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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

) **REPLY BRIEF IN SUPPORT OF
DEFENDANTS' CONSOLIDATED
DEMURRERS AND MOTION TO
STRIKE PLAINTIFFS' COMPLAINTS**

) Hon. Vincent P. DiFiglia

) Date: September 15, 2000
) Time: 1:30 p.m.
) Dept.: 65

Trial Date: None Set

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1 **I. INTRODUCTION.**

2 In the final analysis, these consolidated demurrers present a relatively straightforward question.
3 Can the plaintiffs, under the guise of public nuisance and statutory "unfair competition" allegations,
4 transform their views on the highly politicized and complex issues of firearms regulation into claims
5 for legal liability? For several reasons, the answer is no.

6 As confirmed by the recent Court of Appeal decision in Whitfield v. Heckler & Koch, Inc.
7 (2000) __ Cal.App.4th __, 98 Cal.Rptr.2d 820, a trial court is the wrong venue to resolve the myriad
8 of social policy questions concerning firearms control. Whitfield is consistent with numerous cases
9 which expressly reject efforts to legislate policy issues through litigation.

10 Plaintiffs cannot avoid these common sense principles by labeling defendants' otherwise lawful
11 conduct as a "public nuisance." Notwithstanding plaintiffs' characterizations, the public nuisance
12 doctrine is not unlimited. It does not extend to situations, as here, where the plaintiffs seek to impose
13 liability based on the criminal acts of unidentified third parties. It cannot be used to pursue claims
14 otherwise barred under controlling California law.

15 Nor may plaintiffs pursue their legislative agenda through claims asserted under Bus. & Prof.
16 Code §§ 17200 and 17500. Plaintiffs' Section 17200 claim is primarily based on their defective public
17 nuisance theory which, even if properly alleged, does not proscribe specific conduct. As such, it
18 cannot supply the predicate for an "unlawful" practice claim. While the complaints reference a
19 laundry list of firearms-related statutes, plaintiffs do not even argue that the defendants violated these
20 laws, let alone plead facts to support a violation. The Section 17500 claims are premised on the
21 implausible assertion that the public believes firearms are risk free. That allegation does not satisfy
22 plaintiffs' burden of pleading a "likelihood of public deception." Further, plaintiffs' claim for
23 monetary relief under these statutes is barred under the recent Kraus decision and other cases.

24 Plaintiffs' allegations do not state a valid cause of action. Accordingly, defendants' demurrers
25 should be sustained and the motion to strike granted.

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1 **II. THE COURT SHOULD NOT LEGISLATE FIREARMS CONTROL POLICY**
2 **THROUGH THE PLAINTIFFS' LAWSUITS.**

3 The Legislature, not this Court, should resolve the complex public policy issues embedded in
4 plaintiffs' claims. Just last month, the Court of Appeal in Whitfield v. Heckler & Koch, Inc., *supra*,
5 98 Cal.Rptr.2d 820, refused to impose a tort duty on a firearms manufacturer to police downstream
6 distribution *because of* existing legislative and law enforcement efforts to prevent the criminal
7 acquisition and misuse of firearms: "In view of the ongoing legislative efforts to deal with the evils
8 which led to the type of incident in which appellant was injured, we see no current need for the
9 judiciary to intrude." 98 Cal.Rptr.2d at 834. In sustaining the defendants' demurrer without leave,
10 the Whitfield court stated:

11 We believe it would be unwise to adopt a broad new theory of recovery
12 which would ultimately make courts and juries the arbiters of the merit
13 of every consumer product in the market. We further believe such
14 issues should be resolved by the appropriate legislative bodies.

14 98 Cal.Rptr.2d at 823.

15 The logic underlying the Whitfield holding applies with equal force to the instant claims. The
16 clear weight of California authority confirms that trial courts are the wrong venue to resolve heated
17 social policy questions. *See e.g., Moore v. Regents of University of California* (1990) 51 Cal.3d 120,
18 147 (refusing to extend law of conversion; "(c)omplex policy choices affecting all society are
19 involved, and '[l]egislatures, in making such policy decisions, have the ability to gather empirical
20 evidence, solicit the advice of experts, and hold hearings at which all interested parties present
21 evidence and express their views . . .'" (quoting Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654,
22 694, n.31).); *See* Defs.' Opening Mem. at 4-5, nn. 3-5.^{1/} For this reason alone, defendants' demurrers
23 should be sustained.

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27 ^{1/} As recently as August 21, 2000, a San Francisco Supervisor proposed additional legislation
28 directed against firearms manufacturers, importers and dealers. See Exhibit 5 to the Defendants'
Supplemental Notice of Lodgement.

1 **III. THE PUBLIC NUISANCE ALLEGATIONS STATE NO ACTIONABLE CLAIM.**

2 **A. Plaintiffs' Claims Exceed The Scope Of California Nuisance Law.**

3 Plaintiffs view public nuisance as an absolute liability concept. According to plaintiffs, they
4 need only allege some injury to the public and defendants' conduct – whether lawful, non-negligent,
5 or otherwise – is irrelevant under the "extraordinarily broad" sweep of public nuisance. (Pltfs.
6 Opposition ("Opp.") at 1-2, 14, 16). That is not the law. To permit product liability or negligence
7 claims to proceed under nuisance theories "'would [create] a monster that would devour in one gulp
8 the entire law of tort . . .'" City of San Diego v. United States Gypsum (1994) 30 Cal.App.4th 575,
9 586 review denied (internal citation omitted).^{2/}

