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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

AMENDED DECLARATION OF JENNIE LEE ANDERSON IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEMURRER AND MOTION TO STRIKE

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

8131

I, Jennie Lee Anderson, hereby declare:

1. I am an attorney at law licensed to practice before the courts of the State of California and am an associate of the law firm Lieff, Cabraser, Heimann & Bernstein, LLP, attorneys for plaintiffs.

2. I make this declaration in support of Plaintiffs' Opposition to Demurrer and Motion to Strike. I have personal knowledge of the facts stated in this declaration and, if called as a witness, I could and would testify competently to them except where I make statements on information and belief in which case I am informed and believe the statements to be true.

3. Attached hereto as Exhibit A is a true and correct copy of Memorandum of Decision and Order on Defendants' Motion to Dismiss in City of Boston v. Smith & Wesson Corp. (Mass. Super. Ct. July 13, 2000) No. 1999-02590.

4. Attached hereto as Exhibit B is a true and correct copy of the Court's opinion in Archer v. Arms Technology, Inc. (Mich. Cir. Ct. May 16, 2000) No. 99-912662NZ.

5. Attached hereto as Exhibit C is a true and correct copy of the Court's order in Ceriale v. Smith & Wesson Corp. (Cir. Ct. Cook Cty., Ill. Nov. 30, 1999) No. 99L5628.

6. Attached hereto as Exhibit D is a true and correct copy of the Smith & Wesson Corp. Agreement (March 17, 2000) as signed and entered into by Smith & Wesson Corp., the Federal Government and several other states, cities and counties.

I declare under penalty of perjury according to the laws of the State of California that the foregoing is true and correct, to the best of my knowledge, information and belief, and that this Declaration was executed on August 29, 2000 in San Francisco, California.

Jennie Lee Anderson

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 1999-02590

CITY OF BOSTON, & another[1]

vs.

SMITH & WESSON CORP., & others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

This is an action by the City of Boston and the Boston Public Health Commission against various firearms manufacturers, distributors, sellers and promoters, including firearms industry trade associations. [3] In a detailed six count complaint,[4] Plaintiffs seek to

[1] Boston Public Heatlthe Commission.

[2] Beretta USA Corp., BL Jennings Inc., Browning Arms Co., Inc., Bryco Arms Corp., Charter Arms Corp., Colt's Manufacturing Co., Inc., Davis Industries Inc., Firearms Import and Export Corp., Glock Inc., Harrington & Richardson Corp., Heritage Manufacturing, Inc., Hi-Point Firearms Corp., International Armaments Corp., dba Interarms, Inc., Kel-Tec CNC Industries, Inc., Import Sport, Inc., dba SGS Importers International, Inc., Lorcin Engineering Co., Inc., Marlin Firearms Co., OF Mossberg & Sons, Inc., Navegar, Inc., dba Intratec USA Corp., Phoenix Arms Inc., US Repeating Arms Co., Inc., Remington Arms Corp., Savage Arms Inc., Sigarms, Inc., Sturm, Ruger & Co., Inc., Sundance Industries Corp., Taurus International Manufacturing, Inc., American Shooting Sports Council, Inc., National Shooting Sports Foundation, Inc., Sporting Arms & Ammunition Manufacturers Institute, Inc., Does 1-250. Does 1-50 are unknown business entities that manufacture firearms distributed, marketed, sold, and/or possessed within Boston. Does 51-100 are unknown business entities that are retailers of firearms found in Boston. Does 101-225 are unknown business entities that distribute and/or market firearms found with Boston. Does 226-250 are unknown business entities that are industry trade associations composed of firearms manufacturers, distributors, and retailers.

[3] This action is one of a number of similar suits brought throughout the United States. See Note, Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry, 113 Harv. L. Rev. 1521 (2000).

EXHIBIT A

recover damages allegedly sustained through conduct of Defendants.[5] Briefly stated, Plaintiffs allege that Defendants, through a strategy of willful blindness, exploit and rely upon for profit an illegal, secondary firearms market of juveniles, criminals and other unauthorized gun users in Boston. Plaintiffs allegedly bear immense costs arising from this market. Plaintiffs also allege that Defendants design guns without readily available safety devices and fail to warn of certain dangers.

The matter is before the court on the motion of the manufacturing defendants to dismiss the First Amended Complaint under Mass. R. Civ. P. 12(b)(6) for failure to state a claim. After a hearing, for the reasons discussed below, the motion to dismiss is **ALLOWED** in part and **DENIED** in part.[6]

BACKGROUND

The factual allegations contained in the First Amended Complaint,[7] as relevant to each of the theories of liability, are summarized as follows.[8] For clarity, additional factual allegations are set forth in the discussion section where pertinent.

Plaintiffs allege that Boston faces a high level of violent crime[9] involving guns manufactured by Defendants.[10] Easy movement of firearms from the legal marketplace

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[4] The six counts are: public nuisance (Count 1); negligent distribution and marketing (Count II); breach of warranty through a design defect (Count III); breach of warranty through failure to warn (Count IV); negligence (Count V) and unjust enrichment (Count VI).

[5] Defendants Beretta, Colts's and Phoenix Arms have filed a third-party against China North Industries Corp./Norinco and Denel (Pty) Ltd.

[6] Defendants removed this action to federal court. That court remanded the case. See *City of Boston v. Smith & Wesson Corp.*, 66 F. Supp. 2d 246 (D. Mass. 1999).

[7] All references in this decision to the complaint are to the First Amended Complaint.

[8] In this decision I place no reliance on the settlement agreement between Smith & Wesson and certain public entities, which was submitted to the court after the hearing on this motion.

[9] Plaintiffs allege that these crimes from 1996 through 1998 include 30 homicides, 131 aggravated assaults, 37 armed robberies and 29 suicides.

[10] Plaintiffs allege that over 1,400 guns were involved in the crimes cited in note 9. They also allege that from July 1, 1996, through July 31, 1998, 1,470 guns were seized by the Boston Police Department and that from January 1, 1993, through November 30, 1998, the firearms recovered were made by the individual defendants in the following numbers: Beretta USA (102), Browning Arms (35), Bryco Arms (138), Charter Arms (29), Colt's Mfg. (138), Davis Industries (100), Firearms Import & Export (48), Glock (89),

to unauthorized and illegal users,[11] through an illegal, secondary firearms market, fuels the gun violence.[12]

Plaintiffs also allege that the flow of firearms into the illegal market and into the hands of unauthorized users in Boston has occurred in ways Defendants knew or should have known. Plaintiffs claim that Defendants could have taken action to control and prevent the illegal diversion. The methods of illegal diversion include, according to Plaintiffs: (1) straw purchases, which occurred under circumstances which indicated or should have indicated to the dealer that a straw purchase was being made; (2) multiple sales (where a purchaser buys more than one gun, at one time or over a short period, from a licensed dealer with the intent of conveying the gun to another person not qualified to purchase guns), occurring under circumstances which indicated or should have indicated to the seller that the gun was destined for the unlawful market; (3) sales to "kitchen table" dealers (federally licensed dealers who do not sell from a retail store) by Defendants, even though Defendants knew or should have known that many of those dealers fail to perform background checks or otherwise illegally divert guns to the illegal market; (4)

Harrington & Richardson (.00), Hi-Point (27), Interarms (6), Lorcin (121), Marlin (51), Mossberg (73), Navgar (27), Pheonix (90), Remington (39), Savage (45), Smith & Wesson (369), Sturm & Ruger (167), Sundance (15) and Taurus (56). Plaintiffs allege additionally that thousands of guns used in crime in Boston remain unrecovered.

[11] While Plaintiffs frame many of their allegations in terms of acquisition and use of guns by juveniles and criminals, Plaintiffs refer to "all other classes prohibited from acquiring or possessing guns, such as illegal aliens, fugitives, drug addicts, persons committed to mental institutions, and persons under domestic violence restraining orders." Pls.' Mem. at 5 n.4 (citing 18 U.S.C. § 922; G.L. c. 140, § 129B).

[12] Plaintiffs allege that surveys indicate that juveniles and convicted criminals can easily obtain firearms. Plaintiffs do not allege that the surveys were of Boston respondents. This survey evidence is, according to Plaintiffs, confirmed by a study by the Federal Bureau of Alcohol, Tobacco and Firearms ("ATF"), which found that in Boston over a one year period (Plaintiffs do not state which year) 11 percent of guns traced to crime were seized from juveniles, while the figure for the previous year was 14 percent. The ATF also found (presumably based on national data) that more guns traced to crime are seized from persons in the age group of 18, 19, and 20 years than any other three-year age group. Also presumably based on national data, the ATF found that over 45 percent of seized weapons were possessed illegally by felons. Finally, as a short time interval between retail sale and criminal use of a significant percentage of firearms. Between 40 and 44 percent of guns traced to crime seized in Boston had been sold at retail less than three years earlier, which Plaintiffs allege to be evidence of trafficking.

theft of guns from firearm dealers who failed to provide adequate security for their premises, where Defendants failed to ensure that persons distributing their products have implemented adequate security measures; (5) obliteration of serial numbers from guns, where Defendants, though aware of this problem, took no initiative to make their serial numbers tamper-proof; (6) movement of firearms from states with weak gun control laws to areas (such as Boston) with stronger laws and (7) sales at gun shows, where background checks are usually not required. These guns are often used in more than one crime.

Plaintiffs allege that Defendants' distribution system is reckless and has caused firearms to come into the hands of unauthorized persons, causing Plaintiffs direct harm.[13] Plaintiffs claim that Defendants knew that their guns were distributed into the illegal, secondary market and knew this market supplied a substantial percentage of firearms used to inflict harm upon Plaintiffs.[14] According to Plaintiffs, Defendants could have helped to prevent firearms they manufacture, market, distribute and sell from flowing into the illegal market and into the hands of unauthorized persons.[15]

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[13] Plaintiffs allege 15 incidents of examples of Defendants' misconduct.

[14] According to Plaintiffs, traces by the ATF of guns involved in crimes (where the ATF contacts the manufacturer, who provides the name of the distributor) provides Defendants with actual notice that the distribution system supplies guns to an unlawful market. The ATF data further indicates that a very high percentage of guns traced to crime have been "funneled through" a small set of federally licensed dealers. Plaintiffs cite statements allegedly made by Robert Hass, former Senior Vice President of Marketing and Sales for Smith & Wesson, and Robert Lockett, 1993 (firearms) Dealer of the Year, to the effect that the gun industry knows that their guns seep into an illegal market but takes no action to prevent this.

[15] To restrict or impede the unlawful flow of firearms into Boston, Defendants could have (Plaintiffs allege) take the following "reasonably available" steps:

(1) adequately investigate or screen distributors and dealers through which Defendants distribute and sell firearms;

(2) adequately monitor, supervise, regulate, and standardize distributors' and dealers' methods of distributing and selling firearms;

(3) conduct research (or heed existing research) to better monitor and control the flow of firearms to the illegal, secondary market, and implement preventative strategies;

(4) "established a higher and more direct distribution system in which Defendants remain in control of the distribution of their lethal products";

Plaintiffs also claim that Defendants' guns are unsafely designed in that Defendants fail to incorporate features which would inhibit unlawful access, transfer or theft by criminals, juveniles and other unauthorized users. The defective design results in thousands of unintentional deaths and non-fatal injuries per year, according to Plaintiffs.[16] Plaintiffs claim that failure to incorporate "personalized" gun technology (to prevent unauthorized or prohibited persons from obtaining access to and using guns) results in homicides and other crimes, some of which occur in Boston.

Plaintiffs claim that Defendants are in the best position to conduct research to correct the design of their guns. Plaintiffs allege that Defendants have been aware of the

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(5) adequately train and encourage distributors and dealers to act lawfully and responsibly to ensure compliance with law;
(6) direct distributors and dealers to refuse to sell firearms when the distributor or dealer knows or should know that the firearm likely will not be used for lawful purposes;
(7) require distributors and dealers not to sell more than one handgun per month to any person not holding a federal firearms license and to track sales to enforce this restriction;
(8) require distributors and dealers to sell only to retailers who stock guns for sale from retail stores, and not to sell guns over the Internet, at gun shows, or to "kitchen table" dealers;
(9) require distributors and dealers to certify compliance with all firearms laws and to provide documentation of sales employees' and sales agents' eligibility to sell guns;
(10) require distributors and dealers to certify compliance with all firearms laws and to provide documentation of sales employees' and sales agents' eligibility to sell guns;
(11) refrain (and require distributors and dealers to refrain) from rewarding sales persons or purchasers based on sale or purchase volume;
(12) require distributors and dealers to meet reasonable and specified security requirements to prevent theft;
(13) require distributors and dealers to maintain computerized inventory tracking programs containing information concerning the acquisition and disposition of every gun, and enforce this requirement;
(14) require distributors and dealers to maintain records of trace requests initiated by law enforcement agencies, and to report those requests to the firearm manufacturer;
(15) track and analyze trace requests from law enforcement agencies to determine where and when in the distribution chain the gun may have been diverted to crime, and take preventative measures to reduce diversions; and
(16)institute effective training, monitoring, and sanctions to enforce these requirements (including disciplining or terminating distributors and dealers Defendants know or should know distribute firearms to the illegal market or in an illegal or unsafe manner).

[16] Plaintiffs allege that 23 percent of unintentional shooting deaths nationwide per year occur because the gun user is unaware that the gun is still loaded with ammunition. Plaintiffs allege that this is one reason that the firearm death rate for children aged 14 and under is 12 times higher in the United States than the combined rate in 25 other industrialized countries. According to Plaintiffs, about 35 percent of all unintended shooting deaths occur where the user of the gun is between ages 13 and 16, during which adolescents are attracted to accessible guns and discount the risks of handling a firearm. Plaintiffs claim that the risk that a potentially suicidal adolescent will kill himself doubles if a gun is kept in the home; a person aged 10 to 19 years commits suicide with a gun every six hours; guns are used in 65 percent of male teenager suicides and 47 percent of female teenager suicides, and firearm-related suicides account for about 81 percent of the increase in the rate of suicide among 15- to 19-year olds from 1980 to 1992. In each allegation summarized in the footnote, plaintiffs allege that some of the events described occurred in Boston.

need for design features which would inhibit straw purchases, reuse of stolen weapons and accidental discharges by unauthorized users, but that Defendants have failed to research, develop and implement feasible, available technology.

According to Plaintiffs, it has been reasonably foreseeable that Defendants' guns would come into the hands of unauthorized users.[17] Plaintiffs claim that Defendants have been aware or should have been aware that, when unauthorized users gain access to Defendants' guns, shootings may result. Unintended shootings, suicides and crimes committed by juveniles and other unauthorized users could be prevented if Defendants implemented safer gun designs, Plaintiffs allege. Such designs, according to Plaintiffs, include built-in locking systems, magazine-disconnect safeties and chamber-loaded indicators. Plaintiffs claim that Defendants knew that by failing to implement such safety designs, it was reasonably foreseeable that stolen gun could be employed by unauthorized or prohibited users in violent criminal acts. Plaintiffs claim that they have been repeatedly victimized by Defendants' "unreasonably dangerous products."[18]

According to Plaintiffs, when Defendants manufactured, distributed, promoted, and/or sold these guns, they knew or should have known of the unreasonable dangers of the guns; Defendants knew of and had available to them safety devices or other measures which would decrease the dangers; Defendants are in the best position to correct the unreasonably dangerous design of their products, but have failed to remedy the deficiency and Defendants purposefully and intentionally engaged in their activities knowing that their products could be made to prevent firing by unauthorized users and knowing that Plaintiffs would be injured and forced to bear substantial expenses. Plaintiffs further allege that Defendants have acted in concert with each other in their failure to develop and implement safety features and implement proper warnings.

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[17] Plaintiffs allege that there are guns in about half the homes in the United States.

[18] Plaintiffs allege that each year a number of children in Boston are injured or killed because Defendants' firearms are sold without the means to prevent their use by unauthorized users, without adequate warnings and without adequate instruction regarding the importance of proper firearm storage.

Plaintiffs claim that, to increase profits, Defendants have knowingly, purposefully, intentionally or negligently misled, deceived and confused Boston and its citizens regarding the safety of firearms. Defendants did this, Plaintiffs allege, by claiming falsely and deceptively through advertising that firearm ownership enhances security and that firearms are safe. Plaintiffs say that when Defendants made these claims, Defendants knew or should have known that studies and statistics show that presence of firearms in the home increases the risk of harm and that firearms without locking devices are unsafe.[19] Plaintiffs claim that, in Boston, numerous deaths and injuries have occurred when firearms were foreseeably used in unintentional shootings, suicides by teenagers, domestic disputes and other acts of violence.

Plaintiffs allege that Defendants' conduct undermines the Commonwealth's public policy regarding handguns. Plaintiffs further allege that Defendants' conduct has caused Plaintiffs harm, including substantial financial costs for prevention, amelioration and abatement of the ongoing public nuisance caused by Defendants; increased spending on law enforcement, emergency rescue services, increased security at public school and public building, costs for coroner and funeral services for unknown victims, pensions, disability, and unemployment benefits, higher prison costs and youth intervention programs and lower tax revenues and lower property values.

DISCUSSION

The standard for evaluating the sufficiency of a complaint under Mass. R. Civ. P. 12(b)(6) is undisputed. The court must accept as true the allegations of the complaint, as well as any reasonable inferences to be drawn from them in the plaintiff's favor. *Eyal v. Helen Broad. Corp.*, 422 Mass. 426, 429 (1991). Plaintiffs "need only surmount a

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[19] According to Plaintiffs, the referenced studies indicate that one out of three handguns is kept loaded and unlocked in the home; guns kept in the home for self-protection are 22 times more likely to kill or injure someone known by the owners than an intruder; a gun is used for protection in fewer than two percent of home invasion crimes when someone is home and for every time a gun in the home was used in a legally justifiable shooting, there were four unintentional shootings, seven criminal assaults or homicides and 11 attempted or completed suicides. Compl. at par. 72.

minimal hurdle to survive a motion to dismiss for failure to state a claim." *Bell v. Mazza*, 394 Mass. 176, 184 (1985). A "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Nader v. Citran*, 372 Mass. 96, 98 (1977) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). "[A] complaint is not subject to dismissal if it would support relief on *any* theory of law," *Whitinsville Plaza, Inc. v. Kolseas*, 378 Mass. 85, 89 (1979) (citations omitted; emphasis in original), "even though the particular relief [which the plaintiff] has demanded and the theory on which he seems to rely may not be appropriate." *Nader*, 372 Mass. at 104 (citations omitted). In addition, "[a] complaint should not be dismissed simply because it asserts a new or extreme theory of liability or improbable facts." *Jenkins v. Jenkins*, 15 Mass. App. Ct. 934, 934 (1983).

In this case, Defendants argue that the complaint should be dismissed because the claims are substantively deficient and the claims are barred by reason of six defenses, namely (1) Boston's harm is too remote to confer standing or establish proximate cause; (2) a municipality cannot obtain relief for the expenditure of funds to provide municipal services; (3) the economic loss rule bars recovery; (4) Plaintiffs improperly aggregate claims; (5) the Home Rule Amendment and the Firearms Act bar recovery and (6) the relief requested amounts to improper regulation of interstate commerce. Each issue will be addressed in turn.

