedures.

The explicit availability of disgorgement as a remedy in UCA actions dictates that defendants' motion to strike be denied. Contrary to defendants' assertions, plaintiffs are not required at the demurrer stage to identify the precise amount of defendants' ill-gotten gains or to specify exactly how disgorged funds should be used. Whether or not the plaintiffs at this point have calculated a "measurable amount that the defendants have obtained by their allegedly unfair practices" is immaterial.[19] See Defs. Mem. at 34. Those are issues for the trial court to address once liability under the UCA has been established. At this juncture, all plaintiffs must show to survive a motion to strike is that their prayer for relief is supported by the cause of action alleged. Code Civ. Proc. §§ 431.10, 436. This they have easily done.

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[19] Defendants cite *Day* for the proposition that in order to be entitled to disgorgement, plaintiffs, at the motion to strike stage, must identify a measurable amount of profits to be disgorged. *Day v. AT&T Corp.* (1998) 63 Cal. App. 4th 325. *Day* involved the "filed rate" doctrine, however, and is not relevant here. In *Day*, the court concluded that disgorgement was not appropriate because plaintiffs received the full benefit of their phone cards, despite defendants' misleading statements. Moreover, any monetary recovery by plaintiffs would amount to a rebate in violation of the "filed rate" doctrine. Here, no independent prohibition, such as the "filed rate" doctrine, limits or bars the amount of funds to be disgorged. Accordingly, plaintiffs need only show that defendants violated the UCA to trigger the availability of disgorgement.

VI. CONCLUSION

For all the foregoing reasons, plaintiffs respectfully request that the Court overrule the demurrer in its entirety, and deny defendants' motion to strike.

Respectfully submitted,

Dated: August 25, 2000

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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 600 West Broadway, Suite 1800, San Diego, California 92101.

2. That on August 25, 2000, declarant served the **PLAINTIFFS' OPPOSITION TO DEMURRER AND MOTION TO STRIKE** by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 25th day of August, 2000, at San Diego, California.

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