10 While plaintiffs strenuously disavow any reliance on negligence or other traditional tort
11 theories, their allegations reveal otherwise. The complaints clearly sound in product liability (failure
12 to employ "personalized use technology;" alleged failure to warn) and negligence (inadequate
13 distribution control). (Opp. at 3-5). Just as in City of San Diego, plaintiffs seek to avoid the stricter
14 elements (and defenses) of these traditional theories through a radically-expanded public nuisance
15 theory. City of San Diego applies just as forcefully, if not more so, to these theories.^{3/}

16 Plaintiffs' own authority undercuts their expansive theory. Every "public nuisance" case cited
17 by plaintiffs (and every nuisance case decided since 1851) involved actual or threatened harm to

18 ^{2/} In classic "head in the sand" fashion, plaintiffs glibly dismiss City of San Diego as a mere
19 statute of limitation case and ignore the Court of Appeal's key rationale. Further, the limitations
20 discussion does apply here, given that plaintiffs have not alleged any *facts* of the underlying
21 incidents allegedly involving defendants' products, such as dates of injury, circumstances of the
22 incidents and the like.

23 ^{3/} Plaintiffs, relying solely on Selma Pressure Treating Co. v. Osmose Wood Preserving Co.
24 of Am., Inc., (1990) 221 Cal.App.3d 1601, 1619 n.7, state that "California courts have specifically
25 rejected the notion that any rules of law or precedents relieve manufacturers of products from
26 liability for nuisance." (Opp. at 15:17-19). Plaintiffs clone authority where none exists and distort
27 the *dictum* in Selma Pressure. The "categorical relief" dictum follows the court's statement that
28 "we need not decide whether the absence of control over the offending property insulates one who
creates or assists in the creation of a nuisance from liability where the only remedy sought is
abatement." Id. The court is *not* announcing a rule of law for California, but is simply saying that,
had it chosen to decide the question, it was not bound by the out-of-state cases cited in the
footnote. In any event, City of San Diego was decided over four years *after* Selma Pressure and
distinguishes Selma Pressure as "an action against the installer of the equipment for directly
creating or assisting in the creation of a nuisance, *including an unlined dirt pond containing*
hazardous waste." City of San Diego, 30 Cal.App.4th at 587 (emphasis added). Thus, Selma
Pressure does not assist plaintiffs on the "control" element. See § III B infra.

1 neighboring property or person on neighboring property, violations of positive law or aspects of both.^{4/}
2 Even People ex rel. Gallo v. Acuna (1997) 14 Cal.4th 1090, the most expansive application of public
3 nuisance law in California, involved *illegal* misconduct (drug dealing, consumption of illegal drugs,
4 fighting, threats of bodily harm, murder, battery, vandalism) by *specific* individuals (named members
5 of a gang) in a *circumscribed* area of property (a four-square block neighborhood). In stark contrast
6 to Gallo, here the plaintiffs seek to dictate by injunction the *national* distribution practices of
7 manufacturers of legal commercial products. All this based on conclusory allegations of misconduct
8 by *unidentified third parties*.

9 **B. Plaintiffs Have Not Alleged The Required Element of Control, Nor Can They.**

10 Acknowledging that "control" is an essential element of public nuisance, plaintiffs contend it
11 is sufficiently alleged here because defendants purportedly "contribute to" and "set in motion" the
12 criminal misuse of firearms. (Opp. at 10:10). Plaintiffs' inapposite cases do not support their
13 expansive theory of control.^{5/} The recent Whitfield decision, which analyzed this issue in light of
14 Civil Code § 1714.4(b)(2), squarely rejects plaintiffs' theory. ("The sole proximate cause of gun
15 injuries, according to the Legislature, is the person who discharges [the firearm] at the victim.")
16 Whitfield, 98 Cal.Rptr.2d at 831.^{6/} This only makes sense. If plaintiffs' notion of "control" were

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18 ^{4/} See County of San Diego v. Carlstrom (1961) 196 Cal.App.2d 485 (dilapidated buildings
19 created fire hazards to neighboring buildings); People v. Montoya (1933) 137 Cal.App. 784 (beer
20 hall where drunk and disorderly crowds congregated on the sidewalk in front of premises,
21 obstructing the sidewalk); Hardin v. Sin Claire (1896) 115 Cal. 460 (obstructing a road); People v.
22 Lim (1941) 18 Cal.2d 872 (gambling house disturbed neighbors' peace and obstructed traffic);
23 Sunset Amusement Co. v. Board of Police Comm'rs. (1972) 7 Cal.3d 64 (rejecting renewal permit
24 based on owner's failure to provide adequate parking, which resulted in blocked traffic and
25 trespass on neighboring private property); See Skinner v. Coy (1939) 13 Cal.2d 407 (Agricultural
26 Code); County of Los Angeles v. Spencer (1899) 126 Cal. 670 (violation of statute declaring
infested orchards and nurseries to be nuisances).

27 ^{5/} In Sunset Amusement and Montoya, the rink and beer hall owners had the practical ability
28 to control their own premises – the beer hall owner could have refused to serve inebriated, rowdy
or disrespectful customers and both defendants could have employed guards to perform "crowd
control" on or around the premises. In Shurpin v. Elmhirst (1983) 148 Cal.App.3d 94, 98-101, a
soils engineer negligently failed to supervise and inspect the work of a contractor it chose to
perform reconstruction of a slope which later collapsed – again, direct control was present.

29 ^{6/} The Court may consider the *policy* determination of the Legislature as expressed in Civil
Code § 1714.4(b)(2) regardless of the label plaintiffs attach to their complaint. See Moore, 51
Cal.3d at 135 ("[W]hen the proposed application of a very general theory of liability in a new

1 adopted, virtually any product manufacturer would be subjected to downstream liability if it in any
2 way "contributed to" or "set in motion" the chain of events leading to injury. Automobile
3 manufacturers could, under this expansive and improper concept, be liable for injuries caused by
4 drunk drivers; fast food chains would be liable for "contributing to" health problems triggered by fatty
5 foods. See Whitfield, 98 Cal.Rptr.2d at 823-24.