I. The "Remoteness" Issue

Defendants argue that Plaintiffs' claims are entirely derived from harm or threatened harm to others and, therefore, Plaintiffs cannot establish standing or show that Defendants' alleged actions proximately caused the harm claimed.[20]

Proof of a causal relationship between a defendant's action and a plaintiff's injury is essential in every tort. "Because the consequences of an act go endlessly forward in time and its causes stretch back to the dawn of human history," the concept of proximate causation was developed to limit the liability of a wrongdoer to only those harms with a reasonable connection to the wrongdoer's actions. *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.* 191 F.3d 229, 235 (2d Cir. 1999), *cert. denied.* 120 S. Ct. 799 (2000) (hereafter "*Laborers Local*"). "[T]he notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient." *Holms v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41 at 264 (5th ed. 1984)).[21]

One way in which the concept of proximate cause operates is through the remoteness doctrine, which is sometimes called the direct injury test. *Holmes*, 503 U.S. at 268. The doctrine states that there must be "some direct relation between the injury asserted and the injurious conduct alleged."[22] *Id.* Thus, in general, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by

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[20] Defendants discuss "remoteness" a if it were a free-standing doctrine. The case law, however, considers remoteness as an element of either standing or proximate cause. Defendants do not separate their standing and proximate cause arguments. For purposes of clarity, the court addresses Defendants' arguments in terms of proximate causation but the analysis is equally applicable to standing principles.

[21] The Second Circuit Court of Appeals described the notion of proximate cause as "an elusive concept." Laborers Local, 191 F.3d at 235. The United States Supreme Court noted that "the principle of proximate cause is hardly a rigorous analytic tool." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477 n.13 (1982).

[22] The Second Circuit stated in *Laborers Local* that, in addition to the remoteness doctrine, other elements of proximate cause are the requirements of proof that the defendant's acts were a substantial cause of the injury and that the plaintiff's injury was reasonably foreseeable. 191 F.3d at 235-36. Defendants' argument in this case rests solely on the remoteness inquiry.

the defendant's acts was generally said to stand at too remote a distance to recover." *Id.* at 268-69 (citing J. Sutherland, Law of Damages 55-56 (1882)).

This doctrine has been applied in Massachusetts.[23] In the "classic"[24] case of *Anthony v. Slaid*, 11 Met. (52 Mass.) 290, 291 (1846), the plaintiff, for a fixed annual compensation, contracted to support the poor of a Massachusetts town. After incurring increased expense in caring for a pauper who was the victim of an assault and battery, the plaintiff sued the party responsible for the attack.[25] The Supreme Judicial Court held that the injury to the plaintiff, which derived entirely from the pauper's injuries, was too remote and indirect because the relation between the plaintiff and the pauper was based on a "special contract" rather than as a "natural and legal relation." *Id.*

The Supreme Judicial Court took occasion to explain *Anthony* in *Chelsea Moving & Trucking Co. v. Ross Towboat Co.*, 280 Mass. 282 (1932). In that case, the injured victim's employer sought to recover from the tortfeasor for the employer's loss, which resulted from the victim-employee's decreased work ability, which in turn had resulted from the tortfeasor's negligence. Holding that the injury to the employer was too remote, the Court emphasized that the relationship between the original victim and the plaintiff was based on contract. *Id.* at 287. In contrast, where the plaintiff's loss is the effect of a natural and legal relationship, such as a parent-child relationship, that loss is not too remote. *Id.* at 284; *Baltan v. Ogassin*, 277 Mass. 525, 531 (1931) (father's damages – medical expenses incurred in treatment of injured son – not too remote that father could

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[23] The parties have referred the court to no Massachusetts case articulating this doctrine as clearly as the cases previously discussed in the text. *Anthony v. Slaid*, 11 Met. (52 Mass.) 290 (1846), appears (insofar as the cases the parties discuss) to be the source of the doctrine. This court assumes, for purposes of this motion, that the doctrine is still recognized in Massachusetts.

[24] The case was characterized as "classic" in *Seafarers Welfare Plan v. Philip Morris*, 27 F. Supp. 2d 623, 628 (D. Md. 1998).

[25] The party responsible was the attacker's husband. *Anthony*, 11 Met (52 Mass) at 290.

not recover from tortfeasor); *Dennis v. Clark*, 2 Cush. (56 Mass.) 347, 354-55 (1848) (same).

Similarly, the Supreme Judic ial Court held, the relationship between a master and an apprentice was so important and so like a parent-child relationship that the master could recover for injuries to the apprentice, whose services the master lost. *Chelsea Moving & Trucking Co.*, 280 Mass, at 284-85 (citing *Ames v. Union Ry. Co.*, 117 Mass. 541 (1875)). The reason for this distinction, the Court said, was that the injury to an employer "is not the natural and probable consequence of the ordinary tort." *Id.* at 287. Thus, the employer's injury was too remote because it was not foreseeable to the tortfeasor, who did not know of the contract. Had the tortfeasor know of the contract, a different result may have obtained.

> It is not alleged that there was any knowledge on the part of the defendant of the contract between [the employee] and the plaintiff or that the negligence of the defendant had any relation to such knowledge. There is no allegation of malice on the part of the defendant toward the plaintiff or toward anybody. There was no negligent interference with a contract. There is not allegation of deliberate design by the defendant to accomplish a definite end regardless of consequences to others. If elements of that nature were present a quite different question would be presented.

Id. at 286. See also *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927) (tortfeasor not liable to another "merely because the injured person was under a contract with that other, unknown to the doer of the wrong").

From these cases, it is apparent that a plaintiff cannot recover from a defendant when the plaintiff's loss arises from harm the defendant caused to the injured party, absent some special relationship between the plaintiff and the injured party or, perhaps,

an ordinary contract relationship of which the defendant knew.[26] There is no proximate cause under those circumstances because the plaintiff's harm is too "remote."

The cases the parties cite show that plaintiff's harm arises from harm to a third party when it is "purely contingent on" or "wholy derivative of" harm to the third party.[27] *Laborers Local*, 191 F.3d at 236 & 237. *Holmes* itself was a case of "harm flowing merely from the misfortunes visited upon a third person by the defendant's acts."[28] *Holmes*, 503 U.S. at 268, 269-70.

In this case, the principal portion of the complaint alleging harm states:

> Defendants' conduct has caused [Plaintiffs] to incur public costs to respond to both intentional and accidental gunshot injuries. The harm to [Plaintiffs] includes substantial financial costs necessary for prevention, amelioration and abatement

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[26] See *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 532 n.25 (1983) (quoting J. Sutherland, Law of Damages 55-56 (1882)) ("[w]here the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote, *if the plaintiff sustains not other than a contract relation to such a third person, or is under contract obligation on his account....*") (emphasis added & deleted).

[27] The Second Circuit held:

> [Plaintiffs'] damages are entirely derivative of the harm suffered by plan participants as a result of using tobacco products... Being purely contingent on harm to third parties, these injuries are indirect.

Laborers Local, 191 F.3d at 239.

[28] As Defendants note, numerous other cases bar recovery where the harm the plaintiffs allege is wholly derivative of harm to third persons. A large number of these cases involve suits by health benefit funds against tobacco manufacturers and their public relations, lobbying and research firms. In these cases, the harm to the funds (increased expenses) was found to be too remote, as it derived entirely from harm to third persons (the smokers). See e.g., *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F3d 788, 788-89(5th Cir. 2000); *International Bhd of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818, 827 (7th Cir. 1999); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963-64 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 789 (2000); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 932-33 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (200); *Massachusetts Laborers' Health & Welfare Fund v. Philip Morris, Inc.*, 62 F. Supp. 2d 236, 246 (D. Mass. 1999); *Laborers' & Operating Eng'rs' Util. Agreement Health & Welfare Trust Fund v. Philip Morris, Inc.*. 42 F. Supp. 2d 943, 948 (D.Ariz. 1999); *Seafarers Welfare Plan v. Philip Morris*, 27 F. Supp. 2d 623, 630 (D.Md. 1998). *Coyne v. American Tobacco Co.*, 183 F.3d 488, 494-95 (6th Cir. 1999), is slightly different and imports the remoteness doctrine into the context of standing of taxpayers to sue. A number of these cases also suggest that the health benefit funds sustained no injury (not even remote injury), as the costs were ultimately passed onto others with the funds bring mere "financial intermediaries." *International Bhd. of Teamsters*, 196 F.3d at 823-25. See also *Seafarers Welfare Plan*, 27 F.Supp. 2d at 627-28. Not all courts follow these cases. See *Service Employers Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F.Supp. 2d 70, 86 (D.D.C. 1999). Even within the circuits that decided the above-cited cases, lower courts have found factual distinctions that allow similar claims to proceed beyond the motion to dismiss stage. See *National Asbestos Workers Medical Fund v. Philip Morris, Inc.*, 74 F. Supp. 2d 221, 225-28 (E.D.N.Y. 1999).

> of the ongoing public nuisance caused by [D]efendants. Moreover, [Plaintiffs] ha[ve] suffered economic injury as a result of increased spending on, among other things, law enforcement, emergency rescue services, increased security at public schools and public buildings, cost for coroner and funeral services for unknown victims, pensions, disability benefits, unemployment benefits, higher prison costs, and youth intervention programs. Boston has further been damaged by lower tax revenues and lower property values.

Compl. at par. 76.[29]

This alleged harm is in large part not "wholly derivative of" or "purely contingent on" harm to third parties. Unlike the harm alleged in the cases discussed above, which would not have existed without harm to a third party, harm to Plaintiffs may exist even if no third party is harmed. For example, Plaintiffs allege that Defendants' conduct places firearms in the hands of juveniles causing Plaintiffs to incur increased costs to provide more security at Boston public schools. Thus, wholly apart from any harm to the juvenile

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[29] Additionally, and apart from the generalized allegations found throughout the complaint that Plaintiffs have suffered harm, Plaintiffs allege the following:
As for Count I (public nuisance): Defendants "have caused damage to the public health, the public safety and general welfare of the Boston residents, and have thereby wrongfully caused the plaintiffs to incur enormous costs in support of the public health, safety and welfare... The presence of illegitimately possessed and used firearms in Boston proximately results in significant costs to plaintiffs to enforce the law, arm its police force and treat the victims of firearms." Compl. at pars. 83 & 84.
As for Count II (negligent distribution and marketing): Defendants' conduct has caused Plaintiffs "to expend substantially more resources than (they) otherwise would in the form of police services, fire services, emergency medical services, pension benefits, disability benefits, workers compensation benefits, health care, expenses to provide additional security measures in public schools and other public facilities." *Id* at par 88.
As for Count III (breach of warranty by defective design): "the plaintiffs have paid and will continue to pay increased sums of money for police services, law enforcement, fire and rescue services, indigent health care, emergency medical services and other emergency services, pension benefits, disability benefits, worker's compensation benefits, health care, prison costs, increased security and other services in the public schools and other necessary facilities and services due to the threat of or actual use of the defendants' firearms ... Furthermore, ... Boston has suffered from diminished tax revenues and property values." *Id.* at par. 97 & 98.
As for Count IV (breach of warranty by failure to warn): Plaintiffs repeat, in substance, the allegations of pars. 97 & 98, see *id.* at pars. 106 of 108, and allege that "Boston has suffered from the lost productivity of certain citizens and employees harmed as a result of the use of defendants' products and suffered a direct loss of revenue from lost tax revenues due to diminished property values in the areas of Boston where defendants' products are used." *Id.* at pars. 107.
As for Count V (negligence): Plaintiffs repeat, in substance, the allegations of pars. 97 & 98. *See id.* at pars. 115 &116.
As for Count VI (unjust enrichment): Plaintiffs repeat, in substance, the allegations of par. 97, *see id.* at par. 119, and allege that they have been harmed by "the loss of substantial tax revenues as a result of diminished property values, loss of businesses and lost productivity of those individuals harmed by guns, due to the presence and use of guns throughout Boston." *Id.* at par. 120.

(who may even believe himself to be benefited by acquisition of a firearm), and regardless whether any firearm is actually discharged at a school, to ensure school safety Plaintiffs sustain injury to respond to Defendants' conduct. Even if no individual is harmed, Plaintiffs sustain many of the damages they allege due to the alleged conduct of Defendants fueling an illicit market (e.g., costs for law enforcement, increased security, prison expenses and youth intervention services). Similarly, diminished tax revenues and lower property values may harm Plaintiffs separately from any harm inflicted on individuals.[30] Plaintiffs' harm is in essence the type of harm typically suffered by municipalities due to public nuisances. Cf. *White v. Smith & Wesson*, 97 F. Supp. 2d (N.D. Ohio 2000), 2000 WL 664176 at *6. Indeed, much of the harm alleged is of a type that can only be suffered by these plaintiffs.

To be sure, Plaintiffs do allege injuries that arise from harm to others. Plaintiffs allege, for example, increased costs for emergency medical services, funerals, pensions, disability and unemployment benefits and lost productivity of citizens and employees harmed by guns. In addition, some of the injuries not necessarily derivative of harm to others may be exacerbated if individuals themselves are harmed. Two points need be made on this.

First, the remoteness doctrine, as it appears to exist in Massachusetts, contains an exception in cases of a special relationship between the plaintiff and the injured third party, such as a parent-child relationship or a close master-apprentice relationship.

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[30] In their reply brief, Defendants misconstrue the remoteness doctrine as that doctrine was applied in *Anthony* and in the other cases discussed in Defendants' original memorandum. In the reply brief, Defendants state that "if firearms never were misused by such third parties to inflict direct injury on other third parties, [Plaintiffs] would have no cause to incur any of the claimed expenses." Defs.' Reply Mem. at 4. The remoteness doctrine is concerned with harm that is solely derived from injury to another rather than harm that is caused by persons other than the defendant. Plaintiffs allege that it was Defendants' misconduct that caused Plaintiffs' harm. Defendants' briefs do not raise the argument that their liability is barred by the intervening criminal (or tortious) acts of third persons.

Chelsea Moving & Trucking Co., 280 Mass. at 284-85. An additional exception may arise where the plaintiff and the injured third party, while not in a special relationship, have a relationship of which the defendant knew, or in cases where the defendant acted with malice or with a "deliberate design... to accomplish a definite end regardless of consequences to others." *Id.* at 286. As governmental bodies, Plaintiffs may have the type of special relationship that puts this case with the first exception to *Anthony* (if such an exception exists), and the complaint's allegations are sufficient to place the case within the second *Anthony* exception (if this exception exists).

The uncertainty about the state of the law expressed in the above paragraph raises the second point. It is settled law that a complaint should not be dismissed "simply because it asserts a new or extreme theory of liability or improbable facts." *Jenkins v. Jenkins*, 15 Mass. App. Ct. 934, 934 (1983). A motion to dismiss is not an appropriate vehicle for "resolv[ing] undecided points of substantive law[.]" *M. Aschheim Co. v. Turkanis*, 17 Mass. App. Ct. 968, 968 (1983).

Nearly all the cases to which the parties refer which apply the remoteness doctrine are non-Massachusetts cases.[31] While the *Anthony* case appears to be the ultimate source of the remoteness doctrine, the contours of that doctrine are ill-defined in Massachusetts. Even if Plaintiffs' allegations present an extreme theory of liability, a motion to dismiss is not the proper vehicle to challenge the theory.[32] See *New Eng. Insulation Co. v. Gen. Dynamics Corp.*,26 Mass. App. Ct. 28, 30 (1988).[33]

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[31] The most recent Massachusetts case cited was decided in 1934. See *Ross v. Wright*, 286 Mass. 269, 273 (1934).

[32] In their memorandum, Defendants seek to persuade the court that, should the complaint stand, a veritable Pandora's box would be opened, because cities would be allowed to sue automobile manufacturers on the theory that vehicles are made so as to be able to violate speed laws and sue liquor manufacturers on the theory that Scotch bottles are capable of being opened and the contents consumed by underage drinkers. These examples misconstrue Plaintiffs' allegations. Plaintiffs allege that Defendants' misconduct (i.e.,

In sum, Plaintiffs' allegations are not, as a matter of law, barred by "remoteness."

II. The Free Public Services Issue

Defendants argue that the complaint should be dismissed because a municipality may not recover costs of providing public services. The principal Massachusetts case on which Defendants rely is *Town of Freetown v. New Bedford Wholesale Tire, Inc.*, 384 Mass. 60 (1981). The court does not read *Freetown* as broadly as do Defendants.[34]

In *Freetown*, the plaintiff town alleged that the defendants negligently dumped 750,000 used tires on town land. A fire broke out, and the town's fire department "incurred greater expense than usual and necessary" in extinguishing the fire. *Id.* at 61. The town sought to recover for the defendant's alleged negligence or misrepresentation. The Supreme Judicial Court held that the town could not recover because the costs of controlling that type of fire were to be borne by the town. The court noted that the

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allegedly fueling and exploiting an illegal firearms market and allegedly manufacturing defective and unreasonably dangerous products) caused Plaintiffs to suffer the harm discussed in the text. An apt analogy, to use Defendants' illustration, would be allegations that the alcohol industry exploited and relied upon an illegal, secondary market of underage drinkers and sold defective products, causing harm. In other words, it is not the mere manufacture and sale of a lawful product of which Plaintiffs complain, but rather the tortious manufacture and sale.

[33] Defendants also argue that "practical and equitable considerations" reinforce their position. Defs. Mem. at 11. It is true that, in the context of the proximate cause analysis under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act, the Supreme Court identified three relevant factors: (1) the difficulty of ascertaining the amount of damages attributable to the misconduct rather than to some other source; (2) the difficulty of apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to prevent multiple recoveries and (3) whether suits by directly injured victims would vindicate the general interest in deterring injurious conduct. *Holmes*, 503 U.S. at 269-70. The difficulty in ascertaining damages in this case is best assessed when the case has gone beyond the pleading stage. For purposed of the pending motion, the complaint contains sufficient allegations of harm to survive. While Defendants characterize their connection to the alleged wrongdoing as being shippers of products that made their way, "by a series of legal and illegal acts beyond the manufacturers' control," to persons who misused them, Defs.' Mem. at 13, Plaintiffs allege that Defendants could have exercised control over the distribution of their product. E.g., Compl. at pars. 59-60.

[34] In their original memorandum, Defendants state that the rule articulated in the *Freetown* case "is a corollary of the 'fireman's rule.'" Defs.' Mem. at 15 n.2. Subsequently, the Appeals Court stated that "the firefighter's rule has no continuing vitality in Massachusetts." *Hopkins v. Medeiros*, 48 Mass. App. Ct. 600, 608-09 (2000). In their supplemental memorandum, Defendants argue that the fact that the municipal cost recovery doctrine, as applied by the Supreme Judicial Council [*sic*] in *Freetown*." Defs.' Supp. Mem. (dated June 1, 2000), at final (unnumbered) page of argument section. The court does not rule on the relationship between the firefighter's rule and the *Freetown* doctrine.

establishment and maintenance of a fire department is for the benefit of the public. Implicit in the Court's decision is the determination that the costs of this public benefit are to be carried by the public as a whole, absent a contrary statue.

In this respect, *Freetown* is consistent with the other cases to which Defendants refer. In *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F2d 322, 323 (9th Cir. 1983), the plaintiff city incurred great public expense after the defendant's train, containing liquified petroleum gas, derailed. The Ninth Circuit (predicting Arizona law on an issue of first impression) held that the city could now recover its costs.

> [T]he cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service. Where such services are provided by the government and the costs are spread by taxes, the tortfeasor does not expect a demand for reimbursement.