6 The decision in Martinez v. Pacific Bell (1990) 225 Cal.App.3d 1557 review denied, which
7 plaintiffs essentially ignore, illustrates that the "control" element has limitations that preclude the
8 instant claims. There, plaintiff alleged that Pacific Bell created a public nuisance by placing a public
9 telephone in a location that attracted criminals, facilitated crime and enhanced the risk of injuries to
10 bystanders — and, indeed, was notified by plaintiff of all this prior to his injury. Id. at 1560, 1564-70.
11 The Martinez court rejected the claim based on the defendant's lack of control: "We reject [the]
12 contention that venerable nuisance concepts should be manipulated so as to impose . . . vicarious
13 liability on owners of nearby property, *who lack the legal or practical ability to control* [the] *criminal*
14 *actions of third parties.*" Id. at 1569-70 (emphasis added).

15 Manufacturers which have lawfully sold and, by definition, been divested of ownership and
16 control, have no practical ability to prevent the determined efforts of distant criminals or other third
17 parties to unlawfully acquire and misuse firearms. Moreover, when these defendants do have control
18 over their product, i.e., the initial lawful sale to licensed entities, plaintiffs have not and cannot allege
19 injury to the "general public," thus defeating their claim. Plaintiffs' failure to allege the requisite
20 control by defendants is yet another reason why their nuisance claims fail.^{2/}

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23 context raises important policy concerns, it is especially important to face those concerns and
24 address them openly."); see also, Casillas v. Auto-Ordnance Corp. (N.D. Cal. 1996), 1996 WL
276830, at *2.

25 ^{2/} Plaintiffs' reliance on Hamilton v. Accu-Tek (E.D.N.Y. 1999) 62 F. Supp. 2d 802,
26 questions certified (2d Cir. Aug. 16, 2000), for the definition of "control of distribution" is
27 misplaced. The case on which Hamilton relies for its broad "control of distribution" finding,
28 Moning v. Alfano, 254 N.W.2d 759 (Mich. 1977), has been criticized (and limited to its facts of
sales of slingshots to children) by its authors in Glittenburg v. Doughboy Recreational Indus., 491
N.W.2d 208, 212 n.8 (Mich. 1992), and stands in direct conflict with the Court of Appeal's
decision in Bojorquez v. House of Toys, Inc. (1976) 62 Cal.App.3d 930, 933.

1 **C. Plaintiffs Have Alleged No Conduct By Defendants That Is Unlawful Or**
2 **Otherwise Actionable As Public Nuisance.**

3 Plaintiffs argue they have sufficiently pled a claim for public nuisance based on allegations
4 that "distribution practices," such as multiple purchases,^{8/} "straw purchases"^{9/} and "kitchen-table"
5 sales^{10/} have contributed to the "widespread availability of firearms to juveniles and criminals." Yet,
6 all of the conduct that plaintiffs assert puts firearms into the hands of "juveniles and criminals"
7 involves third parties other than manufacturers. Nowhere in any of the complaints do plaintiffs allege
8 that any specific manufacturer has teamed up with any distributor or dealer to participate or assist in
9 any illegal transaction to supply firearms to unauthorized persons.^{11/} Plaintiffs simply have not alleged
10 any conduct by manufacturers – negligent, ultrahazardous, or illegal – sufficient to sustain a public
11 nuisance claim. See Defs.' Opening Mem. at 13-14.^{12/}

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13 ^{8/} While not disputing that multiple sales *by licensed dealers* are legal under federal law,
14 plaintiffs assert that "multiple purchases" are illegal in California. (Pltfs.' Opp. at 4 n.2). Plaintiffs
15 misstate the law. Plaintiffs fail to tell the Court that multiple sales of concealable firearms are
16 *legal in California if the "transaction is conducted through a licensed dealer."* Penal Code §§
17 12072(B)(viii), 12082 (emphasis added). Since plaintiffs' allegations necessarily center on the
18 alleged misconduct of licensed firearms dealers, plaintiffs' omission is particularly troubling.

19 ^{9/} An illegal straw purchaser always commits a federal felony. 18 U.S.C. § 924(a)(1)(A),(2).
20 But absent knowledge of the straw purchaser's intent to transfer a firearm to an unauthorized user,
21 a retail dealer is duped and does not act unlawfully, let alone the upstream manufacturer which has
22 no connection to the retail transaction. Id. Standing alone, a bare assertion of a "straw purchase"
23 does not lead to a reasonable inference of wrongdoing by any manufacturer, distributor or retailer.
24 And such bare assertions are all that plaintiffs have alleged.

25 ^{10/} Plaintiffs ignore that manufacturers may only sell to *federally-licensed* distributors and
26 dealers and that since 1994, federal law has required all firearms dealers to have business premises
27 where business is conducted during regular business hours. See 18 U.S.C. § 923(d)(1)(E); 27
28 C.F.R. §§ 178.11, 178.47(b)(5). A licensed California firearms dealer must have a valid federal
29 firearms license, Penal Code § 12071(a)(1)(A).

30 ^{11/} The only allegations that come close to asserting illegal acts – cryptic claims of violations
31 of Roberti-Ross and "Saturday Night Special" ordinances by unnamed "certain defendants" (Opp.
32 at 5:5-11) – do not involve sales to unauthorized purchasers, and, moreover, are vague legal
33 conclusions which fail the most basic requirements of notice pleading. Cochran v. Cochran (1997)
34 56 Cal.App.4th 1115, 1121 (stating court may disregard "contentions, deductions or conclusions of
35 fact or law, and may disregard allegations that are contrary to the law or to a fact of which judicial
36 may be taken") (citation omitted).