Id. (citation omitted). The court noted that while sometimes "new tort doctrines are required to cure an unjust allocation of risks and costs," such is not the situation "where a fair and sensible system for spreading the costs of an accident is already in place." *Id.* In addition, the court said, the state legislature had chosen to allocate to the government the costs in question, and the court doubted that judicial intervention was needed to call the attention of the state legislature to "the cost allocation presented by what we find to be the existing rule, for the state and its municipalities presently feel the pinch when they pay the bill." *Id.* at 324

Similarly, in *Township of Cherry Hill v. Conn. Constr. Co.*, 218 N.J. Super. 348, 349, 527 A.2d 921 (N.J. Super Ct. App. Div. 1987), where the plaintiff town sought to recover expenses (largely police overtime) incurred when the defendant ruptured a natural gas main, recovery was barred. "Government has traditionally assumed the ultimate cost of providing basic emergency services that protect the community." *Id.*

"[T]he policy decision is that it would be too burdensome to charge all who carelessly cause or failed to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences." *Id.* (quoting *Krauth v. Israel Geller & Buckingham Homes, Inc.*, 31 N.J. 270, 274, 157 A.2d 129 (1960) (applying firefighter's rule, which shifts to taxpayers financial responsibility for firefighter's or police officer's injury)). See also *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1078, 1080 (D.C. Cir. 1984) (District must bear costs arising from crash of airplane); *County of Lassen v. State*, 4 Cal. App. 4th 1151, 1154, 1156, 6 Cal. Rptr. 2d 359 (Cal. Ct. App. 1992) (county must bear costs of defending inmate suit).

What each of these cases has in common is that the acts causing the damage were of the sort the municipality reasonable could expect might occur, and each of the results was a discrete emergency. Fires, fuel spills and ruptured gas mains are all frequent happenings which, while every effort is made to prevent them, can be expected to occur. Train derailments and airplane crashes are more unusual, but not so rare that a municipality can never expect to have to respond to such an emergency. The cases thus stand for the principle that such contingencies are part of the normal and expected costs of municipal existence, and absent legislation providing otherwise are costs to be allocated to the municipality's residents through taxes. In addition, in those cases there is no evidence that the specific defendants had engaged in a repeated course of conduct causing recurring costs to the municipality.

This case is different. Plaintiffs allege wrongful acts which are neither discrete nor of the sort a municipality can reasonably expect. Plaintiffs allege that Defendants maintained and exploited an illegal firearms market, knowing that the market would and did cause Plaintiffs harm. Defendants' argument based on *Freetown* thus fails because

that case and other cases applying the same doctrine do not extend the rule as far as Defendants contend. Accord *City of Flagstaff*, 719 F.2d at 324 ("Recovery has also been allowed where the acts of a private party create a public nuisance which the government seeks to abate").

III. The Economic Loss Rule

Defendants argue that Plaintiffs' claims are barred by the economic loss rule, which prohibits recovery in negligence for purely economic loss. *Clark v. Rowe*, 428 Mass. 339, 342 (1998). The rule provides that:

> ...when a defendant interferes with a contract or economic opportunity due to negligence for purely economic losses. *Garweth Corp. v. Boston Edison Co.*, 415 Mass. 303, 305 (1993).

Priority Finishing Corp. v. LAL Constr. Co., 40 Mass. App. Ct. 719, 719 n.2 (1996).

Analytically, the economic loss rule occupies an uncertain legal position. Marking the boundary between tort and contract law, the rule may be seen as functionally part of the causation analysis and a limit on boundless recovery. See John M. Palmeri & Monty L. Barnett, The Continuing Vitality of the Economic Loss Rule, 31 Land & Water L. Rev. 757, 758-59 (1996). As such, it may be understood as part of the foreseeability element of proximate cause. *Id.* at 761-62. It may also be understood as going to whether there existed a duty to another person or class of persons. *Id.* at 765. A defendant's fault appears to have some role in the economic loss rule. *Id.* at 761-62.[35]

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[35] The authors state:

> Two generalizations underlie the numerous exceptions [to the economic loss rule]. First, the common rationale for allowing recovery of purely economic losses is foreseeability. Second, the degree to which a defendant knew or should have known the extent of the consequences of negligent conduct, including economic loss, plays a dispositive role in a court's holding; more knowledge means more culpability.
>
> ...
>
> One differentiating factor between those cases allowing recovery and those denying recovery is foreseeability; that is, recovery hinges on whether a defendant could foresee that the negligent

Additionally, as discussed below, the rule serves to separate tort and contract claims by encouraging parties to allocate risk contractually. In Massachusetts, the economic loss rule has been applied in cases where actions by a defendant interfered with a plaintiff's contract[36] and in products strict liability cases.[37]

Both types of cases, of course, lie at the boundary of tort and contract law. The reason for the rule in products liability cases is that when a product causes only economic loss,[36] a commercial user of the products is best left to his contractual remedies. *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 404 Mass. 103, 109-10 (1989). In the typical products liability case where the economic loss rule is applied, a product that the defendant manufactures proves defective, and the purchaser bears costs to repair the product, and usually suffers from loss of business as well. See, e.g., *id.* at 104. The economic loss rule is justified because a "commercial user can protect himself by seeking express contractual assurances concerning the product (and thereby perhaps paying more for the product) or by obtaining insurance against losses." *Id.* at 109-10. In contrast, a person physically injured by the product "had neither the bargaining power nor

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conduct would cause harm to a specific person, known class of persons, or foreseeable persons under the circumstances.

Palmeri & Barnett, *supra*. At 761-62, 765 (footnotes omitted).

[36] See *FMR Corp. v. Boston Edison Co.*, 415 Mass. 393, 395 (1993) (plaintiffs claimed defendants' negligent conduct caused plaintiffs to sustain damages from loss of income and increased costs of doing business); *Garweth Corp.*, 415 Mass. at 305 (plaintiff claimed defendant's conduct caused plaintiff to sustain monetary losses in connection with contract); *Stop & Shop Cos. v. Fisher*, 387 Mass. 889, 893 (1983) (plaintiff claimed that defendant's negligence in striking bridge caused economic injury to plaintiffs). See also Restatement (Second) of Torts § 766C (1979).

[37] See *Marcil v. John Deere Indus. Equip. Co.*, 9 Mass. App. Ct. 625, 630-31 (1980) (plaintiff claimed manufacturing defect in construction equipment caused plaintiff business losses). See also Restatement (Third) of Torts: Products Liability § 21 (1997).

[38] "Economic loss" in the products liability setting is "the cost of repairs and lost profits." *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 404 Mass. 103, 107 (1989). The Appeals Court defined "economic loss" as including "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits without any claim of personal injury or damage to other property...." *Marcil*, 9 Mass. App. Ct. at 630 n.3 (quoting *Alfred N. Koplin & Co. v. Chrysler Corp.*, 49 Ill. App. 3d 194, 199 (1977)).

the opportunity to bargain" to protect himself. *Id.* at 110. See also Restatement (Third) of Torts: Products Liability § 21 (1997).

In my view, the economic loss rule does not compel dismissal of this case for several reasons.

First, Plaintiffs' allegations here differ from those in cases where the economic loss rule was applied. Insofar as the complaint states allegations under prodects liability law, this case is dissimilar to the typical products suit discussed above. The reasons supporting application of the economic loss rule to strict products liability actions, essentially risk-allocation principles, do not apply to the allegations in this case with the same force as in the usual products liability action. See *Clark*, 428 Mass. at 342 (Refusing to apply the economic loss rule to legal malpractice, the Court stated, "When the economic loss has been applied, the parties usually were in a position to bargain freely concerning the allocation of risk, and, more importantly, there was no fiduciary relationship."). To the extent the complaint states allegations analogous to the other line of cases applying the rule (interference with a contract or economic opportunity), Plaintiffs allege that it was foreseeable that they would suffer harm. Also, Plaintiffs have an interest in the safety and welfare of the residents of Boston. Accord *Priority Finishing Corp.*, 40 Mass App. Ct. at 721 (noting that bailee of damaged property not barred by economic loss rule from financial harm because "the paintiff's pecuniary losses are derived from physical harm to property for which the plaintiff has a right to recover").

Secondly, while the allegations of harm in this case include economic harm, they are not limited to that type of harm. See, e.g., Compl. at par 76 (Plaintiffs incurred

"public costs"); at par 83 (Plaintiffs incurred "enormous costs in support of the public welfare"); at pars. 107 & 120 (loss of productivity of individuals harmed).

Finally, as noted, the uniqueness of the allegations of this case counsels against dismissal at the pleading stage.[39]

IV. The Aggregation Issue

Defendants next argue that the complaint must be dismissed because it improperly aggregates claims that individually could not survive the pleading stage, that are too "amorphous" and that are "factually diverse independent claims." As to the argument that the complaint improperly combines separate claims that are individually deficient, I defer discussion to the substantive claims (see pages 30 to 41).

Defendants' second argument is that the complaint is vague because Plaintiffs have brought suit "on the basis of some amorphous injury to unspecified citizens linked in only general terms to some amorphous wrong by a group of defendants." I disagree. In my view, the complaint meets basic notice pleading requirements.

Defendants' third argument is that this action is an effort to aggregate factually and legally diverse individual claims as a strategic effort to bypass the difficulty of proving causation or the existence of a tort, and to overcome affirmative defenses. Defendants misconstrue Plaintiffs' allegations. As noted in the discussion of "remoteness," Plaintiffs do not seek to aggregate multiple claims of individuals and recover on the behalf. Rather, Plaintiffs, two government bodies who have advanced various theories of liability, claim that Defendants' conduct caused harm to them. The harm alleged, including costs for preventative measures, youth intervention programs,

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[39] Defendants' argument that the economic loss rule requires dismissal of the claims for public nuisance and unjust enrichment is without merit, as the rule does not appear to apply to such claims. See *Garweth Corp.*, 415 Mass. n.306.

increased security at schools and other public buildings and emergency rescue services, is not the same as harm to individuals.

V. Home Rule Amendment and Preemption

In their analysis of the Home Rule Amendment to the Massachusetts Constitution, Defendants advance two distinct arguments. First, they argue that Plaintiffs lack authority to bring this action under the Home Rule Amendment, Mass. Const. Art. Amend. 2, § 6 ("HRA"). Secondly, they claim that this action is preempted by the Massachusetts Firearms Act, G.L. c. 140, §§ 121 *et. seq.*

Turning first to the Home Rule Amendment, the Legislature provides municipalities with the express statutory right to sue and be sued. G.L. c. 40, § 2.[40] It is well established that cities and towns have authority to initiate suits to recover damages under tort and contract theories.[41] See , e.g., *Town of Middleborough v. Middleborough Gas & Elec. Dep't*, 422 Mass. 583, 585 (1996).

Defendants' Home Rule Amendment[42] argument is premised on a misinterpretation of Plaintiffs' claims. According to Defendants, Plaintiffs claim

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[40] General Laws c. 40, § 2 provides:

> A town may in its corporate capacity sue and be sued by its name, and may appoint necessary agents therefor.

The reference only to "town" is complemented by G.L. c. 40, § 1, which makes clear that § 2 applies to cities as well, Section 1 states:

> Cities and towns shall be bodies corporate, and, except as otherwise expressly provided, shall have the powers, exercise the privileges and be subject to the duties and liabilities provided in the several acts establishing them and in the acts relating thereto. Except as expressly provided, cities shall have all the power of towns and such additional powers as are granted to them by their charters or by general or special law, and all laws relative to towns shall apply to cities.

[41] Of course, the Boston Public Health Commission is the second plaintiff. However, Defendants make no separate argument as to the commission's authority to be a plaintiff, and they treat both plaintiffs the same. In the complaint, Plaintiffs rely on G.L. c. 111, § 122 (and Append. 2-4 & 2-5), for the commission's authority to sue.

[42] Article 89 of the Amendments to the Constitution of the Commonwealth was ratified in 1966, and is commonly known as the Home Rule Amendment. This replaced the existing Article 2. At present, Article 2 of the Amendments, section 6, reads in full:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not

"statutory authority to regulate through litigation." Plaintiffs, however, do not seek to regulate but rather assert common law and statutorily based claims. The terms "ordinance" and "by-law" found in the Home Rule Amendment are not so broad as to encompass civil actions like this case. That the courts of the Commonwealth have recognized the existence of tort and contract actions by municipalities, before and after ratification of the Home Rule Amendment, belies such an expansive interpretation.[43]

In their reply brief, Defendants seek to distinguish between a city acting in its "corporate capacity" and one acting in its "governmental capacity." Thus, Defendants argue, the language in G.L. c. 40, § 2 (allowing a town—and, through § 1, a city—to sue "in its corporate capacity"), does not allow a city to sue in its "governmental capacity."[44] This argument simply repeats the contention that Plaintiffs are seeking to regulate by lawsuit.

> inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

General Laws c. 43B, § 13 (part of the Home Rule Procedures Act), largely tracks the language of the Home Rule Amendment. Section 13 has as its subject ordinances or by-laws, and "legislative or executive actions."

[43] In a footnote in their reply brief, Defendants argue that while G.L. c. 40, § 2 empowers municipalities to sue and be sued in their own names, the scope of that empowerment derives from some other authority, such as the Home Rule Amendment. This argument has no merit. As noted, cities and towns have long had the authority to initiate tort and contract actions. The court does not believe that c.40, § 2 requires that there exist specific statutory or constitutional authorization as to every asserted tort or contract cause of action before a city or town may initiate a suit. Defendants cite no authority to support that position.

[44] The sole Massachusetts authority on which Defendants rely to support this distinction is *Higginson v. Treasurer & Sch. House Comm'rs of Boston*, 212 Mass. 583 (1912). *Higginson* held that the legislature had authority to designate city parkland as the site for a school building. The Court stated that there existed two characters of city and towns, a governmental capacity and a capacity similar to a private corporation. *Id.* at 585. Defendants make this distinction, apparently, to suggest that G.L. c. 40 § 2 only allows municipalities to sue in their "corporate capacity" (i.e. acting in the nature of a private corporation), and not in their "governmental capacity." Regardless which capacity Plaintiffs are suing in, the cases discussed plainly allow contract and tort suits to be brought by municipalities. Defendants cite no Massachusetts case barring suit and relying on the distinction made in *Higginson*. In *Slama v. Attorney Gen.*, 384 Mass. 620, 623-24 (1981), the Court made a different distinction and suggested that "coporate capacity" meant a municipality acting as a distinct entity, and "representative capacity" meant a municipality acting as a representative of its citizens, the actual rightholders, for whom it would be difficult or impossible to assert claims.

Defendants next argue that this action is preempted by the Massachusetts Firearms Act, G.L. c. 140, § 121 et. seq., and by state regulations regarding firearms, 940 Code Mass. Regs. §§ 16.00 et seq. (regulations promulgated under G.L. c. 93A). In support of this argument, Defendants recite the standard for determining whether a local ordinance or by-law is inconsistent with and thus preempted by a state statute. See *Boston Gas Co. v. City of Newton*, 425 Mass. 697, 699 (1997).[45] They argue that the Firearms Act is so comprehensive that the court should infer a legislative intent to preempt the field.[46]

Defendants' argument fails because this is a tort and contract case, not a suit about a local by-law or ordinance. The issue before the court is not whether the statute and regulations preempt an ordinance or by-law, but whether the statute abrogates this state's common law of tort and contract and the relevant portions of the Uniform Commercial Code relating to warranties. "[A]n existing common law remedy is not to be taken away by statute unless by direct enactment or necessary implication." *Eyssi v. Lawrence*, 416 Mass. 194, 199-200 (1993) (quoting *Ferriter v. Daniel O'Connell's Sons*, 381 Mass 507, 521 (1980)). See also *General Elec. Co. v. Department of Envil. Protection*, 429 Mass., 798, 804-05 (1999). "Moreover, '[a] statute is not to be interpreted as effecting a material change in or repeal of the common law unless the intent to do so is clearly expressed.'" *Eyssi*, 416 Mass. at 200 (quoting *Riley v. Davison Constr. Co.*, 381 Mass. 432, 438 (1980) (alteration by *Riley* Court)); *Hopkins v. Medeiros*, 48 Mass. App. Ct. 600, 610

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[45] To determine whether an ordinance or by-law is inconsistent with state law, the Court asks (1) whether there was an express legislative intent to forbid local activity on the same subject, (2) whether the local regulation would frustrate the purpose of a statute so as to warrant an inference the Legislature intended to preempt the subject or (3) whether legislation on the subject is so comprehensive that legislative intent to preempt can be inferred, as any local enactment would frustrate the statute's purpose. *Boston Gas Co.*, 425 Mass. at 699.

[46] Defendants make no separate argument in relation to the regulations in 940 Code Mass. Regs. §§ 16.00 et. seq.

(2000). Defendants cite no authority, and the court has found none, stating that the Firearms Act or the regulations clearly express an intent to abrogate the common law, or that they do so by necessary implication.[47]

VI. The Commerce Clause Issue

Defendants next argue that this suit is barred by the Commerce Clause.[48] U.S. Const. Art. 1, § 8.[49] The affirmative grant to Congress of authority to regulate interstate commerce encompasses a "dormant" limitation on the authority of states to enact legislation affecting interstate commerce. *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989). In this respect, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects with the State," *id.* at 336 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982)), and bars "a statute that directly controls commerce occurring wholly outside the boundaries of a State... regardless of whether the statute's extraterritorial reach was intended by the legislature," *id.* (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)). "[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also... how the challenged statute may interact with the legitimate regulatory regimes of other States...." *Id.*[50] The applicability of the Commerce Clause to causes of action under state tort and contract law is unsettled.

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[47] I do not intend anything in this decision to affirm the propriety of the injunctive relief Plaintiffs seek. Any such comment would be highly premature.

[48] Defendants frame argument in terms of the Commerse Clause. In one paragraph of their memorandum, Defendants discuss Due Process principles, in connection with *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996). Because the thrust of this portion of their memorandum clearly focuses on a Commerce Clause argument, the court declines to read this paragraph of defendants' memorandum as raising a Due Process argument any broader than the doctrine discussed in *BMW of N. America*.

[49] Clause 3 of Art. 1. § 8, grants Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"

[50] The United States Supreme Court has summarized its two-tiered approach as follows:

The standard for analysis under the Commerce Clause has its focus on positive law—statutes or regulations. See *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987) ("The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce.").[51] With one exception, none of the cases Defendants cite as conducting a Commerce Clause analysis involve application of a remedy by a court after finding defendants liable under state tort and contract law. See, e.g., *Healy*, 491 U.S. at 326 (Connecticut statute); *Brown-Forman Distillers Corp.*, 476 U.S. at 584 (New York statute); *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 679 (1981) (Iowa statute); *Hughes v. Oklahoma*, 441 U.S. 322, 323 (1979) (Oklahoma statute); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 354 (1997) (Washington statute); *Dean Foods Co. v. Brancel*, 187 F.3d 609, 620 (7th Cir. 1999) (Wisconsin regulations); *Knoll Pharm. Co. v. Sherman*, 57 F. Supp. 2d 615, 623 (N.D. Ill. 1999) (Illinois statute).

Nonetheless, the Supreme Court did state, in *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 572 (1996), that Commerce Clause principles apply in some civil suits, although the Court recognized that state civil suits may proceed even though the result may be to effect a change in out-of-state practices.[52, 53] In *BMW of N. America*, the

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> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interste commerce clearly exceeds the local benefits.

Healy, 491 U.S. at 337 n.14 (quoting *Brown-Forman Distiller Corp.*, 476 U.S. at 579) (citations omitted).

[51] See also *Dennis v. Higgins*, 498 U.S. 439, 447 (1991) (Commerce Clause is limitation on "the power the States to enact laws imposing substantial burdens on [interstate] commerce.") (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 476 U.S. 82, 87 (1984); alteration added).

[52] The Court stated: "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *BMW of N. America*, 517 U.S. at 572 n.17. The Court cited *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (relating to defamation and First Amendment), and *San Diego Bldg. Trades Council v. Garman*, 359 U.S. 236, 247 (1959) (relating to displacement of state jurisdiction under National Labor Relations Act).

plaintiff alleged that failure to disclose that the new automobile he purchased in Alabama had been damaged and repainted constituted fraud under Alabama law. The repainting occurred in Georgia, and the nondisclosure was due to a nationwide BMW policy not to advise car dealers of repairs to new cars if the repair cost was no more than 3 percent of the suggested retail price. After trial, the jury awarded the plaintiff compensatory damages and $4 million in punitive damages. The plaintiff argued that the large punitive damage award was necessary to change BMW's policy nationwide.

The Supreme Court held that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States" *Id.* at 572 (footnote omitted). Economic penalties (in the form of legislatively authorized fines or judicially imposed punitive damages) "must be supported by the State's interest in protecting its own consumers and its own economy." *Id.* Thus, Alabama could not "punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents," and could not "impose sanctions on BMW in order to deter conduct that is lawful[54] in other juristictions." *Id.* at 573. Applying notions of fairness,[55] the Court concluded that the punitive damages award was grossly excessive.

Thus, the Supreme Court never held that the plaintiff's suit in the *BMW* case was barred by the Commerce Clause. In fact, the Court appeared to take for granted that the suit was proper, as would legislation have been obtaining the same result:

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[53] The Court's statements in this regard may properly be characterized as dicta, since the Court assumed that the ultimate damage award of $2 million (after remittitur by the Alabama Supreme Court) was based only on conduct occurring in Alabama and held that even this award was grossly excessive. *BMW of N. America*, 517 U.S. at 574. Thus, the Commerce Clause discussion was not necessary to the Court's analysis. See *id.* at 604 (Scalia, J., dissenting); *id.* at 607 (Ginsburg, J., dissenting).

[54] The Supreme Court did not consider whether a State may attempt to change a tortfeasor's unlawful conduct in another state. *BMW of N. America*, 517 U.S. at 573 n.20.

[55] While the Supreme Court discussed notions of fairness enshrined in "constitutional jurisprudence," the Court appeared to rely on Due Process. *BMW of N. America*, 517 U.S. at 574 n.22.

> No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors to disclose presale repairs that affect the value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner. Some States rely on the judicial process to formulate and enforce an appropriate disclosure requirement by applying principles of contract and tort law. Other States have enacted various forms of legislation.... The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.
>
> That diversity demonstrates that reasonable people may disagree about the value of a full disclosure requirement.

Id. at 568-70 (footnotes omitted). What the Supreme Court held to be improper was, in part, seeking to change BMW's conduct in other states. *Id.* at 572. See also *id.* at 572 n.18 ("The record discloses no basis for [the plaintiff's] contention that BMW could not comply with Alabama's law without changing its nationwide policy.")

Here, Plaintiffs allege violations of longstanding state law and seek remedies specific to these violations. Plaintiffs seek compensatory, not punitive, damages, which the Supreme Court never questioned in *BMW of N. America*.[56] Certainly, some of the expansive injunctive relief Plaintiffs seek (e.g., to enjoin "manufacturing, distributing, or offering for sale firearms without appropriate safety devices and warnings, including device designed to prevent unauthorized use") can be read to seek directly to impact out-of-state conduct. However, as I have previously emphasized, all 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.[57] The court then will also be able to determine whether

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[56] See *BMW of N. America*, 517 U.S. at 576 ("But this observation [that infliction of economic injury may warrant a substantial penalty] does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.").

[57] Defendants point out that the alleged diversions into an illegal firearms market can occur anywhere in the country and thus an injunction could have the effect of forcing Defendants to change its practices nationwide. Again, an argument as to the scope of injunctive relief, should such an argument be necessary and should injunctive relief be deemed appropriate, is best addressed at a later stage of litigation. Also, as noted, the Supreme Court has left open the question whether a state may attempt to change a tortfeasor's *unlawful* conduct in another state. *BMW of N. America*, 517 U.S. at 573 n.20.

the intent of any of the proposed remedies is to deter or punish for out-of-state conduct, or whether the intent is to protect residents of Boston. See *BMW of N. America*, 517 U.S. at 572-73.[58]

The contention that the allegations of the complaint violate the Commerce Clause is also weakened by the existence of the Firearms Act, G.L. c. 140, §§ 121 et seq., and the Attorney General's regulations, 940 Code Mass Regs. §§ 16.00 et seq. Defendants have not attempted to argue why maintaining this action violates the Commerce Clause while the Firearms Act and the regulations do not.

VII. The Substantive Claims

Finally, Defendants argue that each of the six counts in the complaint is legally deficient.

Public Nuisance

A public nuisance is an "unreasonable interference with a right common to the general public."[59] Restatement (Second) of Torts § 821B(1) (1979) (quoted in *Leary v. Boston*, 20 Mass. App. Ct. 605, 609 (1985)).

> Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) Whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

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[58] Defendants state that according to the complaint, most of the sales of firearms to distributors took place outside Massachusetts. This appears to speak to a personal jurisdiction argument, and Plaintiffs appear to have interpreted is as such. Nevertheless, Defendants in their reply brief emphatically deny that they dispute personal jurisdiction. Defs.' Reply Mem. at 32.

[59] See also *Planned Parenthood League of Mass. Inc. v. Bell*, 424 Mass. 573, 578 n.4, *cert. denied*, 522 U.S. 819 (1997) ("A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or *by causing a common injury*.") (quoting *Connerty v. Metropolitan Dist.Comm'n*, 398 Mass. 140, 148 (1986)) (emphasis added); Restatement (Second) of Torts § 821B, cmt. h ("a public nuisance does not necessarily involve interference with use and enjoyment of land.... When the particular harm consists of interference with the use and employment of land, the public nuisance may also be a private nuisance....").

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B(2). A public nuisance differs from a private nuisance: "It is a much broader term and encompasses much conduct other than the type that interferes with the use and enjoyment of private property." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 90, at 643 (5th ed, 1984). Thus, in its broadest statement, the concept of a public nuisance "seems unconnected to place or property." *Leary*, 20 Mass. App. Ct. at 609.

Liability for a public nuisance may arise even though a person complies in good faith with laws and regulations. *Hub Theaters, Inc. v. Massachusetts Port Auth.*, 370 Mass. 153, 156 (1976); *Strachan v. Beacon Oil Co.*, 251 Mass. 479, 488 (1925). Liability extends to all who join or participate in the creation or maintenance of a public nuisance. *Attorney Gen. v. Baldwin*, 361 Mass. 199, 208 n.3 (1972).

Defendants argue that Plaintiffs' claim fails because it does not arise from activities on or related to property. However, as noted, a public nuisance is not necessarily one related to property. Defendants also argue that the claim fails because Plaintiffs cannot allege that the manufacturers owned or had control of the land or instrumentality that caused the harm, citing *Belanger v. Commonwealth*, 41 Mass. App. Ct. 668, 670 n.3 (1996). *Belanger*, however, addressed private nuisance, which is, as noted, distinct from public nuisance.[60] Defendants also cite *Commonwealth v. Mead*, 153 Mass. 284, 286 (1891). In *Mead*, a criminal case, the nuisance alleged was the keeping of a tenement used for the sale of intoxicating liquors. As such, *Mead* was a case where

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[60] "A private nuisance is actionable when a property owner creates, permits, or maintains a condition... that causes a substantial and unreasonable interference with the use and enjoyment of the property of another." *Belanger*, 41 Mass. App. Ct. at 670 n.3 (quoting *Asiala v. Fitchburg*, 24 Mass. App. Ct. 13, 17 (1987)).

the nuisance was one connected with property, but the case does not hold that the connection is required. See *id.* At 286.[61] Plaintiffs allege that Defendants created and supplied and illegal, secondary market in firearms. The "instrumentality" which Plaintiffs allege Defendants controlled is the creation and supply of this secondary market.[62]

Review of the complaint shows that Plaintiffs allege Defendants intentionally and negligently created and maintained an illegal, secondary firearms market. They further allege that this market unreasonably interfered with public rights by (1) significantly interfering with the public safety, health, or peace, (2) producing permanent or long lasting harm and (3) undermining Massachusetts firearms law, making enforcement of those laws difficult or impossible. Compl. pars. 79 & 81.[63] Thus, the complaint alleges sufficient facts to state a claim for public nuisance.[64] To be sure, the legal theory is unique in the Commonwealth but, as previously noted, that is not reason to dismiss at this stage of the proceedings.

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[61] Along similar lines is *Massachusetts v. Pace*, 616 F. Supp. 815, 821 (D. Mass. 1985), which Defendants also cite. In that case, the federal court held that the defendants did not participate to a substantial extent in the release of chemicals into the ground when the defendants only transported the chemicals to a chemical was waste reclamation facility, which did release the chemicals into the ground. Thus, the nuisance in *Pace* was also of the type connected to property.

[62] In their reply brief, Defendants argue that, in order to exercise control to abate the nuisance, they would have to "identify [all criminals and disarm] them – something neither defendants, nor [Boston] with all its statutory and law enforcement resources can do." This argument misses the point of Plaintiffs' allegations. To exercise control to abate the alleged nuisance, Defendants would have to cease maintaining the illegal secondary market.

[63] Plaintiffs have also alleged that they sustained special or peculiar harm.

[64] In a footnote to their original memorandum, Defendants observe that Plaintiffs have not pled that Boston's Corporation Counsel has initiated this action. Defendants conclude this makes Boston not a proper party. Defs.' Mem. At 21 n.5. Under Chapter 5 of the City of Boston Code, the city's law department is placed under the charge of the Corporation Counsel. The ordinance states in pertinent part that the Corporation Counsel "shall, subject to the direction of the Mayor, institute any suit or proceeding in behalf of the City which he shall deem the interest of the City requires; shall by himself or by his assistants in the Law Department appear as Counsel in all suits, actions, or prosecutions which may involve the rights or interests of the City[.]" City of Boston Code, Ordinances, c.5, § 5-8.1(1985 & 1999 update). Defendants cite no cases or rule of civil procedure, and present no argument as to why the quoted language from the city ordinance requires that the city plead that it has satisfied the ordinance, and why failure to do so requires dismissal. Plaintiffs do not address this issue in their opposition memorandum, and Defendants do not raise it in their reply memorandum or their sur-reply memorandum. See Mass. R. Civ. P. 9(a). Defendants thus have not pressed this issue.

Negligent Distribution and Marketing

Defendants argue that Plaintiffs' claim for negligent distribution and marketing fails because, as a matter of law, Defendants did not owe Plaintiffs a duty to protect from the criminal acts of third parties.[65] Here, too, Defendants misconstrue the complaint. Plaintiffs do not allege that Defendants were negligent for failure to protect from harm but that Defendants engaged in conduct the foreseeable result of which was to cause harm to Plaintiffs.[66]

To recover for negligence, a plaintiff must show that the defendant owed the plaintiff a legal duty; the defendant breached that duty and that this breach actually and proximately caused injury. *Davis v. Westwood Group*, 420 Mass. 739, 742-43 (1995). The existence of duty is a question of law. *Id.* At 743; *Bergendahl v. Massachusetts Elec. Co.*, 45 Mass. App. Ct. 715, 722-23 (1998), *rev. denied*, 428 Mass. 1111, *cert. denied*, 120 S. Ct. 326 (1999). "In determining whether the law ought to provide that a duty of care is owed by one person to another, we look to existing social values and customs, and appropriate social policy. A basic principle of negligence law is that ordinarily everyone has a duty to refrain from affirmative acts that unreasonably expose others to a risk of harm." *Yakubowicz v. Paramount Pictures Corp.*, 404 mass. 624, 629 (1989) (citation omitted).

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[65] Defendants' argument is framed in terms of the first element of a negligence action, the existence of a duty of care. However, the penultimate of this portion of their memorandum speaks of misuse of a firearm as being a bar to recovery. Defs.' Mem. at. 34. This confronts the proximate causation analysis, which is an issue distinct from whether there exists a duty of care. To the extent Defendants argue that liability is barred by the intervening acts of third persons, such an argument fails in Massachusetts if the third person's acts could have been foreseen, which is what Plaintiffs allege. See *Poskus v. Lombardo's of Randolf, Inc.*, 423 Mass. 637, 639-40 (1996); *Jesionek v. Massachusetts Port Auth.*, 376 Mass. 101, 105 (1978); *Gidwant v. Wasserman*, 373 Mass. 162, 166-67 (1977).

[66] Plaintiffs allege that Defendants are jointly and severally liable. Compl. at par. 87. Defendants make no argument against joint and several liability.

Taking Plaintiffs' allegations as true, Defendants have engaged in affirmative acts (i.e., creating an illegal, secondary firearms market) by failing to exercise adequate control over the distribution of their firearms. Thus, it is affirmative conduct that is alleged—the creation of the illegal, secondary firearms market. The method by which Defendants created this market , it is alleged, is by designing or selling firearms without regard to the likelihood the firearms would placed in the hands of juveniles, felons or others not permitted to use firearms in Boston. Further, according to the complaint, Defendants did this knowing that the firearms would end up in that market, and, depending upon precisely that result, realizing that Plaintiffs would be harmed. Taken as true, these facts suffice to allege that Defendants' conduct unreasonably exposed Plaintiffs to a risk of harm.[67] Worded differently, the Plaintiffs were, from Defendants' perspective, foreseeable plaintiffs.[68] Thus, the court need not decide whether Defendants owed a duty greater than the basic duty.[69,70]

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[67] The complaint alleges alternatively that Defendants were negligent in failing to inhibit the formation of the secondary market. Failing to prevent an event from happening, if one knows it will occur absent intervention and one desires it to occur, may be the functional equivalent of an affirmative act. However, the court need not decide this issue, as a complaint should not be dismissed "if it would support relief on any theory of law." *Whitinsville Plaza*, 378 Mass. at 89 (citations omitted; emphasis in original).

[68] Foreseeability is sometimes considered an element of the ascertainment of the existence of a duty of care. *Whittmaker v. Saraceno*, 418 Mass. 196, 198-99 & n.3 (1994).

[69] The legislature and the Attorney General have, as noted, established statutory and regulatory rules to prevent the harm Plaintiffs allege. This may be evidence of "existing social values and customs, as well as [] appropriate social policy," *Davis*, 420 Mass. at 743, from which a different duty can be inferred. The court does not reach this issue. Cf. *Tobin v. Norwood Country Club, Inc.*, 422 Mass. 126, 133 (1996) ("Determinations of public policy, especially when a statute 'undoubtedly' identifies such a policy, are highly relevant to [the initial inquiry, whether the defendant owed a duty of care]."); *Michnik-Zilberman v. Gordon's Liquor, Inc.*, 390 Mass. 6, 11 (1983) ("Once a vendor places liquor in the hands of a minor, it may set in motion the very harm which the Legislature has attempted to prevent.").

[70] Plaintiffs also allege that Defendants were negligent in marketing their products by failing to educate consumers regarding the risks of firearms, representing that purchase of a firearm will enhance household security, representing that firearms are safe and representing that families could safely store firearms unlocked and accessible to minor or mentally impaired persons, causing additional harm to Plaintiffs. Compl. at par. 89. Defendants make no argument relative to these allegations, and the court does not address them.

Breach of Warranty—Defective Design

The complaint alleges that Defendants breached the implied warranties of merchantability and of fitness for a particular purpose, by way of defective design, by failing to incorporate certain devices.

In Massachusetts, a warranty that goods are merchantable is implied in every sale of goods.[71] G.L. c. 106, § 2-314. Defendants assert two reasons why this count should be dismissed. They argue (1) knowing and deliberate misuse is a complete bar to recovery and (2) Plaintiffs are not in privity with Defendants.[72]

Under the doctrine of unreasonable use, "a plaintiff's knowing and unreasonable use of a defective product is an affirmative defense to defendant's breach of warranty." *Colter v. Barber-Greene Co.*, 403 Mass. 50, 60 (1998). Apart from this affirmative defense, as an element of their claim Plaintiffs must prove that the time of their injuries Defendants' products were being used " in a manner that the defendant seller, manufacturer, or distributor reasonably could have foreseen." *Allen v. Chance Mfg. Co.*, 398 mass. 32, 34 & n.1 (1986). See *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 357 (1983). As to the latter, Plaintiffs have put forth sufficient allegations to survive this motion to dismiss. See Compl. at pars. 93 & 95.[73] As to the former, the affirmative

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[71] Defendants do not argue that the implied warranty of fitness for a particular purpose does not apply. G.L. c. 106, § 2-315.

[72] As these are the only grounds for dismissal of this count urged by Defendants, the court confines its discussion to these two issues. In their reply brief, Defendants for the first time appear to raise the argument that the guns were not "defective." See Defs.' Reply Mem. at 27. The argument, in its entirety, is as follows: "When a product is deliberately functioned [sic] to accomplish a known and intended result, the product is not defective and liability is not extended to the manufacturer." Defendants reference a footnote in their original memorandum. That footnote argues that misuse of firearm constitutes a superseding cause, negating a finding of proximate causation. Defs.' Mem. at 27 n.9. Thus, Defendants present no argument as to why the firearms were, as a matter of law, not "defective" under warranty law. The court notes that the complaint contains sufficient allegations that Defendants' products were defective. See, e.g., Compl. at par. 94. See *Commonwealth v. Johnson Insulation*, 425 Mass. 650, 660-61 (1997) (discussion of breach of implied warranty of merchantability).

[73] While these paragraphs of the complaint allege that Defendants reasonably could have expected that Plaintiffs would have been injured by Defendants' defectively designed guns (and thus speaks to the

defense, Defendants carry the burden of proof, and they have not shown that, on the facts alleged, Plaintiff's cannot prove any set of facts which would entitle them to relief.[74] See *Nader*, 372 Mass. at 98.

As to Defendant's privity argument, G.L. c. 106, § 2-318 provides in relevant part:

> Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume of *be affected by the goods.*

(emphasis added).

On its face, then, the relevant statute does not require privity between Plaintiffs and Defendants in this case, as Plaintiffs allege that Defendants could reasonably have expected (or actually knew) that Plaintiffs would be harmed by their goods. See *Jacobs v. Yamaha Motor Corp., U.S.A.*, 420 Mass. 323, 328 (1995) (explicit language of G.L. c. 106, §2-318, invalidates claim that privity is required for plaintiff to sue motorcycle manufacturer). The decision in *Sebago, Inc.*, 18 F. Supp. 2d at 99, is not to the contrary. *Sebago, Inc.*, predicting Massachusetts law, read *Jacobs* as being limited to "consumer goods," and ruled that privity is required when a contract-based warranty claim arises from a commercial transaction. *Id.* In this case, Defendants do not argue that the

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foreseeability of harm rather than foreseeability of use), the facts alleged in the complaint, if proven, would show that defendants reasonably could have foreseen the use to which their products were put. See, e.g., Compl. at pars. 53-55 (alleging, in substance, that Defendants reasonably should have known that their guns were being used by the secondary, illegal market to inflict harm by gun violence).