37 ^{12/} Plaintiffs rely on Snow v. Marian Realty Co. (1931) 212 Cal. 622, 625, for their assertion
38 that they need not establish an underlying tort to sustain a nuisance claim. Plaintiffs stretch Snow
39 beyond its holding. The court in Snow only stated that while the realty company may not be liable

1 In fact, plaintiffs' only attempt to link defendants to the generically-alleged third party
2 misconduct is the assertion that, through trace requests from the Bureau of Alcohol, Tobacco and
3 Firearms ("BATF"), defendants are generally aware that some firearms are illegally acquired by
4 juveniles and convicted felons. (Opp. at 3:14-15, 8:16-20). Plaintiffs again overreach. This
5 contention says nothing about illegal or tortious conduct by any manufacturer, distributor or dealer
6 – nor does a trace request to a manufacturer.^{13/} In any event, "generalized knowledge" that firearms
7 may be illegally acquired and criminally misused is not a basis for imposing a new tort duty on
8 manufacturers – *under any label*^{14/} – to police downstream distribution to prevent distant illegal
9 transactions by others – a notion rejected by an overwhelming majority of courts, most recently by
10 the Court of Appeal in Whitfield, 98 Cal.Rptr.2d at 824, 832-34 (rejecting negligent distribution

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14 in negligence for the acts of an independent contractor, it could be liable in nuisance because the
15 realty company had obtained the permits under a city building ordinance which prohibited builders
16 from allowing sand, dirt and other material produced in construction to accumulate on neighboring
17 property, and the realty company directly supervised the project. Id. at 624. Snow thus involved a
18 knowing statutory violation. Moreover, plaintiffs, while relying on selected portions of the
19 Restatement (Second) of Torts, ignore the numerous comments by its drafters that public nuisance,
20 as well as private nuisance, requires actionable tortious conduct to sustain liability. See §§ 821A
21 cmt. c, 821B cmt. e, 822 cmt. a, 822 cmt. h.

18 ^{13/} As the BATF states:

19 ***[C]rime gun traces do not necessarily indicate illegal activity by***
20 ***licensed dealers or their employees.*** Guns purchased from [Federal
21 Firearms Licensees] may have been unknowingly sold by the FFL to
22 straw purchasers, resold by an innocent purchaser or by an illegal
23 unlicensed dealer, otherwise distributed by traffickers in firearms,
24 bought or stolen from FFLs or residences, or simply stolen from its
25 legal owner. [W]hen trafficking indicators are present, it is
26 important to find out if the FFL or someone else is violating the law.
27 ***This requires either a regulatory inspection or a criminal***
28 ***investigation.***

29 Department of Treasury/BATF, Commerce in Firearms in the United States, pp. 22-23 (February
30 2000) (emphasis added). Defendants' Supplemental Request for Judicial Notice, Ex. 4. The Court
can and should take judicial notice of this statement from the very governmental agency that
regulates the manufacture, distribution and sale of firearms in this country, particularly since
plaintiffs rely on this report. Evid. Code § 452(c).

^{14/} See Limandri v. Judkins (1997) 52 Cal.App.4th 326, 329 (regardless of label attached to
plaintiffs' pleading, court may look past its form to its substance).

claim),^{15/} and by the Ohio Court of Appeals in City of Cincinnati v. Beretta U.S.A. Corp., (Aug. 11, 2000) 2000 WL 1133078, at *4-*6 (rejecting public nuisance and negligent distribution claims in suit brought by municipality against firearms manufacturer).^{16/}

Plaintiffs try to divert attention from their inability to establish actionable conduct on the part of manufacturers by baldly asserting that manufacturers "affirmatively" create and promote an "illegal secondary market" by "oversaturating" legal markets with firearms, where they allegedly move from "weak" gun law jurisdictions to "strong" gun law jurisdictions. (Opp. at 3; LA County, ¶ 83, LA City, ¶ 94, SF, ¶ 26). Putting aside the conclusory nature of the allegation, it is a red herring. Plaintiffs' allegation says nothing about the circumstances of the purchases purportedly made in "weak" law states, the manner in which the firearm reached a "strong" law jurisdiction and certainly does not lead to an inference of any unlawful or improper conduct by any manufacturer.^{17/}

Stripped of the conclusions, rhetoric and *non sequiturs*, the complaints read that manufacturers are lawfully selling firearms to federally-licensed entities within a regulatory framework established by Congress, and supplemented by state and local governments – the very conduct which legislatures

^{15/} The Whitfield court rejected a duty to police distribution in the face of allegations that the firearm manufacturer "negligently flooded the market with their products allowing and/or assuring that they would be obtained illegally and by people engaged in the illegal gun market and by people engaged in crime," and "fail[ed] to monitor distribution or institute safeguards to prevent unlawful sales and [] fail[ed] to use safety designs or features that would have prevented the use of their weapons by individuals who purchased the weapons illegally." 98 Cal.Rptr.2d at 824. Plaintiffs make identical allegations in this case. See Opp. at 3-5.

^{16/} Plaintiffs try to distinguish City of Cincinnati by claiming that California nuisance law is "much broader" than Ohio public nuisance law. (Opp. at 9 n.4). Plaintiffs cite no authority for this proposition and, in fact, the hollowness of plaintiffs' assertion is easily revealed. The Ohio Court of Appeals, in rejecting Cincinnati's public nuisance claim, relied in part on Tioga Public School Dist. v. United States Gypsum Co. (8th Cir. 1993) 984 F.2d 915, 921 (refusing to extend nuisance law to product design and distribution claims; to do otherwise would make nuisance law "a monster that would devour in one gulp the entire law of tort."). City of Cincinnati, 2000 WL 1133078, at *6 n.34. The Court of Appeal in City of San Diego v. United States Gypsum Co. (1994) 30 Cal.App.4th 575, 586-87, review denied (Feb. 23, 1995), in also dismissing a public nuisance claim in the product design and distribution context, relied on the rationale of the Tioga court. See § III A supra.

^{17/} Plaintiffs' bare assertion that defendants design firearms without "personalized use technology" similarly fails as a predicate for nuisance. (See LA County, §§ 117-22, LA City, §§ 126-31, SF, §§ 59-64). Plaintiff in Whitfield made identical allegations. 98 Cal.Rptr.2d at 824. The Court of Appeal rejected the claim. Id. at 832. The only specific "devices" identified by plaintiffs – "loaded chamber indicators" and "magazine disconnects" – do not prevent access to firearms or criminal misuse.

1 have specifically authorized. Huddleston v. United States (1974) 415 U.S. 814, 824 (describing Gun
2 Control Act: "Commerce in firearms is channeled through federally licensed importers,
3 manufacturers, and dealers;" "[t]he principal agent of federal enforcement is the dealer"). Such
4 legislatively authorized activity cannot be a public nuisance, as plaintiffs concede. See City of
5 Cincinnati, 2000 WL 2000, at *7; Defs.' Opening Mem. at 6-7, 15-16.

6 Thus, plaintiffs have failed to state a viable claim for public nuisance. As will be shown, their
7 Section 17200 and 17500 allegations are fatally defective as well.

8 **IV. PLAINTIFFS' OPPOSITION FAILS TO SALVAGE THEIR DEFECTIVE SECTION**
9 **17200 AND SECTION 17500 CLAIMS.**

10 **A. Plaintiffs' "Unlawful" Practice Claim Allegations Are Wholly Inadequate.**

11 In classic strawman fashion, plaintiffs contend they are not required to support their Section
12 17200 claims with the "time, place and name" detail required for pleading fraud. Defendants have
13 made no such argument. Rather, the demurrer to the "unlawful" practice claims is based on the well-
14 settled rule that, absent "supporting facts," the mere conclusion that a defendant has violated a statute
15 states no claim under Section 17200. People v. McKale (1979) 25 Cal.3d 626, 635. Plaintiffs do not
16 dispute the McKale rule, but simply claim they have alleged "unlawful activity with detail." Not so.

17 Plaintiffs do not even argue that defendants have *violated* the laundry list of statutes pleaded
18 in the complaints, let alone allege *facts* to properly support a predicate violation. Rather, plaintiffs
19 assert that defendants' conduct "ignores [the] policy goals" of these laws and otherwise "undermines"
20 and "frustrate[s]" their purpose. (Opp. at 20:5-10). Whatever "ignoring policy goals" means, it surely
21 is not a factual allegation sufficient to establish a "violation of law" for purposes of an unlawful
22 practice claim under Section 17200. Plaintiffs' unartful dodge on this crucial point is particularly
23 glaring, given that 40-plus defendants are lumped together without facts alleged to support a claim
24 against any one of them.

25 Plaintiffs' flawed nuisance theory cannot provide the predicate for an "unlawful" practice
26 claim, as it states no claim under California nuisance law. Even if it did, Klein v. Earth Elements,
27 Inc. (1997) 59 Cal.App.4th 965 teaches that the violation of a civil legal doctrine is not an adequate
28 predicate for an "unlawful" practices claim. Like the common law claims for product liability and

1 implied warranty addressed in Klein, an allegation of "public nuisance" does not, in and of itself,
2 "describe acts or practices that are illegal or otherwise forbidden by law." Id., 59 Cal.App.4th at 969.
3 Rather, public nuisance provides the basis for liability only upon proof of certain elements -- which
4 plaintiffs cannot satisfy here -- and only then does a court attempt to balance the challenged conduct
5 against the alleged harm. Gallo, 14 Cal.4th at 1105. As such, it cannot supply the predicate "violation
6 of law" for purposes of an "unlawful" practice claim. Klein, 59 Cal.App.4th at 969; see also,
7 Californians For Population Stabilization v. Hewlett-Packard Co. (1997) 58 Cal.App.4th 273, 287
8 (breach of contract claims do not "constitute violations of law as contemplated by section 17200"),
9 citing Samura v. Kaiser Foundation Health Plan, Inc. (1993) 17 Cal.App.4th 1284, 1299.^{18/}

10 Plaintiffs' argument that the public nuisance doctrine has a codified analog in Civil Code
11 § 3480 changes nothing. Just because a common law doctrine is codified by statute does not make
12 it a proper predicate for a Section 17200 cause of action. The breach of the implied warranty of fitness
13 is codified in Civil Code § 1792.2, but was rejected by Klein as an insufficient basis for "unlawful"
14 act liability. The law of negligence is likewise codified in Civil Code § 1708, yet no one would
15 suggest mere negligence constitutes "unlawful" conduct under Section 17200. Like the common law
16 doctrines of negligence and implied warranty, "public nuisance" as codified under Civil Code § 3480,
17 cannot provide the predicate for an "unlawful" practice claim under Section 17200.^{19/}

18 ///

19 ///

20 _____
21 ^{18/} Plaintiffs' argue that Klein is distinguishable because this case supposedly involves
22 "intentional" conduct. Yet, the determinative factor identified in Klein is whether the alleged
violation is expressly "forbidden by law," as opposed to merely the basis for potential civil
liability under a common law doctrine. Klein, 59 Cal.App.4th at 969.