[74] The court acknowledges that the breach of warranty by defective design claim seeks to apply warranty law in a way unlike past cases. The typical breach of warranty case involves allegations that the defendant's product, used in a reasonably foreseeable way, harmed the plaintiff-user. In such a situation, the defendants may assert the affirmative defense that the plaintiff acted unreasonably toward a product he knew to be defective and dangerous. Here, however, Plaintiffs were not the users, a difference which raises novel questions of law regarding the affirmative defense of unreasonable use. These questions are better addressed in the context of a factual record. Cf. *Bolduc v. Colt's Mfg. Co.*, 968 F. Supp. 16, 18 (D. Mass 1997) (deciding, at summary judgment, that plaintiff's decedent's deliberate misuse of firearm barred recovery on negligent design claim).

firearms were purchased through commercial transactions. See also *Thayer v. Pillsburgh-Corning Corp.*, 45 Mass. App. Ct. 435, 440, *rev. denied* 428 Mass. 1109 (1998) (no privity required for worker injured by asbestos to sue asbestos manufacturer).

Breach of Warranty—Failure to Warn

Plaintiffs also allege that Defendants breached the implied warranties of merchantability and fitness for a particular purpose by failing to provide adequate warnings or instructions. Defendants argue that this count must be dismissed because Plaintiffs lack privity and because the dangers posed by firearms are "open and obvious." The court has already addressed the privity argument in the context of the count alleging defective design.

A product's manufacturer has a duty to warn foreseeable users of latent dangers in the product's normal and intended use. *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 23 (1998); *Carey v. Lynn Ladder & Scaffolding Co.*, 427 Mass. 1003, 1003 (1998); *Bavuso v. Caterpillar Indus., Inc.*, 408 Mass. 694, 699 (1990). There is no duty to warn, however, where the danger is obvious or where the plaintiff appreciated the danger substantially to the same extent as a warning would have provided. *Carey*, 427 Mass. at 1004.

In this case, Plaintiffs allege that Defendants failed adequately to warn or instruct, e.g., as to risks that children could obtain access to the firearms, that a gun's chamber may contain a round of ammunition, as to proper storage of guns to prevent suicide, accidents, or theft, that guns can be fired with the ammunition magazine removed and without pulling the trigger, that the guns may not contain safety devices, that a gun in the home dramatically increases rather than decreases risk of injury to household members, that training is needed to handle guns safely and that improperly stored guns could be

stolen. Compl. at par. 103. This failure to warn, Plaintiffs allege, was the proximate cause of Plaintiffs' injuries. *Id.* at par. 106.[75]

Defendants reference no case where on a motion to dismiss for failure to state a claim it was decided that, as a matter of law, the danger was obvious or that it was appreciated to the same extent as if a warning had been supplied. See *Carey*, 427 Mas. at 1003 (summary judgment); *Bavuso*, 408 Mass. at 694 (jury trial); *Bell v. Wysong & Miles Co.*, 26 Mass. App. Ct. 1011, 1012 (1988) (jury trial); *Killeen v. Harmon Grain Prods., Inc.* 11 Mass. App. Ct. 20, 21 (1980) (directed verdict for defendant); *Wasylow*, 975 F. Supp. at 378 (summary judgment); *Bolduc v. Colt's Mfg. Co.*, 968 F. Supp. 16, 17 (D.Mass. 1997) (summary judgment).[76]

Defendants do not argue that they have no duty to warn of any of the dangers presented by firearms. The court does not have before it any evidence of the warnings that were provided, from which the court could determine whether, as a matter of law, adequate warnings were provided. Defendants are, in essence, asking this court to take judicial notice that the dangers posed by firearms discussed in paragraph 103 of the complaint are so obvious (or were actually appreciated) such that warnings or instructions were not required. This is contrary to Plaintiffs' allegations, and the court declines to do so.

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[75] Paragraph 106 of the complaint mentions by name only the implied warranty of merchantability. It does, however, reference G.L. c. 106 § 2-315, the implied warranty for fitness for a particular purpose.

[76] *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107, 111 (D. Mass. 1983), was a case involving a handgun decided on a motion to dismiss under Fed. R. Civ. P. 12(b)(6). That case does not appear to have involved allegations of failure adequately to warn. Applying what it perceived to be Massachusetts law as it then existed, the federal district court decided that the .38 caliber Llama automatic pistol was not inherently defective and declined to certify the issue to the Supreme Judicial Court. *Id.* & n.5. The allegations in *Mavilia* were different from Plaintiffs' allegations in this case.

Negligence

In this count of their complaint, Plaintiffs allege that Defendants negligently designed, marketed, distributed and sold their products. Compl. at par. 111. Inasmuch as this states a claim for negligent distribution and marketing, it is duplicative of Count II and is dismissed. However, this count states a claim not previously stated, for negligent design.

"A manufacturer is under a duty to design its product with reasonable care to eliminate avoidable dangers. The manufacturer must anticipate the environment in which the product will be used and design against reasonably foreseeable risks attending the product's use in that setting. The duty is placed on the manufacturer because it stands in a superior position to recognize and cure defects in its product's design." *Simmons v. Monarch Mach. Tool Co.*, 413 Mass. 205, 211 (1992) (citations omitted).

In this case, Plaintiffs have alleged that Defendants were negligent in their design of firearms by failing to include adequate safety devices and falling to include adequate warnings. Such a claim is distinct from the breach of warranty counts. *Uloth v. City Tank Corp.*, 376 Mass. 874, 875 (1978). See J.R. Nolan & L.J. Sartorio, Tort Law & 307 (2d ed. 1989 & 2000 Supp.) Because Defendants have only argued for dimissal of this count on grounds that it is duplicative, the court need not test the sufficiency of the allegations further.

In sum, the court dismisses Count V to the extent it alleges negligent distribution and marketing, but denies Defendants' motion as to the claim for negligent defsign.

Unjust Enrichment

In the final count of the complaint, Plaintiffs allege that Defendants have been unjustly enriched because they have "reaped substantial profits and gains" from their conduct, causing Plaintiffs' harm.

A claim that a party has been unjustly enriched seeks the equitable remedy of restitution. *Keller v. O'Brien*, 425 Mass. 774, 778 & n.8 (1997). Restitution is appropriate when the circumstances of receipt or retention of a benefit "are such that, as between the two persons, it is unjust for [one] to retain it." *Keller*, 425 Mass. at 778 (quoting *National Shawmut Bank v. Fidelity Mut. Life Ins. Co.*, 318 Mass. 142, 146 (1945)). "A person confers a benefit upon another if he... in any way adds to the other's security or advantage." 9 Mass. Jurisprudence § 2:5 (1993) (citing Restatement of Restitution § 1, cmt. b.).

Here, Plaintiffs allege that they have conferred a benefit upon Defendants by paying for the costs of the harm caused by Defendants' conduct ("externalities"). See *White*, 97 F. Supp. 2d at ---, 2000 WL 664176, at *10. Plaintiffs further allege that Defendants undertook the alleged wrongful conduct for the purpose of increasing their profits. Thus, Plaintiffs state a claim for unjust enrichment.

CONCLUSION

The parties in this case have pressed upon the court public policy considerations which they believe the court should consider. Defendants, in urging the court to look behind the allegations in the complaint, which they describe as "politicized rhetoric and conclusory allegations," emphasize that they are not the ones "truly responsible" for the harm. Plaintiffs put forth examples of the devastating effects of gun violence. It is not this court's function, on a motion under Rule 12(b)(6), to decide whether public policy requires that the complaint proceed or that it be dismissed. Rather, the court's inquiry is limited to deciding whether the complaint fails to state a claim upon which relief can be granted.

ORDER

For the foregoing reasons, Defendants' motion to dismiss is **ALLOWED** as to Count V to the extent that count alleges negligent distribution and marketing. Defendants' motion to dismiss is DENIED as to Count V to the extent it alleges negligent design. As to all other counts, the motion to dismiss is DENIED.

Margaret R. Hinkle
Justice of the Superior Court

DATED: July 13, 2000

EXHIBIT B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DENNIS W. ARCHER, et al

Plaintiffs,

v.

ARMS TECHNOLOGY, INC., et al.

Defendants.

Case No. 99-912658 NZ
Hon. Jeanne Stempien

and

EDWARD H. MCNAMARA, et al.

Plaintiffs,

v.

ARMS TECHNOLOGY, INC., et al.

Defendants.

Case No. 99-912662 NZ
Hon. Jeanne Stempien

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OPINION

EXHIBIT B

This matter is before the court on Defendants' Motion for Summary Disposition. Plaintiffs filed suit individually as well as on behalf of the citizens of Wayne County and the City of Detroit. Plaintiffs' allege public nuisance and negligence. Defendants manufacture, distribute and sell guns. Defendants move for summary disposition pursuant to MCR 2.116(C)(8).

A motion for summary disposition under MCR 2.116(C)(8) questions whether a claim is so clearly unenforceable as a matter of law that no factual development could justify recovery. It tests the legal sufficiency of a claim based on the pleadings alone. Lowman v Karp, 190 Mich App 448 (1991). "Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied." Atkinson v Farley, 171 Mich App 784 (1988). Upon review of a (C)(8) motion, the factual allegations in the complaint are to be accepted as true, together with any inferences which can be reasonably drawn therefrom. Mitchell v General Motors Acceptance Corp, 176 Mich App 23 (1989). However, it is important to note that the mere statement of conclusions unsupported by allegations of fact, will not suffice to state a cause of action. Golec v Metal Exchange Corp. 208 Mich App 380, 382 (1995)

For the reasons stated below, Defendants' motion is granted in part and denied in part.

I. Negligence Claim

To establish a *prima facie* case of negligence the plaintiff must prove: (1) that the defendant owed a duty to plaintiff; (2) that the defendant breached that duty; (3) that

the defendant's breach of duty was a proximate cause of the plaintiff's damages; and (4) that the plaintiff suffered damages. Krass v Tri-County Security, Inc, 233 Mich App 661 (1999). Plaintiffs' negligence claim fails to state facts sufficient to establish duty, therefore, this claim must fail.

THE ISSUE OF DUTY

Duty is a necessary element in establishing a negligence cause of action. The issue of duty is one of law for the courts to decide. Krass, supra; Tame v AL Damman Co, 177 Mich App 453, 455 (1989). In determining whether a duty exists, the courts typically look to different variables, including foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct and the injury, moral blame attached to the conduct, policy of preventing future harm, the burdens and consequences of imposing a duty and the resulting liability of the breach. Krass, supra at 668. Only after finding that a duty exists may the factfinder determine, whether in light of the particular facts of the case, there was a breach of duty. Murdock v Higgins, 454 Mich 46, 53 (1997).

Generally, duty is any obligation that the defendant has to plaintiff to avoid negligent conduct. Simko v Blake, 448 Mich 648,655 (1995). In Boss v Glaser, 220 Mich App 183, 186 (1996), the court summarized the law on duty as follows:

> Duty Is a legally recognized obligation to conform to a particular standard of conduct toward another, Chivas v Koehler, 182 Mich App 467,475; 453 NW2d 264 (1990). ***Duty comprehends whether the defendant Is under any obligation to the plaintiff to avoid negligent conduct, it does not include the nature of the obligation.*** Moning v Alfono, 400 Mich. 425, 437 254 NW2d 759 (1977). If the

> court determines as a matter of law that a defendant owed no duty to a plaintiff, summary disposition is properly granted under MCR 2.116(C)(8). Dykema v Gus Macker Enterprises, Inc. 196 Mich App 6, 9; 492 NW2d 472 (1992). (Emphasis added)

It is important to note that the question of duty turns on the relationship existing between the actor and the injured. Krass, supra at 668. Plaintiffs' complaint alleges that Defendants manufacture and distribute guns in a manner which ensures that guns will flow into the "illegal secondary market." Plaintiffs maintain that they are injured by the criminal misuse of the guns from this illegal market.

It is well accepted that there is no duty to protect another person from the criminal acts of a third party in absence of special circumstances. Krass, supra; Williams v Cunningham Drug Stores, Inc. 429 Mich 495, 498-499 (1988). Where there is a duty to protect an individual from a harm by a third person, that duty arise arises from a "special relationship" either between the defendant and the victim, or the defendant and the third party who caused the injury. Such a special relationship must be sufficiently strong to require a defendant to take action to benefit the injured party. Murdock, supra at 54.

Defendants' argue that there are no allegations or facts to support the conclusion that there is an existing special relationship between the Defendants and the Plaintiffs or the third party criminal actors. This court agrees. Plaintiffs point to the general duty that Defendants have to use care in the operation of their business, i.e. the distribution of guns. No one would argue against the notion that a manufacturer, wholesaler or retailer has a duty to avoid negligent conduct. But, the duty is owed to their consumers with whom there is unquestionably a relationship. Moning v Alfono, 400 Mich 425, 439 (1977). Plaintiffs,

however, do not bring this suit as a consumer.

The court also notes that no special circumstances exist between these Plaintiffs and these Defendants such that a duty should be imposed. The present case does not illustrate a special relationship, where one entrusts himself to the protection of another and relies upon that person to provide a place of safety, e.g., landlord-tenant innkeeper-guest, common carrier-passenger. Williams, supra; Prosser & Keeton. § 56, p. 383. Nor is this a case of special circumstance where the defendant had knowledge of the assailant's dangerous propensities or control of the premises. Samson v Saginaw Professional Bldg. Inc. 393 Mich 393, 419-420 (1975). Small, "The Landowner/Occupier's Duty to Prevent Assaults by Third Parties", 68 Mich B J 32 (1989). It is also not a case where the custodial circumstances involved imposed a duty to protect the individual against his own propensities. Hickey v Zezulka, 489 Mich 408 (1992); York v Detroit (After Remand), 438 Mich 744 (1991). Finally, unlike many of the other gun litigation cases, this is not a products liability claim where an innocent bystander was injured by a defective product. Piercefield v Remington Arms Co Inc, 375 Mich 85 (1965). MacPherson v Buik Motor Co, 217 NY 382; 111 NE 1050 (1916).[1]

In response to Defendants' argument, Plaintiffs assert that they are not required to establish a special relationship because the Defendants took actions which created or

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[1]For example, in a recent opinion Judge Donald C. Nugent ruled in favor the City of Cleveland denying defendant gun manufacturer's motion for summary disposition. However, that case is primarily a products liability claim under the Ohio statute, thus is not comparable to the case before this court. *See*, Mayor Michael R. White, et al, v Smith & Wesson, et al. unpublished opinion of the United States District Court, Northern District of Ohio, Eastern Division, decided March 14, 2000 (Docket No. 1:99CV1134).

increased the risk of harm. It is Plaintiffs' position that they need not demonstrate a special relationship to establish duty where the damages are caused by a defendant's misfeasance. Plaintiffs cite Murdock v Higgins, supra, 54 (1997) and Williams v Cunningham Drugs, supra, 498 -99 (1988) as support for their contention.[2] Contrary to Plaintiffs' assertion, these case do not support their position. Instead, both cases clearly hold that a special relationship is required to establish a duty to protect an individual from harm by a third person. Murdock, supra at 54; Cunningham, supra at 499.[3] The Cunningham court only discusses the Issue of misfeasance and nonfeasance with respect to determining the standard of care or conduct. *See* Cunningham, supra at 498.[3] The standard of conduct that must be employed by a defendant is only an issue once a duty is established. As noted earlier, "duty comprehends whether the defendant is under any obligation to the plaintiff to avoid negligent conduct; it does not include the nature of the obligation." Krass, supra 668. As such, the court finds this argument to be without merit.

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[2]The Plaintiffs also rely Ross, supra to support their claim. In Ross, the court found a sufficient relationship between the defendant actor who supplied a gun to his son when defendant knew or should have known that his son would use the firearm in a long standing feud with a neighbor. Ross found that a sufficient relationship between the parties existed. If Ross has any application to gun litigation, it would be in a case factually similar to Ceriale v Smith & Wesson Corp, unpublished opinion of the Circuit Court of Cook County, Illinois, decided November 30, 1999 (Docket No 99L5628) wherein the plaintiffs were victims of gunshot wounds from illegally sold weapons. The plaintiffs in Ceriale prevailed on a motion for summary disposition.

[3]The Murdock court found no duty existed because there was no special relationship between the plaintiff and defendant such that the defendant owed the plaintiff a duty to protect him from harm by a third party. In contrast, the Cunningham court found that a duty existed to protect based on the invitor-invitee relationship between the parties, but the standard of conduct was not as extensive as the plaintiffs claimed.

A review of the pleadings leads to the conclusion that the actual duty advanced by Plaintiffs is essentially one of crime prevention. According to Plainfiffs' complaint, the Defendants manufacture, sell a distribute guns in a manner that ensures that they will ultimately be purchased by criminals youth or otherwise irresponsible persons for use in the commission of crime. (See Plaintiffs' complaint, p. 3). Plaintiffs maintain that Defendants negligently or intentionally create and maintain the illegitimate secondary gun market by way of open illegal sales[4] or through a process they have termed "willful blindness." (See Plaintiffs' complaint, ¶¶ 5, 6). Plaintiffs assert that after these guns are diverted into the illegal secondary market to unauthorized buyers, they are then used in the commission of crime which has caused Plaintiffs and their citizens harm in the form of loss of life, serious injury, increased law enforcement costs, health care costs, and other damages. (pp 2, 7, 8). It becomes clear, after reading Plainfiffs' complaint, that the crime that results from the use of guns in the illegal secondary market causes the harms delineated. Crime prevention, however, is simply not a cognizable legal duty owed by these Defendants to these Plaintiffs.[5] Based on the foregoing, the Plaintiffs have failed to establish an existing duty.

A determination of whether a duty exists may include an analysis of other factors

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[4]Defendants argue that Plaintiffs fail to plead an illegal sale. Instead, Plaintiffs' complaint alleges numerous "straw man sales." These sales, however, are sufficient evidence, though circumstantial, that illegal sales are made. Circumstantial evidence may be used to support a fact. S 112nd 3.10. If this is accepted as true for this motion, it is evidence of a pattern. MRE 404(b).

[5]Plaintiffs concede that the Defendants owe no legal duty to prevent crime. See Plaintiffs Response to Supplemental Briefs, p. 14.

in addition to the relationship between the parties. The concept of a duty also includes consideration of the allocation of losses arising out of human behavior. The court may consider the burdens and consequences of imposing a duty and the resulting liability of finding a breach of that duty. Krass, supra at 668. In this case, a finding of an existing duty would mean that each single breach is actionable by these Plaintiffs. Thus, a negligent act or omission in the sale of a single firearm would subject Defendants to liability for Plaintiffs' damage claims absent a special relationship.

II. Public Nuisance

Plaintiffs' complaint also alleges a count of public nuisance. At the outset it is important to note that Defendants assert that Plaintiffs' claim of public nuisance is dependent upon a finding of negligence. According to Defendants, summary disposition of Plaintiffs' negligence claim would necessitate summary disposal of this claim. Although negligence can be the cause, a constituent or a factor of nuisance, it is merely one type of conduct which can give rise to a nuisance.

> Thus, liability for nuisance does not depend upon the existence of negligence, except where such nuisance is one based upon negligence in which circumstances the nuisance is sometimes referred to as a "qualified nuisance," ***and, with this exception in mind, negligence is not an essential or material element of a cause of action for nuisance, and need not be pleaded or proven, especially where the thing complained of is*** a nuisance per se, or ***a public nuisance*** ... 58 Am Jur 2d, Nuisances , §82, p 734. (Emphasis added).

> Negligence is not necessary to nuisance, though many wrongs thus denominated are made so through the defendants omitting to perform a duty ... Awad v McColgan, 357 Mich 386 (1959), overruled on other grounds by Mobil Oil Corp v Thorn 401 Mich 306 (1977).