23 ^{19/} Even if codified, generalized common law doctrines do not specify the proscribed conduct
24 with sufficient particularity to justify "unlawful" conduct liability under Section 17200. In
25 contrast, virtually all of the cases that have upheld "unlawful" practice claims involved violations
of statutes that define the "illegal" conduct with reasonable particularity. See State Farm Fire &
26 Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093, 1103 (cataloging cases finding
"unlawful" act liability based on violations of particular statutes proscribing, for example,
27 unlawful sale of whale meat, racial discrimination in employment, retaliatory eviction, etc.) The
defendants in those cases could reasonably be expected to know what conduct violates a particular
law and, as such, might provide the basis for an "unlawful" practice claim. Here, in contrast,
28 plaintiffs' "unlawful" practice claim is based on an inappropriate extension of the ill-defined
doctrine of public nuisance.

1 **B. Plaintiffs' "Unfair" Business Practice Allegations State No Claim.**

2 In another attempt to bootstrap their gun control policy arguments into a Section 17200 cause
3 of action, plaintiffs contend that the public nuisance allegations state an unfair practice claim under
4 both the State Farm "utility of the conduct" and the Casa Blanca "violates public policy" tests. Yet,
5 both tests have been squarely rejected by the California Supreme Court as: (a) too amorphous, and
6 (b) an improper intrusion into the Legislature's role regarding public policy matters. Cel-Tech
7 Communications v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 184-185. Both
8 concerns referenced in Cel-Tech are clearly present here.^{20/}

9 Regardless of the precise test applied, plaintiffs cannot avoid the fact that their unfair practice
10 claims suffer from a fatal defect identified by Cel-Tech and several other California cases.
11 Specifically, plaintiffs' claims are predicated upon "public policy" questions that fall within the
12 province of the Legislature and, as such, are an inappropriate extension of the UCL statute. See Cel-
13 Tech, 20 Cal.4th at 185 (cautioning that courts should avoid "ventur[ing] into public policy issues);
14 Wolfe v. State Farm Fire & Casualty Ins. Co. (1996) 46 Cal.App.4th 554, 568 (urging "judicial
15 restraint" in UCL case based on insurance policy issues subject to legislative oversight). This is
16 particularly true, given that plaintiffs' UCL claims would essentially end-run the Legislature's
17 expressed limitation on product liability claims arising from firearm-related injuries. See Civil Code
18 § 1714.4(b)(2); Whitfield, 98 Cal.Rptr.2d at 831.

19 **C. Plaintiffs Have Not Alleged a Viable Claim For Fraudulent Business Practices or**
20 **for Violation of Section 17500.**

21 Plaintiffs' arguments with respect to their defective "fraudulent" business practice claim and
22 their essentially identical Section 17500 claim are based on a flat misstatement of the law. Plaintiffs
23 claim that Committee on Children's Television v. General Foods (1983) 35 Cal.3d 197 "specifically
24 _____

25 ^{20/} While Cel-Tech limited its holding to the "competitor versus competitor" context, the
26 Court's rationale clearly applies outside that setting. This is demonstrated by the Court's rejection
27 of the "old" unfairness tests in State Farm and Casa Blanca, two cases which were outside the
28 competitor context. Further, the twin concerns identified – vagueness and intrusion into legislative
function – are relevant in other UCL actions and certainly are triggered here. Plaintiffs can hardly
argue otherwise, given that they cite Cel-Tech themselves in support of their opposition. (Opp. at
19:28-20:1).

1 endorses an 'unsophisticated consumer' standard" for section 17200 and section 17500 claims. (Opp.
2 at 23:27-28). Children's Television does not even mention the phrase "unsophisticated consumer,"
3 let alone adopt that language as a "standard."

4 While Children's Television involved alleged misrepresentations to children, it does not hold
5 that a deceptive advertising claim is stated if the complaint alleges that *any* consumer could have been
6 deceived. Children's Television does not override the many cases decided before and after that
7 decision which hold that the "likelihood of public deception" test must be considered, at the pleading
8 stage and trial, under an objective, "reasonable person" standard. See, e.g., Freeman v. Time, Inc. (9th
9 Cir. 1995) 68 F.3d 285, 289; State Board of Funeral Directors & Embalmers v. Mortuary in
10 Westminster Memorial Park (1969) 271 Cal.App.2d 638, 642. As detailed in defendants' opening
11 brief, the Court can and should find that no reasonable consumer could be deceived into believing that
12 guns are risk free. Plaintiffs offer no response to this common sense argument, nor can they.^{21/}

13 Plaintiffs' related argument that they can predicate liability upon defendants' purported failure
14 to warn is likewise misplaced. (Opp. at 23:14-15, 19-21.) The mere failure to warn, without more,
15 will not support a section 17200 or 17500 claim. Day v. AT&T Corp. (1998) 63 Cal.App.3d 325, 332-
16 33. A failure to disclose is actionable only if it renders an affirmative statement misleading. Id. Here,
17 on the basis of three advertising slogans, plaintiffs attempt to pursue "failure to warn" claims against
18 40-plus defendants. That is clearly improper.

19 Finally, plaintiffs' response regarding First Amendment protection is a complete dodge. There
20 is no dispute that *purely* commercial speech can be regulated if it is misleading. But speech on an
21 issue of public interest, even if made by a person with a commercial interest, *is* protected by the First
22 Amendment. DuPont Merck Pharmaceutical Co. v. Superior Court (2000) 78 Cal.App.4th 562, 567
23 (in Section 17500 suit, drug makers' advertisements regarding relative safety of its product constitutes
24 protected speech). Here, plaintiffs do not dispute that they are, in large part, seeking to enjoin
25

26 ^{21/} Plaintiffs' reliance on People v. Wahl (1940) 39 Cal.App.2d Supp. 771, 774, a 60-year-old
27 decision of a Superior Court appellate department, is likewise misplaced. Wahl simply reflects the
28 notion that reasonable consumers will not necessarily be expected to have highly specialized
product knowledge. One hardly needs highly specialized knowledge to understand that guns are
not risk free.

defendants' expressions of opinion on firearms policy questions. See e.g., LA County Complaint, ¶¶ 127-129, 158. Those types of statements clearly constitute protected speech under DuPont Merck and numerous other cases. At a minimum, plaintiffs should not be permitted to avoid First Amendment review with evasive and ambiguous pleading.

V. PLAINTIFFS' CLAIMS FOR MONETARY RELIEF UNDER SECTION 17203 AND 17535 SHOULD BE STRICKEN.

With the belated acknowledgment that "damages" are not available under these statutes, plaintiffs now disavow any claim for "law enforcement costs, medical costs, emergency response costs and expenses for loss of life and personal injury." (Opp. at 32:27-28). Despite this concession, plaintiffs nevertheless contend they are entitled to "restitution" of all funds "unfairly obtained by defendants." Id. However, in order to obtain restitution under Section 17203, plaintiffs must plead facts demonstrating that "*measurable amounts* [have been] *wrongfully taken* by means of an unfair business practice." Day v. AT&T Corp. (1998) 63 Cal.App.4th 325, 388-89 (emphasis original). Plaintiffs must also show that the persons who are allegedly entitled to restitution can be specifically identified. Kraus v. Trinity Management Services, Inc. (2000) 23 Cal.4th 116, 138. Plaintiffs do not even argue they have met these requirements. For these reasons, plaintiffs cannot maintain any claim for restitution.

Plaintiffs' alternative claim for "disgorgement" likewise fails. As Day makes clear, the "measurable amounts" rule applies with equal force to the disgorgement remedy. Day, 63 Cal.App.4th at 338-339. More basically, the recent Kraus decision holds that no disgorgement can be obtained under a "fluid recovery" procedure in a non-class action UCL lawsuit. Kraus, 23 Cal.4th at 138. Yet, that is precisely the disgorgement relief that plaintiffs seek in this case.

Plaintiffs argue that Kraus does not apply to public UCL prosecutions. Yet, the Kraus holding is principally based on a construction of the UCL remedy statute, Section 17203. Kraus, 23 Cal.4th at 137. In amicus briefing filed in Kraus, the California District Attorney Association conceded that Section 17203 draws no "distinction between public and private actions." Kraus, 23 Cal.4th at 148, Wedegard J., dissenting opinion. Indeed, the Kraus majority specifically criticized (if not directly overruled) the only appellate decisions that approved fluid recovery in non-class UCL actions --

1 People v. Thomas Shelton Powers, M.D., Inc. (1992) 2 Cal.App.4th 330 and People ex rel. Smith v.
2 Parkmerced Co. (1988) 198 Cal.App.3d 683. See Kraus, 23 Cal.4th at 136-137. Both of these
3 decisions were public prosecutor lawsuits. Plaintiffs offer no logical reason why the Kraus bar on
4 disgorgement through fluid recovery should not apply, nor can they.^{22/}

5 **VI. PLAINTIFFS' LAWSUITS VIOLATE THE COMMERCE AND DUE PROCESS**
6 **CLAUSES OF THE U.S. CONSTITUTION.**

7 Notwithstanding their effort to obfuscate the issues, plaintiffs cannot avoid the fact that they
8 are attempting to "end run" the Constitution by legislating national firearms policy through litigation.
9 As such, plaintiffs' claims clearly violate the Commerce and Due Process Clauses.

10 In analyzing the extraterritorial effect of a regulation, the "critical inquiry is whether the
11 practical effect of the regulation is to control conduct beyond the boundaries of the State." Healy v.
12 Beer Institute (1989) 491 U.S. 324, 336. The adjudication of legal claims can trigger an improper
13 extraterritorial regulation.^{23/} The instant claims clearly seek to regulate the lawful conduct of the
14 defendant manufacturers outside of California in their nationwide production, distribution and sales
15 practices.

16 Plaintiffs attempt to confuse the issue with personal jurisdiction arguments. Plaintiffs appear
17 to argue that, if they have alleged injury occurring within the State of California, their claims are
18 immunized from constitutional scrutiny. As Healy and other cases makes clear, that is simply not the
19 law. Under the guise of nuisance and UCL claims, plaintiffs seek to impose a regulatory regime that

21 ^{22/} Effectively conceding that Kraus does apply, plaintiffs alternatively argue that Kraus
22 authorizes trial courts to issue disgorgement orders to supplement injunctive relief. (Opp. at
23 33:15-21). Nonsense. Kraus states only that a trial court may use "reasonable means," such as
ordering defendants to identify and locate affected persons, to ensure that moneys are returned
under a *restitution* order. Kraus, 23 Cal.4th at 138.

24 ^{23/} BMW of North America v. Gore (1996) 517 U.S. 559, 573 ("State power may be exerted
25 as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."); New York
26 Times Co. v. Sullivan (1964) 376 U.S. 254, 265 ("It matters not that that law has been applied in a
27 civil action and that it is common law only . . . The test is not the form in which state power has
28 been applied but, whatever the form, whether such power has in fact been exercised."); San Diego
Bldg. Trades Council v. Garmon (1959) 359 U.S. 236, 246-247 ("Our concern is with delimiting
areas of conduct which must be free from state regulation if national policy is to be left
unhampered. Such regulation can be as effectively exerted though an award of damages as
through some form of preventive relief.")