Instead, it is said that where the origin of the complaint is negligence then negligence needs to be proven 58 Am Jur 2d, Nuisance, § 82, p 735. However, in the present case, the origin of the public nuisance complaint also lies in Plaintiffs' allegation of willful misconduct on behalf of the Defendants and not only negligence. As such, the court finds that Plaintiffs' public nuisance claim does not depend on a finding of negligence.

Restatement of Torts.

Public Nuisance

(1) A public nuisance is an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right. Restatement of Torts, 2d at § 821B.

A public nuisance is an unreasonable interference with a common right enjoyed by the general public. Cloverleaf Car Company v Phillips Petroleum, 213 Mich App 186,190 (1995). Therefore, a complaint alleging public nuisance must allege and present supporting facts of both an unreasonable interference and a common right. The term

unreasonable interference includes conduct that: (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. Cloverleaf, supra *citing* Wagner v Regency Inn Corp, 186 Mich App 158, 163 (1990).

Defendants assert a number of reasons why Plaintiffs' complaint fails. First, Defendants note that the typical nuisance case generally involves the conditions of property and not products. Detroit Board of Education v Celotex Corporation, 196 Mich App 694, 711 (1993), *app den*, 4, Mich 908 (1993). Plaintiffs attempt to distinguish their case on the basis that their claim is one of public nuisance and not private nuisance. This distinction is determinative.

While the court could not find cases alleging claims of public nuisance for products, it also could not find any cases which disavow such a claim. At its most basic level, claims such as the one alleged by Plaintiff may be properly termed to be a "public nuisance." Prosser and Keaton note that:

> A public or common nuisance, on the other hand, is a species of catch-all criminal offenses, consisting of an interference with the rights of the community at large. Prosser, Torts (5th ed), § 86, p 618.

The authors further note that:

> Public nuisances may be considered as offenses against the public by either doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires, Id. *citing* Russel, *Crimes & Misdemeanors*, (8th ed, 1923) p1691.

This would be consistent with McDonell v Brozo, 285 Mich 38. 43 (1938) which holds that nuisance involves not only a defect, but threatening or impending danger to the public, or if a private nuisance, to the property rights or health of persons. As the McDonell court notes "running through all of these cases is the element of wrongful, continuous, impending danger to the lives, limbs, or health of the public, or to the legitimate property or personal rights of private persons peculiarly subject to danger." (emphasis added) McDonell, supra *citations omitted*. A fair reading of these sources suggests that claims of public nuisance(s) do not exclusively involve real property as the right claimed to be disturbed or as the condition causing the disturbance.[6] Interestingly, Prosser and Keaton later note:

> Then, there are those activities that are "public nuisance' ***because the defendant is engaged in a continuing course of conduct that is calculated to result in physical harm or*** **economic loss to so many persons** as to become a matter of serious concern. (Emphasis added). Prosser, Torts (5th ed), § 90, pp 651 -652.

This is exactly the essence of Plaintiffs' complaint.

Specifically, Plaintiffs maintain that the "Defendants employ a careful strategy which couples manufacturing decisions, marketing schemes, and distributions patterns with a carefully constructed veil of deniability regarding particular point of sale transactions." This mechanism is termed by Plaintiffs as "willful blindness" and allows for and helps to divert guns into the "illegal secondary market" causing substantial and ongoing harm to

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[6]Examples referenced in the Comments to the Restatement include shooting of fireworks, indecent exhibitions, loud and disturbing noises. These are acts of misfeasance that are not necessarily related to the use of land.

Plaintiffs' citizens in the form of fear of crime and danger to persons and property, loss of life, and significant costs to the County and City itself to enforce the laws, arm its police force and treat victims of firearm crime. (See Plaintiffs' complaint ¶¶ 2-8, 107, 123, 124). Plaintiffs' complaint further states that it has a "clearly ascertainable right to abate conduct that perpetuates this nuisance" and that "stemming the flow of firearms into the illegitimate firearm market will help to alleviate this problem, will save lives, prevent injuries" and make the City and County a safer place to live. (See Plaintiffs' complaint, ¶¶ 126, 127). Defendants rebut, arguing that they comply with a complex set of federal and state rules and regulations regarding the manufacturing, distribution and sale of weapons. But, as Plaintiffs note, the conduct creating the public nuisance may be entirely lawful. Rental Property Owners Association v City of Grand Rapids, 455 Mich 246, 246-65 (1997).

Plaintiffs' nuisance case is not nuisance *per se*, but nuisance *per accidens* or nuisance in fact.[7] In other words, the guns in this case are not in and of themselves a nuisance, nor are the Defendants' businesses, but they are alleged to be a nuisance because of the manner in which they are operated, and by which firearms are manufactured and distributed. (See Plaintiffs' complaint, ¶ 2).

In Michigan, our courts have held that the appropriate remedy for a nuisance *per accidens* is regulation. Cullum v Topps-Stillman's Inc, 1 Mich App 92, 97 (1965) *citing* Adams v Kalamazoo Ice Fuel Company, 245 Mich 261, 264 (1938). In this case, there are existing federal and state regulations already addressing the manufacture, sale and

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[7]This is further supported in 58 Am Jur 2d Nuisance § 165 (A business that is itself legal cannot be negligence per se, and, generally, a legitimate industry is not a nuisance).

distribution of firearms and ammunition More importantly, however, the state legislature has specifically prohibited regulation of firearms and ammunition. MCL 123.1102 provides:

> A local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or ***regulate in any other manner*** the ownership, registration, ***purchase, sale, transfer, transportation, or possession*** of pistols or other firearms, ammunition for pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state. (Emphasis added).

It is important to note, however, that regulation is not the only available remedy. The Cullum court notes that abatement is appropriate in cases where regulation cannot be made. Cullum, supra at 97. The Michigan court recognized that abatement is not synonymous with regulation.

Although Plaintiffs have maintained that they do not seek abatement (even in the form of injunctive relief), Plaintiffs clearly seek reimbursement for the costs associated with the abatement of the nuisance allegedly caused by Defendants. This is a type of abatement. City of Evansville v Kentucky Liquid Recycling, Inc, 604 F2d 1008 (CA 7, 1979); United States v Illinois Terminal Railroad Co, 501 F Supp 18 (ED Mo 1980). To the extent that injunctive relief and/or regulation is not requested or permissible, the remaining question is whether Plaintiffs may maintain their cause of action seeking only monetary damages.

MUNICIPAL COSTS RECOVERY RULE

Defendants contend that Plaintiffs may not recoup municipal costs as damages. As such, Defendants argue that Plaintiffs claim fails for want of recoverable damages.

In District of Columbia v Air Florida Inc, 750 F2d 1077, 1080 (DC Cir 1984), the court found that:

> The general common-law rule in force in other jurisdictions provides that, absent authorizing legislation, "the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service." (Citations omitted)

The court further notes that "we are especially reluctant to reallocate risks where a governmental entity is the injured party ... it is within the power of the government to protect itself from extraordinary emergency services by passing statutes or regulations that permit recovery from negligent parties." Air Florida, supra. Based on this statement, the Defendants maintain that the damages requested are not allowable.

However, there is authority for the proposition that public entities may be allowed damages for the costs of abating public nuisances. In City of Flagstaff v Atchison, Topeka & Santa Fe, 719 F2d 322, 324 (CA 9, 1983) the court notes that governmental entities have been allowed to recover the cost of its services where it is authorized by statute or regulation and in cases where the government incurs expenses to protect its own property. Government entities have also been allowed to recoup costs when required to effect the intent of federal legislation and where the acts of a private party created a public nuisance which the government seeks to abate. There is no Michigan case which prohibits monetary damages in a public nuisance case. Therefore, the damages sought by Plaintiff are not barred by the municipal cost recovery rule in claims involving allegations of public nuisance.

It is important to note, however, that the court states that:

> These cases fall into distinct, well-defined categories unrelated to the normal provision of police, fire, and emergency services, and none are applicable here. City of Flagstaff, *supra*.

Plaintiffs' complaint asserts damages for loss of life, serious injuries, increased law enforcement costs and health care costs. In a nutshell, Plaintiffs' complaint. ¶ 127, surmises that they have sustained costs to "enforce the law, arm its police force and treat victims of firearm crimes." While it is arguable that some of the damages sought qualify as costs associated with the normal provision of police, fire and emergency services, it cannot be said as a matter of law that no facts could be developed to demonstrate that these costs are beyond normal police, fire or emergency services. It is plausible that Plaintiffs could prove that the costs of the public nuisance constitute a "distinct, well-defined" category unrelated to the normal provision of police, fire and emergency services. City of Flagstaff, supra. As such, summary disposition pursuant to MCR 2.116(C)(8) is inappropriate.

REMOTENESS OF DAMAGES

Defendants also maintain that Plaintiffs' damages are too remote. According to Defendant, the doctrine of remoteness completely bars Plaintiffs' claim as a matter of law. Defendants' remoteness argument is twofold. First, Defendants argue that Plaintiffs' alleged damages for municipal costs are derivative of actual or potential injuries to Plaintiffs' citizens. Defendants argue that because the damages claimed by Plaintiffs are purely contingent on actual or potential injury or harm to third parties and not plaintiffs, the

damages sought are too remote.

It is well accepted that a plaintiff may not recover derivative damages for injuries to third parties. Holmes v Securities Investor Protection Corp. 503 US 258, 112 S Ct 1311, 117 L Ed 2d 532 (1992). Plaintiffs do not debate this well established rule of law, but assert that some of the alleged damages are not derivative. The concept of derivative liability is not always clear, but generally refers to a claim in which the plaintiff seeks damages for a wrong done to the plaintiff that is proximately caused by a wrong done to another. Burchett v RX Optical, 232 Mich App 174,184; 691 NW2d 652 (1999). A common example of derivative liability is that of loss of consortium, which cannot exist without a prior injury to a spouse. Id. Plaintiffs state that there are many instances where a gun is illegally possessed or used and no one but Wayne County or the City of Detroit is injured. As an illustration, Plaintiffs cite examples such as the unlawful gun possession by a juvenile that ends with an arrest before tragedy occurs. Plaintiffs contend that they still incur costs and lose revenues from every shooting, as well as other gun crimes, regardless of whether a citizen is injured.

It is important to note that this motion is based on MCR 2.116(C)(8). The question before the court is whether Plaintiffs' have alleged facts, which if accepted as true state, a cause of action. Mitchell, supra. Defendants contend that Plaintiffs fail to state a cause of action for lack of recoverable damages. If, however, Plaintiffs' factual allegation that they experience harm outside of those incurred by third party citizens is accepted as true, it cannot be said that they fail to state a claim for damages. The test is based on the pleadings alone and Plaintiffs are not required to prove the specific damages incurred at

this stage of the proceedings. Instead, summary disposition is properly granted only if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Simko v Blake, 448 Mich 648, 654 (1995).

Second, Defendants' maintain that Plaintiffs' alleged damages are too remote from the named Defendants' conduct to allow recovery. Defendants assert that the Plaintiffs' damages are caused by the misuse use of guns by non-defendant wrongdoers. This raises an issue of proximate cause. In general, proximate cause is a question of fact for the jury unless reasonable minds would not differ as to whether defendant's breaches of duty were not the cause in fact of plaintiff's injuries or were too insignificantly connected to defendant's breach. Mills v White Castle, 167 Mich App 202, 209 (1988). The rule also applies to public nuisance. *See*, Kinsey v Lake Odessa Machine Products, 368 Mich 666, 670 (1962).

Foreseeability is often times used as a precursor to imposing a duty. However, the concept of foreseeability is also used in describing proximate cause. Whether a described consequence was proximately caused by an act or omission involves an evaluation of causation in fact and the limitations placed on the causal connection, that is, was the consequence reasonably anticipated, or in other words, foreseeable.

The Supreme Court in Buczkowski v McKay, 441 Mich 96 (1992)[8] recognized that

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[8]Defendants relied on Buczkowski in discussing Plaintiffs' negligence claim. The court assumes that Defendants would apply the case to the public nuisance theory, also. The Supreme Court in Buczkowski declined to impose a duty. Its ruling was predicated on an analysis of the relationship of the parties. The Court clearly limited its ruling in two manners. The Supreme Court noted that it was dealing with ammunition as opposed to a firearm. Further, the Court announced it favored the line of cases that

(continued...)

illegal gun sales may foreseeably lead to criminal acts. The Supreme Court distinguished the facts in Buczkowski from cases that recognize a cause of action against suppliers where a gun was misused when the seller violated a state or federal firearm statute.

> In those cases, the courts reason that where a legislature identifies certain classes of people as incompetent to possess weapons, ***it is foreseeable that such persons will commit crimes if allowed weapons in violation of the statute.*** Buczkowski, at pg. 107 (emphasis added).

Reasonable minds could find that the costs incurred by the taxpayers for the apprehension and prosecution of criminals may be reasonably anticipated and, thus, proximately caused by the public nuisance.

It is important to note there may be more than one proximate cause of a plaintiff's damages. Ross, supra, holds that a criminal act following the wrongful supply of a firearm is not, as a matter of law, a superceding intervening event which breaks the chain of causation. Intervening misuse of a firearm may be an issue for the jury. Williams v Johns, 157 Mich App 115, 120 (1987).

It cannot be said that reasonable men would agree that Defendants' willful distribution of firearms into the "illegal secondary market" as alleged by Plaintiffs' complaint was not a proximate cause of Plainfiffs' injury. As such, the damages claimed are matters properly decided by a jury.

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[6](... continued)
refused to impose liability absent a statutory violation. The court noted that the ammunition sale in Buczkowski was not prohibited by the legislature. The opposite is true in Plaintiffs' public nuisance claim.

III. Individual Plaintiffs

MCR 2.201 (C)(5) provides that an officer who sues in his or her official capacity may be described as a party by official title and not by name. It further provides that the court may require the name to be added. Plaintiffs' complaint contains the names of the public officials. The claim of public nuisance is solely for the govemment subdivisions and no cause of action is stated for damages for individuals outside of their capacity to sue on behalf of the public entities.

IV. Conclusion

The court finds that Plaintiffs have failed to state a cause of action on a theory of negligence.

Plaintiffs have stated a cause of action for public nuisance. The factual allegations in the complaint establish that the Defendants are engaged in a continuing and systematic course of conduct that is proscribed by statute and calculated to result in harm and economic loss to the citizens of the City of Detroit and Wayne County. The damages sought are non-derivative economic losses and are recoverable in a public nuisance cause of action.

Defendants' motion for summary disposition is denied in part and granted in part.

MAY 16 2000
DATE

JEANNE STEMPIEN
Circuit Court Judge

EXHIBIT C

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVSION

ANTHONY CERIALE, Special Administrator of the estate of MICHAEL CERIALE, individually and on behalf of a class of similarly situated persons,

Plaintiff,

v. NO. 99 L 5628

SMITH & WESSON CORP., a Delaware Corporation, et al.

Defendants.

OBRELLIA SMITH, Special Administrator of the estate of SALADA SMITH, individually and on behalf of a class of similarly situated persons,

Plaintiff,

v. NO. 99 L 13465

BRYCO ARMS, a California Corporation, et al

Defendants.

STEPHEN YOUNG, Special Administrator of the estate of ANDREW YOUNG, individually and on behalf of a class of similarly situated persons,

Plaintiff,

v. NO. 98 L 6684

BRYCO ARMS, a California Corporation, et al.

Defendants.

EXHIBIT C

ORDER

FACTS / PROCEDURE

The families of Michael Ceriale, Andrew Young, and Salada Smith filed complaints on behalf of their decedents against various firearm manufacturers, distributors, and retail sellers. Their complaints contain similar allegations contending that the defendants "have created and maintained a channel of firearm distribution through which thousands of guns have been funneled to children in the City of Chicago." (Ceriale Complaint, par. 46, Smith Complaint, par. 52; Young Complaint, par. 48) They further allege that the long-term cumulative effect of these practices constitutes a public nuisance that has created a "climate of violence" among the citizens of the City of Chicago. (Ceriale Complaint, par. 88-100, Counts I-III; Young Complaint, par 90-102, Counts I-III; Smith Complaint. par. 94-106, Counts I-III)

Defendants in all three cases have filed their motions to dismiss the public nuisance counts pursuant to 735 ILCS 2-615. The Court decided on June 3, 1999 to consolidate these cases for purposes of resolving this issue. The Court received briefs from the following firearm manufacturers: Navegar, Inc.; Bryco Arms, B.L. Jennings, Inc., Taurus Manufacturing, Inc., Forjas Tauras, S.A., and Phoenix Arms, Smith & Wesson Corp., Sturm, Ruger and Co., Inc., and Colt's Manufacturing, Inc., jointly; Glock, Inc., H&R 1871, Inc., Hi-Point Firearms, Kel-Tec CNC Industries, Inc and Browning Arms Co. jointly. The Court received briefs from the following firearm distributors: B.L. Jennings, Inc., Faber Brothers, Inc., Riley's Inc. and ABN Sports Supply, Inc., a/k/a Ashland Shooting Supplies, jointly. The Court received briefs from the following firearm resellers: Chuck's Gun Shop and Breit & Johnson Sporting Goods, Inc. The remaining defendants have joined in these motions and have elected not to file briefs on this issue.

Defendants' motions contain virtually identical arguments. First, they argue that Illinois courts have uniformly rejected tort theories that would impose liability on firearm manufacturers, distributors, and resellers for the criminal misuse of their products. Second, they argue that as a matter of law, plaintiffs' complaints cannot state a claim for public nuisance. Plaintiffs filed their consolidated response to the defendants' motions. Defendants filed replies in support of their motions.

DECISION

A. Standing

Although not addressed by the panics, the Court will initially address whether plaintiffs have standing to bring a claim for public nuisance against the defendants. The purpose of the doctrine of standing is to ensure that courts are deciding actual, specific controversies and not abstract questions or moot issues. *Glisson v. City of Marion*, 297 Ill. App. 3d 841, 849 (5th Dist. I 998). To have standing, a plaintiff must present an actual controversy between adverse parties, and as to that controversy the plaintiff must not be merely curious or concerned but must possess some personal claim status, or right. Id.

ORDER

Because most public nuisances are a violation of a statute or an ordinance, the general rule is that an action for an injunction or damages can be brought only by a public official. *Village of Wilsonville v. SCA Services, Inc.*, 77 Ill. App. 3d 618 (4th Dist. 1979). However, there are exceptions to this general rule.

A private individual may bring an action for public nuisance where the nuisance causes such individual a special and particular injury distinct from that suffered by him in common with the public at large. *Hoyt vMcLaughlin*, 250 Ill. 442, 447 (1911). *Hoyt* involved a complaint by an owner of rental property who alleged that a nearby tavern operating with an allegedly invalid license constituted a public nuisance Id. at 443-4. The court found that the plaintiff had standing because in addition to the disruption of peace and quiet caused by the tavern to the public at large, the plaintiff also alleged that he suffered monetary damages due to the depreciation in the value of his property and due to the reduction in the amount of rent he could charge his tenants.

In the instant case, the plaintiffs also allege special and particular injuries distinct from that suffered by the public at large. They are bringing wit on behalf of their decedents who were killed as a result of the defendants' alleged conduct.

A Second exception allows for private persons to bring public nuisance claims where it defendants' conduct threatens to disrupt a person's healthful environment. Article XI § 2 of the Illinois Constitution of 1970 states: "Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."Ill. Const. 1970, art XI, § 2. In *Glisson*, the plaintiff asserted that defendant's plans to construct a dam would endanger and threaten certain animal species thereby violating the plaintiff's right to a healthful environment. *Glisson v. City of Marion*, 297 Ill. App. 3d at 843. The court held that Article XI, section 2, of the Illinois Constitution of 1970 created a legally cognizable interest and found that plaintiff had standing to bring his action against the defendant. Id. at 853.

What is meant by the term 'healthful environment' is not entirely clear. However, the court in *Glisson* excerpted certain committee comments regarding Article XI, section 2, of the Illinois Constitution of 1970. A comment under the heading "Public Policy" is particularly helpful and states:

"The Committee selects the word 'healthful' as best describing the kind of environment which ought to obtain. "Healthful" is chosen rather than 'clean', 'free of dirt, noise, noxious and toxic materials' and other suggested adjectives because 'healthful' described the environment in terms of its direct effect on human life while the other suggestions describe the environment more in terms of its physical characteristics."

Glisson v. City of Marion, 297 Ill. App. 3d at 846

Plaintiffs' complaints are replete with factual allegations concerning the effects of defendants' conduct on the plaintiffs individually and the public at large. For example, the

complaints contain statistics concerning the number of homicides committed by juveniles, the number of minors who own guns, and even the percentage of minors who carry their guns to school (Ceriale Complaint, par. 88-100, Young Complaint; par. 90-102, Smith Complaint, par. 94-106) The complaints also state that the number homicides committed by juveniles has more than doubled between 1985 and 1992. (Ceriale Complaint, par. 90; Young Complaint, par 91; Smith Complaint, par. 95) These allegations and others sufficiently assert that the defendants' conduct may be violative of plaintiffs' right to a healthful environment, particularly in terms of the direct effect of that conduct on human life.

Therefore, based on the foregoing, the Court finds that plaintiffs have standing to bring their cause of action for public nuisance against defendants.

A. Defendants' 2-615 Motion to Dismiss Plaintiffs' Public Nuisance Counts

A motion to dismiss for failure to state a cause of action admits all well-pled facts in the complaint and attacks only the legal sufficiency of the complaint. Towner v Board of Education, 275 Ill. App. 3d 1024, 1031 (1st Dist 1995). All well-pled factual allegations must be taken as true. Id. The question presented by a section 2-615 motion to dismiss is whether sufficient facts are contained in the pleadings that, if established, could entitle the plaintiff to relief. Quinn v. Jewel Food Stores, Inc., 276 Ill. App. 3d 861, 864 (1st Dist. 1995). In making this determination, the court is to interpret the allegations of the complaint in the light most favorable to the plaintiff. Id.

Defendants first argue that Illinois courts have rejected, as a matter of law, tort theories that would hold firearm manufacturers, distributors and resellers liable for the criminal misuse of their products. In support of this argument, they have cited several Illinois cases dealing with this issue. *Riordan* v. *International Armament Corp.*, 132 Ill. App. 3d 642 (1st Dist. 1985), *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984), *Linton v. Smith & Wesson*, 127 Ill. App. 3d 676 (1st Dist. 1984) and most recently, *Bubalo and Doffyn v. Navegar, Inc.*, 1998 U.S. Dist. LEXIS 3598 (N.D. Illinois, 1998).

In *Riordan v. International Armament Corp.*, plaintiff alleged that a large number of injuries and deaths resulted from the criminal misuse of firearms. *Riordan v. International Armament Corp.*, 132 Ill. App. 3d 642, 645 (1st Dist. 1985). They further alleged that the criminal misuse of firearms was foreseeable and that the defendants were negligent in marketing the guns without taking precautions to assure that the guns did not get into the hands of persons who had used the handguns in crimes. Id. The plaintiffs contended that the manufacturers and distributors had a duty to determine whether retailers properly screened prospective purchasers so that guns were not sold to persons who would use them for crimes. Id. The court in *Riordan* held that Illinois recognizes no common law duty under negligence and product liability theories upon manufacturers of a non-defective handgun to control the distribution of the product to the, general public. Id. at 646.

Riordan relied upon *Linton v. Smith & Wesson*, 127 Ill. App. 3d 676 (1st Dist 1984). Similarly, *Linton* dealt with allegations concerning the distribution of firearms and the manufacturers' failure to prevent the sale of guns to persons who would misuse them. Id. Again, the allegations in Linton were based on negligence and willful and wanton theories.

Martin Y. *Harrington & Richardson Inc.*, 743 F. 2d 1200, predates the appellate court's ruling in *Riordan*. The Seventh Circuit Court of Appeals was aware of the trial court's ruling when it dismissed plaintiff's complaint. The ruling in *Martin* addresses the issues raised by the trial court in *Riordan* and agrees with the court's conclusions.

Finally, *Bubalo v. Navegar*, 1998 U S. Dist. LEXIS 3598, relies an the *Martin* case and finds that no Illinois case supports plaintiff's public nuisance claim. Accordingly, the District Court declined to recognize the cause of action. *Bubalo v. Navegar*,1998 U.S Dist. LEXIS 3598

However, the Court finds that the allegations presented by the plaintiffs are significantly different than the allegations in either *Riordan* or *Linton*.

In the instant cases, the plaintiffs do not seek to impose a duty upon the defendants based on any of the theories of liability discussed in either *Linton* or *Riordan*. The plaintiffs do not allege that defendants failed to warn the public about the potential dangers of its product. They do not allege that defendants failed to take proper precautions while engaging in an ultrahazardous activity. Nor do they allege that the manufacturers and distributors had a duty to determine if retailers properly screened prospective purchasers.[1] What plaintiffs in the instant cases allege, and which is very clear to this Court, is the following:

1. The defendants' marketing and distribution practices together have, over many years, caused large numbers of handguns to be funneled into an underground market where they become freely available to criminally oriented street gangs, including juveniles,

2. In large cities, such as the City of Chicago, specific ordinances prohibit the sale of firearms within city limits and also prohibit minors from possessing them;

3. The defendants are aware of these city ordinances and the underground market. They also know that the weapons they design and distribute are bought and sold in this market and eventually fall into the hands of minors;

4. In an effort to circumvent the city ordinances, the defendants oversupply or saturate surrounding areas where it is legal to sell and possess firearms knowing that the firearms will find their way into the larger cities to satisfy the demands of the underground markets;

5. These distribution practices, combined with their marketing strategies have enabled the underground handgun market within the City of Chicago to flourish. These practices have made it easy for minors to obtain handguns and the number of minors possessing handguns has increased. The number of violent crimes committed by minors using handguns within the city has risen. The result is an atmosphere of violence and intimidation for the citizens of Chicago.

[1] The Court recognizes that paragraph 69 makes these types of allegations. However, Paragraph 69 will be addressed later in this opinion.

6. The defendants' distribution practices and marketing strategies are specifically designed to intentionally appeal to juvenile and other criminal offenders. Some examples are as follows:

    a) Smith & Wesson's 357 Magnum revolver, referred to as "man stopper" is designed to fire longer than usual and more rapidly;

    b) Intratec markets the TEC-DC9 with a sling swivel that allows for the attachment of a shoulder strap to enhance mobility and the ability to spray bullets from the user's hip. Intratec also advertises the fact that the gun's finish is highly resistant to fingerprints,

    c) Beretta markets a 25 ACP semi-automatic pistol that is 4 5 inches and weighs 9 9 ounces making it easily concealed;

    d) Interarms markets a gun which it advertises as "considered the ultimate hideaway undercover back-up gun available anywhere;"

    e) Similar allegations are directed toward the other defendant manufacturers.

These factual allegations in plaintiff's complaints are qualitatively different from those in *Riordan* and *Linton*. Here, the plaintiffs allege affirmative acts by the defendants that specifically target juvenile offenders and other criminal elements and encourage them to acquire weapons the defendants' make readily available. Furthermore, *Riordan* and *Linton* deal with negligence and product liability theories. The sufficiency of the negligence claims is not before this Court. The arguments that center on the negligence or product liability theories, (i.e. no duty to protect another against criminal acts of a third party except where the parties had a special relationship and where the criminal attack was reasonably foreseeable, or no recovery under ultra-hazardous theory of strict liability), are not controlling to the issues before this Court. These motions only address the sufficiency of the counts which allege public nuisances.

Illinois courts have recognized the existence of a public right to be free from disturbance and reasonable apprehension of danger to person and property. *Bubalo and Doffyn v. Navegar*, 1999 U.S Dist. LEXIS 3598 at 4, citing *Village of Des Plaines v. Poyer*, 123 Ill.348 (Ill. 1888). In order to sustain a cause of action for public nuisance, the interference with the public right must rise to the level of being "unreasonable." *Bubalo and Doffyn v. Navegar*, 1998 U.S. Dist. LEXIS 3598 at 5; Restatement (Second) of Torts §821B(l). The following circumstances may sustain a holding that an interference with a public right is unreasonable

1. whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

2. whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

3. whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right. Restatement (Second) of Torts, § 821B(2)

ORDER

The determination of whether a defendant's actions are unreasonable is generally a question for the jury. *Bubalo and Doffyn v. Navegar*, 1998 U.S. Dist. LEXIS 3598 at 6, citing *Gilmore v. Stanmar, Inc.*, 261 Ill. App 3d 651, 661 (1st Dist. 1994).

Plaintiffs' complaints sufficiently allege that the citizens of Chicago have a public right to be free from disturbance and the reasonable apprehension of danger to themselves and their property. The complaints contain statistics concerning the number of homicides committed by juveniles, the number of minors who own guns, and even the percentage of minors who carry their guns to school (Ceriale Complaint, par. 88-100, Young Complaint; par 90-102; Smith Complaint, par. 94-106) The complaints also state that the number homicides committed by juveniles has more than doubled between 1985 and 1992. (Ceriale Complaint. par. 90, Young Complaint, par. 91; Smith Complaint, par. 95) As already stated, the complaints allege specific and affirmative marketing strategies. Taking all well-pled facts as true, it is clear that these facts allege that the rising gun-related crime rate has created a reasonable apprehension of fear and danger among the citizens of Chicago and that defendants' actions contribute to this fear and danger.

The allegations in plaintiffs' complaints also sufficiently satisfy the requirements of § 821B(1) of the Restatement. First, the allegations cited above clearly demonstrate a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience as required in Part 1. Second, the plaintiffs' complaints allege that defendants' conduct violates certain City of Chicago ordinances prohibiting the sale and possession of firearms to minors as required in Part 2. (Ceriale Complaint. Par. 75; Young Complaint, par. 77; Smith Complaint, par. 81) Finally, plaintiffs have sufficiently pled that the defendants' conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the defendants know or have reason to know, has a significant effect upon the public right as required by Part 3. (Ceriale Complaint, par. 81-100; Young Complaint, par. 83-102; Smith Complaint, par 87-106)

Plaintiffs have sufficiently pled the existence of a public right and have stated sufficient facts to support their allegations that the defendants' conduct was unreasonable.

It should be noted however that Paragraph 69 of the complaints contains allegations of the manufacturers' failure to supervise dealers. This issue was squarely dealt with in *Riordan* as being an element of a negligence cause of action, which is legally insufficient.

ORDER

Therefore, based on the foregoing, the Court orders as follows:

1) The defendants' motion to dismiss Counts I-III of the plaintiffs' complaints are denied.

2) Paragraph 69 of Counts I-III of the plaintiffs' complaints are stricken pursuant to 2-603.

ENTER:

Judge Judge's No.

EXHIBIT D

AGREEMENT

Preamble

The manufacturer parties to the Agreement and the Department of the Treasury, the Department of Housing and Urban Development, and the undersigned state, city and county parties to the Agreement enter into this Agreement to reduce the criminal misuse of firearms, combat the illegal acquisition, possession and trafficking of firearms, reduce the incidence of firearms accidents, and educate the public on the safe handling and storage of firearms. Furthermore, the manufacturer parties to the Agreement enter into this Agreement as a continuation of their efforts to make their firearms as safe as practicable for their customers and the public. Accordingly, in consideration of the commitments set forth below:

1. The undersigned state, city, and county parties to the Agreement dismiss the manufacturer parties to the Agreement with prejudice from the lawsuits specified in Appendix A subject to any consent orders entered pursuant to paragraph VIII; and

2. The undersigned state, city and federal parties to the Agreement agree to refrain from filing suit against the manufacturer parties to the Agreement on an equivalent cause of action.

The parties agree that this Agreement constitutes the full and complete settlement of any and all claims that were raised or could have been raised in the subject litigation. The parties agree further that this Agreement does not constitute an admission of any violation of law, rule or regulation by the manufacturer parties to the Agreement, or any of their employees. Nothing in this Agreement shall be construed to be an admission of liability. The adoption of standards for firearms design and distribution in this Agreement shall not be construed as an admission by the manufacturer parties to the Agreement that practices they engaged in prior to the execution of this Agreement were negligent.

EXHIBIT D

I. **Safety and design.**

A. Each firearm make and model sold by each manufacturer party to this Agreement shall be tested by ATF or an agreed upon proofing entity against the following standards. Existing makes and models shall meet these standards within 60 days of execution of this Agreement unless a longer period is specified in the standard. New makes and models shall not be manufactured and sold after the execution of this Agreement unless they conform to these standards.

1. **Standards applicable to all handguns:**

a. **Second "hidden" serial number.** The gun must have both a visible serial number on the exterior of the frame or receiver, as well as a second serial number hidden on the interior of frame or receiver (e.g., under the grips) or visible only with the aid of an optical instrument.

b. **External locking device.** As an interim measure, until the implementation of I.A.1.c, within 60 days of execution of the Agreement, each firearm shall be supplied with an external locking device that effectively prevents the operation of the firearm when locked.

c. **Internal locking device.** Within 24 months of execution of the Agreement, each firearm shall have a built-in, on-board locking system, by which the firearm can only be operated with a key or combination or other mechanism unique to that gun.

d. **Authorized user technology.** The manufacturer parties to this Agreement shall each commit two percent of annual firearms sales revenues to the development of a technology that recognizes only authorized users and permits a gun to be used only by authorized persons. Within 36 months of the date of execution of this Agreement, this technology shall be incorporated in all new firearm

designs, with the exception of curios and collectors' firearms. This requirement does not apply to existing designs currently in production.

If the eight firearms manufacturers and/or importers with the largest United States firearms sales volume agree to incorporate authorized user technology in all firearms, the manufacturer parties to this Agreement will incorporate authorized user technology in all firearms.

e. **Child safety.** Within 12 months of execution of the Agreement, each firearm shall be designed so that it cannot be readily operated by a child under the age of 6. Such mechanisms include: making the trigger pull resistance at least ten pounds in the double action mode; or designing the firing mechanism so that an average five year old's hands would be too small to operate the gun; or requiring multiple, sequenced actions in order to fire the gun.

f. **Minimum barrel length.** Each firearm make and model must have a barrel length of at least 3", unless it has an average group diameter test result of 1.7" or less at seven yards, 3.9" or less at 14 yards, and 6.3" or less at 21 yards. The average group diameter test result is the arithmetic mean of the results of three separate trials, each performed on a different sample firearm of the make and model at issue. For each trial, the firearm shall fire five rounds at a target from the specified distance and the largest spread in inches between the center of any of the holes made in a test target shall be the result of the trial.

g. **Performance test:** A sample of each firearm make and model will be test-fired with "proof cartridges" (cartridges loaded to generate excess pressure as set forth in accepted specifications for proof cartridges) to ensure the integrity of the material. At least one cartridge shall be fired from each chamber. Following this test firing, the firearm will be examined for hairline cracks or other signs of material failure and

will pass this test only if there are no hairline cracks or other signs of material failure. Each firearm make and model shall also pass the following performance test: the gun shall fire 600 rounds, stopping only every 100 rounds to tighten any loose screws and to clean the gun (if required by the cleaning schedule recommended in the manual), or as needed to refill the empty magazine or cylinder to capacity before continuing. For any gun that loads other than with a detachable magazine, the tester shall pause every 50 rounds for ten minutes. The tester shall use the ammunition recommended in the user's manual, or if none is recommended, any standard ammunition of the correct caliber in new condition. A gun shall pass this test if it fires the first 20 rounds without a malfunction and the full 600 rounds with no more than 6 malfunctions and without any crack or breakage of an operating part of the gun that increases the danger of injury. Malfunctions caused by failure to clean and lubricate, or by defective ammunition, shall not be counted.

h. **Drop test.** Pass the more rigorous of: (a) the SAAMI Standard drop test in effect on the date the firearm is sold; or (b) the following test: The gun shall be test-loaded, set such that it is ready to fire and dropped onto a steel plate or equivalent material of similar hardness from a height of one meter from each of the following positions: (1) normal firing position; (2) upside down; (3) on the grip; (4) on the muzzle; (5) on either side; and (6) on the exposed hammer or striker (or, if no exposed hammer or striker, on the rearmost part of the gun). If the gun is so designed so that its hammer or striker may be set in other positions, it shall be tested with the hammer or striker in each such position (but otherwise ready to fire).

2. **Additional standards for pistols:**

a. **Safety device.** The pistol must have a positive manually operated safety device as determined by standards relating to imported guns promulgated by ATF .

b. **Minimum length and height standards.** The pistol's combined length and height must not be less than 10" with the height being at least 4" and the length being at least 6", unless it has an average group diameter test result of 1.7" or less at seven yards, 3.9" or less at 14 yards, and 6.3" or less at 21 yards. The average group diameter test result is the arithmetic mean of the results of three separate trials, each performed on a different sample firearm of the make and model at issue. For each trial, the firearm shall fire five rounds at a target from the specified distance and the largest spread in inches between the center of any of the holes made in a test target shall be the result of the trial.

c. **Magazine disconnector.** Within 12 months of execution of the Agreement, each pistol shall have a magazine disconnector available for those customers who desire the feature.

d. **Chamber load indicator.** Within 12 months of the execution of the Agreement, each pistol shall have a chamber load indicator painted in a prominent, contrasting color or a feature that allows the operator physically to see the round in the chamber.

e. **Large capacity magazines.** No pistol make or model designed after January 1, 2000 shall be able to accept magazines manufactured prior to September 14, 1994, with a greater than 10 round capacity, and such models shall not be capable of being easily modified to accept such magazines. Nor shall ammunition magazines that are able to accept more than 10 rounds be sold by the manufacturer parties to this Agreement or their authorized dealers and distributors. See Part II.A.1.h, below.

f. **Additional safety features.** Each pistol must have a firing pin block or lock.

3. **Additional standard for revolvers.** Each revolver make and model must pass a safety test. Each make and model must have a safety feature which automatically (for a double action revolver) or by manual operation (for a single action revolver) causes the hammer to retract to a point where the firing pin does not rest upon the primer of the cartridge. The safety device must withstand the impact of a weight equal to the weight of the revolver dropping from a distance of 1 meter in a line parallel to the barrel upon the rear of the hammer spur, a total of 5 times.

B. **Law enforcement and military exception.** An exception to a requirement of paragraph A may be granted for firearms manufactured or imported for sale to a law enforcement agency or the military if the law enforcement agency or military organization certifies to the manufacturer party to this Agreement that the exception is necessary for official purposes. Where a law enforcement agency authorizes or requires its officers to purchase firearms individually for official use, an appropriate certification from the agency will be permitted to apply to sales to a number of individual officers. The manufacturer party to this Agreement shall maintain the certification in its records and provide a copy to the Oversight Commission. Firearms sold to law enforcement or the military pursuant to this exception, which do not comply with the design standards of this Agreement, will be accompanied by a statement:

1. "On [date], [manufacturer parties to this Agreement] and [governmental parties to this Agreement] entered into an Agreement establishing certain design standards for firearms sold to civilians. Pursuant to that Agreement, we are obliged to inform you that this firearm does not comply with all of the design standards of the Agreement. We are further obliged to request that you not resell this firearm to civilians. This statement is not intended to suggest that there are any design flaws with this firearm, and you remain entitled to dispose of it in any lawful manner."