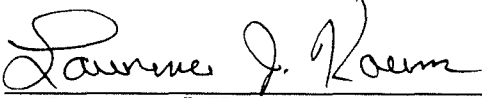
1 would effectively dictate the national conduct of the defendant manufacturers in jurisdictions where
2 the present practices are lawful and in accord with the policies of those jurisdictions. As such,
3 plaintiffs' claims violate the Commerce Clause.^{24/} This is true whether or not the Court has
4 jurisdiction over a particular defendant.

5 **VII. CONCLUSION.**

6 For these reasons and those set forth in defendants' opening brief, the demurrers should be
7 sustained and those portions of plaintiffs' complaints that are referenced in defendants' motion to strike
8 should be stricken.

9
10 DATED: September 8, 2000

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16 Counsel for Defendant Manufacturers

17 SEE SIGNATURE PAGES ATTACHED AS
18 EXHIBIT 1 FOR ADDITIONAL COUNSEL AND
19 PARTIES JOINING IN THIS PLEADING
20
21
22

23 ^{24/} Although the Commerce Clause violations can most readily be seen through plaintiffs'
24 request for injunctive relief on their various causes of action, their request for monetary damages,
25 i.e., restitution and disgorgement, also amounts to an attempt to regulate extraterritorially. As
26 noted by the Supreme Court in San Diego Bldg. Trades Council v. Garmon (1959) 359 U.S. 236,
27 247, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of
28 governing conduct and controlling policy." When the conduct and policy that is attempting to be
controlled occurs beyond the borders of the mandating jurisdiction, unconstitutional regulation of
interstate commerce has occurred. Therefore, contrary to plaintiffs' argument, it is not simply
plaintiffs' request for injunctive relief which would violate the Commerce Clause. All forms of
relief requested would place an undue burden on interstate commerce.

1 PEOPLE OF THE STATE OF CALIFORNIA, et. al. v. ARCADIA MACHINE & TOOL, et. al.
Judicial Council Coordination Proceeding No. 4095
2 San Francisco Superior Court Case No. 303753
Los Angeles Superior Court Case No. BC 210894
3 Los Angeles Superior Court Case No. BC214794

4 **FIREARMS CASES**

5 **EXHIBIT 1**

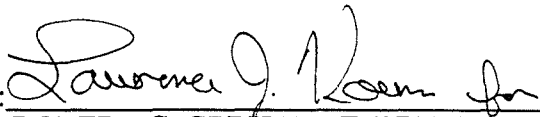
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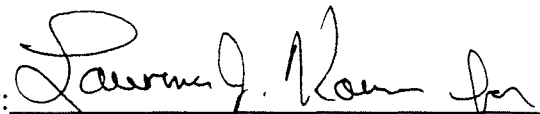
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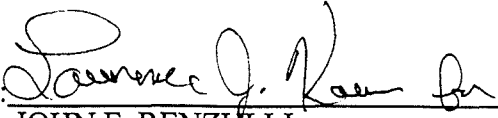
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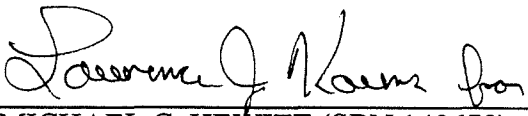
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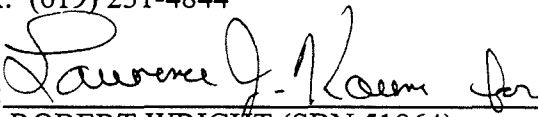
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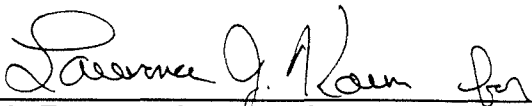
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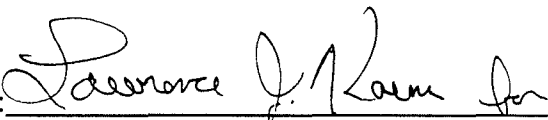
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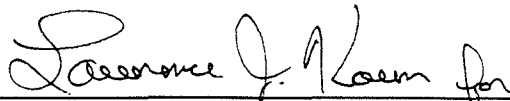
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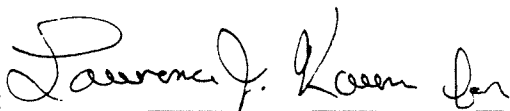
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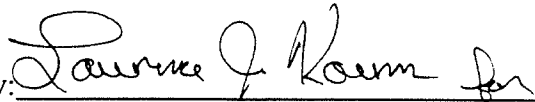
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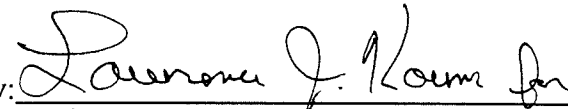
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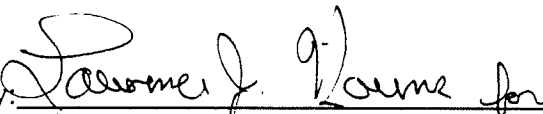
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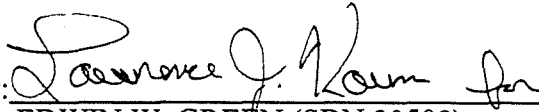
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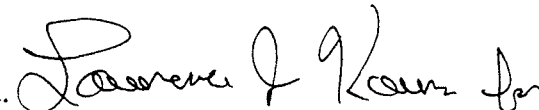
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