C. **Warnings about safe storage and handling.** Within 6 months of execution of this Agreement, manufacturer parties to this Agreement shall include in the packaging of each firearm sold a warning on risk of firearms in the home and proper home storage. At a minimum, these warnings shall state in 14 point type, bold face:

> "This handgun is not equipped with a device that fully blocks use by unauthorized users. More than 200,000 firearms like this one are stolen from their owners every year in the United States. In addition, there are more than a thousand suicides each year by younger children and teenagers who get access to firearms. Hundreds more die from accidental discharge. It is likely that many more children sustain serious wounds, or inflict such wounds accidentally on others. In order to limit the chance of such misuse, it is imperative that you keep this weapon locked in a secure place and take other steps necessary to limit the possibility of theft or accident. Failure to take reasonable preventative steps may result in innocent lives being lost, and in some circumstances may result in your liability for these deaths."

D. **Illegal firearms.** The manufacturer parties to this Agreement shall not sell firearms that can be readily converted to an illegal firearm, that is, a weapon designed in a manner so that with few additional parts and/or minimal modifications an owner can convert the firearm to an illegal fully automatic weapon; nor shall the firearms be designed so that they are resistant to fingerprints.

II. **Sales and distribution.**

In addition to complying with specific terms, the manufacturer parties to this Agreement will agree for themselves and as part of any distribution or agency agreement that they, and their authorized distributors and authorized dealers, including franchisees, shall commit to a standard of conduct to make every effort to eliminate sales of firearms that might lead to illegal firearm possession and/or misuse by criminals, unauthorized juveniles, and other prohibited persons ("suspect firearms sales"). Suspect firearm sales include sales made to straw

purchasers, multiple sales of handguns without reasonable explanation (excluding sales to FFLs), and sales made to any purchaser without a completed background check.

As specified in Part II.A.2 below, the manufacturer parties to this Agreement will take action against dealers and distributors that violate these requirements if the manufacturers receive actual notice of such a violation.

A. Authorized distributors and dealers.

1. The manufacturer parties to this Agreement may sell only to authorized distributors and authorized dealers. In order to qualify to become an authorized distributor or authorized dealer, the distributor or dealer must agree in writing to:

   a. Possess a valid and current federal firearms license, and all other licenses and permits required by local, state or federal law, and certify on an annual basis, under penalty of perjury, compliance with all local, state and federal firearms laws.

   b. Execute in the presence of the purchaser the following elements of all firearms transactions at the premises listed on its federal firearms license: completion of the forms and related requirements under the Brady Act and the Gun Control Act and physical transfer of the firearm.

   c. Where available, carry insurance coverage against liability for damage to property and for injury to or death of any person as a result of the sale, lease, or transfer or a firearm in amounts appropriate to its level of sales, but at a minimum no less than $1 million for each incident of damage, injury or death.

   d. Make no sales at gun shows unless all sales by any seller at the gun show are conducted only upon completion of a background check.

e. Within 24 months of the date of execution of this Agreement, maintain an inventory tracking plan for the products of the manufacturer parties to this Agreement that includes at a minimum the following elements:

(1) Electronic recording of the make, model, caliber or gauge, and serial number of all firearms that are acquired no later than one business day after their acquisition and electronic recording of their disposition no later than one business day after their disposition. Monthly backups of these records shall be maintained in a secure container designed to prevent loss by fire, theft, or other mishap.

(2) All firearms acquired but not yet disposed of must be accounted for through an electronic inventory check prepared once each month and maintained in a secure location.

(3) For authorized dealers and franchisees, all ATF Form 4473 firearm transaction records shall be retained on the dealer's business premises in a secure container designed to prevent loss by fire, theft, or other mishap.

(4) If an audit of a distributor's or dealer's inventory reveals any firearms not accounted for, the distributor or dealer shall be subject to sanctions, including termination as an authorized distributor or dealer.

f. Implement a security plan for securing firearms, including firearms in shipment. The plan must satisfy at least the following requirements:

(1) Display cases shall be locked at all times except when removing a single firearm to show a customer, and customers shall handle firearms only under the direct supervision of an employee;

(2) All firearms shall be secured, other than during business hours, in a locked fireproof safe or vault in the licensee's business premises or in another secure and locked area; and

(3) Ammunition shall be stored separately from the firearms and out of reach of the customers.

g. Require persons under 18 years of age to be accompanied by a parent or guardian when they are in portions of the premises where firearms or ammunition are stocked or sold.

h. Not sell ammunition magazines that are able to accept more than 10 rounds regardless of the date of manufacture, not sell any semi-automatic assault weapon as defined in 18 U.S.C. 921(a)(30) regardless of the date of manufacture, provide safety locks and warnings with firearms, as specified in Section I above, and sell only firearms that comport with the design criteria of this Agreement.

i. Provide law enforcement, government regulators conducting compliance inspections, and the Oversight Commission, for purposes of determining compliance with conditions imposed as a result of this Agreement, or for any other authorized purpose, full access to any documents related to the acquisition and disposition of firearms deemed necessary by one of those parties.

j. Participate in and comply with all monitoring of firearms distribution by manufacturers, ATF or law enforcement.

k. Maintain an electronic record of all trace requests initiated by ATF, and report those trace requests by make, model and serial number of firearm, date of trace, and date of sale to the manufacturer of the firearm on a monthly basis, unless ATF, for investigative reasons, directs the licensee not to report certain traces.

l. Agree to cooperate fully in the oversight mechanism established in Section III of this Agreement, including providing access to all necessary documents, and to be subject to the jurisdiction of the court enforcing this Agreement.

m. Require all employees to attend annual training developed by manufacturers in consultation with ATF and approved by the Oversight Commission. The training shall cover at a minimum: the law governing firearms transfers by licensees and individuals; how to recognize straw purchasers and other attempts to purchase firearms illegally; how to recognize indicators that firearms may be diverted for later sale or transfer to those not legally entitled to purchase them; how to respond to those attempts; and the safe handling and storage of firearms. New employees will receive training on the above topics, based on materials developed for the annual training, before handling or selling firearms and shall attend annual training thereafter. Such training may be delivered by electronic medium. Within 12 months of the date of execution of this Agreement and annually thereafter, the manufacturer parties to this Agreement will obtain from all authorized dealers and distributors certifications that such training has been completed, with a list of the names of all trained employees.

n. Require all employees to pass a comprehensive written exam, which shall be developed by the manufacturers in consultation with ATF and approved by the Oversight Commission, on the material covered in the training before being allowed to sell or handle firearms. Any employee who fails to pass the exam shall be prohibited from selling or handling firearms on behalf of the distributor or dealer. The annual certification discussed in II.A.1.m, above, will include certification that all employees have passed the exam.

o. Not complete any transfer of a firearm prior to receiving notice from the NICS that the transferee is not a prohibited person under the Gun Control Act.

p. Verify the validity of a licensee's federal firearms license against an ATF database before transferring a firearm to that licensee.

q. Forgo any transfer of a firearm to a licensee if the dealer or distributor knows the licensee to be under indictment for violations of the Gun Control Act or any violent felony or serious drug offense as defined in 18 U.S.C. § 924(e)(2).

r. Transfer firearms only:

(1) To individuals who have demonstrated that they can safely handle and store firearms through completion of a certified firearms safety training course or by having passed a certified firearms safety examination.

(2) After demonstrating to the purchaser how to load, unload, and safely store the firearm, and how to engage and disengage all safety devices on the firearm.

(3) After providing the purchaser with a copy of the ATF Disposition of Firearms Notice.

(4) After obtaining the purchaser's signature on a form certifying that the purchaser has received the instruction described in subparagraph (2) and the notice described in subparagraph (3) and maintaining that form in its files.

(5) After providing the purchaser with a written record of the make, model, caliber or gauge, and serial number of each firearm transferred to enable the purchaser to accurately describe the

firearm to law enforcement in the event that it is subsequently lost or stolen.

2. The manufacturer parties to the Agreement shall incorporate into any distribution or agency agreement with their authorized distributors and authorized dealers, including franchisees, procedures for terminating distributors, dealers or franchisees that engage in conduct in violation of this Agreement. Distributors and dealers shall agree to this enforcement system as a condition of becoming authorized. The manufacturer parties to this Agreement shall require annual certification by their authorized dealers and distributors that they are in compliance with the requirements in II.A.1(a-r) of this Agreement and applicable provisions of B. and C., below. If the manufacturer parties to this Agreement receive actual notice of a violation of the Agreement through their course of dealing with their authorized dealers and distributors, from ATF, state or local law enforcement, the Oversight Commission, another dealer or distributor, a customer or other credible source, the manufacturer parties to this Agreement will either immediately terminate sales to the dealer or distributor in violation or take the following actions. The manufacturer(s) that have authorized the dealer or distributor to sell its/their firearms will, individually or collectively, notify the dealer or distributor within seven (7) business days of learning of such violation and inform the dealer or distributor of the breach and request information regarding the breach. The distributor or dealer will then have fifteen (15) days to provide the manufacturer(s) with the requested information. If the manufacturer(s) determine that the dealer or distributor is in violation of this section of the Agreement, the manufacturer(s) will provide no further product to the distributor or dealer until the manufacturer(s) determine that the distributor or dealer is in compliance with the Agreement.

   The manufacturer(s) shall inform the Oversight Commission and ATF of its/their notifications and decisions and provide them with the information provided by the dealer or distributor. If the Oversight

Commission determines that suspension or termination of the dealer or distributor is warranted, and the manufacturer(s) did not take this action, the Oversight Commission shall direct the manufacturer(s) to do so.

B. **Authorized distributors - additional provision.**

Authorized distributors must agree to sell the manufacturer's products only to other authorized distributors or authorized dealers or directly to government purchasers.

C. **Authorized dealers -- additional provisions.**

In addition to the requirements in section II(A)(1), authorized dealers must agree:

1. Not to sell any of the manufacturers' products to any federal firearms licensee that is not an authorized distributor or authorized dealer of that manufacturer.

2. Not to engage in sales that the dealer knows or has reason to know are being made to straw purchasers.

3. To adhere to the following procedure for multiple handgun sales. If a purchaser wants to purchase more than one handgun, the purchaser may take from the dealer only one handgun on the day of sale. The dealer at that point will file a Multiple Sales Report with ATF. The purchaser may take the additional handguns from the dealer 14 days thereafter. This provision shall not apply to sales to qualified private security companies licensed to do business within the State where the transfer occurs for use by the company in its security operations.

D. **Manufacturers.**

Each manufacturer must:

1. Provide quarterly reports of its own sales data and downstream sales data, with the volume of sales by make, model, caliber and gauge, to ATF's National Tracing Center.

2. Not market any firearm in a way that would make the firearm particularly appealing to juveniles or criminals, such as advertising a firearm as "fingerprint resistant."

3. Refrain from selling any modified or sporterized semi-automatic assault pistol of a type that cannot be imported into the United States.

4. Reaffirm their longstanding policy and practice of not placing advertisements in the vicinity of schools, high crime zones, or public housing.

5. Verify the validity of a license against an ATF database before transferring a firearm to any licensee.

6. Forgo any transfer of a firearm to a licensee if the manufacturer knows the licensee to be under indictment violations of the Gun Control Act or any violent felony or serious drug offense as defined in 18 U.S.C. § 924(e)(2).

7. Implement a security plan for securing firearms, including firearms in shipment. The plan will include the following elements.

    a. Employee and visitor movement into and out of the manufacturer's facility will be only through designated security control points, and visitors will be admitted only after positive identification and confirmation of the validity of the visit. Employees and visitors will pass through a metal detector before leaving

    b. All areas where firearms are assembled and stored will be designated as restricted areas. Access will be authorized only for those

employees whose work requires them to enter these areas or for escorted visitors. Protective barriers will be installed in restricted areas to deny or impede unauthorized access.

c. Each facility or area where firearms, ammunition, or components are stored will be provided with a system to detect unauthorized entry.

d. If firearms are shipped in cartons, the cartons will bear no identifying marks or words. The manufacturer parties to this Agreement will use only very strong cartons to protect against concealed pilferage in truck shipments, and large cartons will be secured with steel strapping in two directions. The manufacturer parties to this Agreement will use only carriers and freight forwarders that warrant in writing that they conduct criminal background checks on delivery personnel and report all thefts or losses of firearms to ATF within 48 hours of learning of the theft or loss. The manufacturer parties to this Agreement will inspect carriers' and forwarders' local facilities periodically.

8. Encourage its authorized dealers and distributors to consent to up to three unannounced ATF compliance inspections each year.

E. Corporate responsibility.

If ATF or the Oversight Commission informs the manufacturer parties to this Agreement that a disproportionate number of crime guns have been traced to a dealer or distributor within three years of the gun's sale, the manufacturer(s) that have authorized the dealer or distributor to sell guns will either immediately terminate sales to the dealer or distributor or take the following actions. The manufacturers will, individually or collectively, notify the dealer or distributor of the disproportionate number within seven (7) days and demand an explanation and proposal to avoid a disproportionate number of traces in the future. The dealer or distributor will have fifteen (15) days to provide the explanation and proposal. If the

manufacturer(s) determine that the explanation and proposal are not satisfactory, the manufacturer(s) will terminate supplies to the dealer or distributor. If the manufacturer(s) determine that the explanation and proposal are satisfactory, the manufacturer will continue supplies, but will closely monitor traces to the dealer or distributor in question. If disproportionate traces continue, the manufacturer(s) will terminate supplies to the dealer or distributor.

The manufacturer(s) shall inform the Oversight Commission and ATF of its/their notifications and decisions and provide them with the information provided by the dealer or distributor. If the Oversight Commission determines that suspension or termination of the dealer or distributor is warranted, and the manufacturer(s) did not take this action, the Oversight Commission shall direct the manufacturer(s) to do so.

Disproportionate number of crime guns: Upon execution of this Agreement, the Oversight Commission will convene to determine a formula to identify what constitutes a disproportionate number of crime guns. In determining the formula, the Oversight Commission shall consider the available data and establish procedures to ensure that the relevant data is obtained. This provision will not take effect until the Oversight Commission sets the formula and a mechanism for its implementation.

III. Oversight

A. Oversight Commission.

1. **Composition.** An Oversight Commission comprised of five members shall be formed. The Commission members shall serve five-year terms except for first terms as noted and shall be appointed as follows:

   a. Two members by the city and county parties to the Agreement. First appointees to serve two- and three-year terms, respectively.

b. One by the State parties to the Agreement. First appointee to serve a three-year term.

c. One member by the manufacturer parties to the Agreement. First appointee to serve a four-year term.

d. One selected by ATF. First appointee to serve a five-year term.

2. Authority. -- The Oversight Commission, which will operate by majority vote, will be empowered to oversee the implementation of this Agreement. Its authorities will include but not be limited to the authority to (1) review the findings of ATF or the proofing entity that will oversee the design and safety requirements of Part I of this Agreement, (2) maintain records of firearms sold pursuant to the law enforcement exception, as set forth in Part I.B of this Agreement, (3) review the safety training materials and test set forth in Parts II.A.1.m-n of this Agreement, and (4) participate in the oversight of the distribution and sales provisions established in Part II of this Agreement, as set forth in Parts II.A.2 and II.E.

   The Oversight Commission shall have a staff, which will be entitled to inspect participating manufacturers and their authorized dealers and distributors to ensure compliance with the Agreement. The costs of the Commission shall be funded by the parties to the Agreement. Each manufacturer party to this Agreement will pay no more than $25,000 annually.

B. Role of ATF. -- ATF will continue to issue, regulate and inspect federal firearms licensees, collect multiple sales forms, conduct firearms traces, investigate firearms traffickers and straw purchasers, enforce the Gun Control Act and the National Firearms Act and fulfill its other statutory responsibilities. To the extent consistent with law and the effective accomplishment of its law enforcement responsibilities, ATF will work with the manufacturer parties to the Agreement and the Oversight Commission to

assist them in meeting their obligations under the Agreement. In particular, to the extent that ATF uncovers violations of the following provisions in its inspections or other contacts with federal firearms licensees, it will inform the Oversight Commission: II(A)(1)(a), (b), (e), (h), (i), (j), (k), (o), (p), and (q), (C)(2) and (D)(1) and (5). Nothing in this paragraph shall diminish the obligation of the manufacturer parties to this Agreement to make reasonable efforts to identify noncompliance and respond to notifications of violations from parties other than ATF.

C. Manufacturer cooperation.

1. Each manufacturer shall designate an executive level manager to serve as a compliance officer and shall provide the compliance officer with sufficient resources and staff to fulfill the officer's responsibilities under this agreement.

2. The compliance officer shall be responsible for

   a. Ensuring that the manufacturer fulfills its obligations under this agreement;

   b. Training the manufacturer's officers and employees on the obligations imposed by this agreement; and

   c. Serving as the liaison to the Oversight Commission.

3. Each manufacturer shall commit to full cooperation in the implementation and enforcement of this Agreement.

IV. Cooperation with Law Enforcement.

A. The manufacturer parties to this Agreement reaffirm their commitment to cooperate fully with law enforcement and regulators to eliminate illegal firearms sales and possession.

B. Within six (6) months of the effective date of this Agreement, if technologically available, the manufacturer parties to this Agreement shall fire each firearm before sale and enter the digital image of its casing along with the weapon's serial number into a system compatible with the National Integrated Ballistics Identification Network system. The digital image shall be made available electronically to ATF's National Tracing Center.

C. Manufacturers shall participate in ATF's Access 2000 program to facilitate electronic linkage to their inventory system to allow for rapid responses to ATF's firearms trace requests.

V. Legislation.

The parties to this Agreement will work together to support legislative efforts to reduce firearms misuse and the development of authorized user technology.

VI. Education trust fund.

Upon resolution of the current lawsuits brought by cities, counties, or States, the manufacturer parties to this Agreement shall dedicate one percent of annual firearms revenues to a trust fund to implement a public service campaign to inform the public about the risk of firearms misuse, safe storage, and the need to dispose of firearms responsibly.

VII. Most favored entity.

If the manufacturer parties to this Agreement enter into an agreement with any other entity wherein they commit to institute design or distribution reforms that are more expansive than any of the above-enumerated items, such reforms will become a part of this Agreement as well.

In addition, if firearms manufacturers that are not party to this Agreement agree to design or distribution reforms that are more expansive than any of

the above-enumerated items, and if the manufacturers who are party to the other agreement(s) with more expansive terms, in combination with the manufacturer parties to this Agreement, account for fifty percent or more of United States handgun sales, manufacturer parties to this Agreement will agree to abide by the same design and distribution measures.

VIII. **Enforcement.**

The Agreement will be entered and is enforceable as a Court order and as a contract.

Dated this 17 day of March, 2000.

Approved and Authorized by:

Manufacturer parties to this Agreement:

Smith & Wesson

Governmental parties to this Agreement:

Department of the Treasury

Department of Housing and Urban Development

State parties to this Agreement:

_____
State of New York

_____
State of Connecticut

City and County parties to this Agreement:

_____

_____

_____

_____

_____

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 31, 2000, declarant served the **AMENDED DECLARATION OF JENNIE LEE ANDERSON IN SUPPORT OF 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 31st day of August, 2000, at San Diego, California.

Veronica Rivera

VERONICA RIVERA

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