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17

SUPERIOR COURT OF THE STATE OF CALIFORNIA

18

COUNTY OF FRESNO

19

20 NATIONAL SHOOTING SPORTS  
FOUNDATION, INC., a nonprofit trade  
21 association; and SPORTING ARMS AND  
AMMUNITION MANUFACTURERS'  
22 INSTITUTE, INC., a nonprofit trade  
association,

23 Plaintiffs,

24

vs.

25

26 STATE OF CALIFORNIA, acting by and  
through its Attorney General, KAMALA D.  
HARRIS; and DOES 1 through 100, inclusive,

27

Defendants.

28

CASE NO. 14CECG00068 DSB

The Honorable Donald S. Black

**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANT'S  
DEMURRER TO COMPLAINT**

Date: April 30, 2014

Time: 3:30 p.m.

Dept: 502

Action Filed: January 9, 2014

Trial Date: None Set

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1 **I. INTRODUCTION.**

2  
3 The complaint in this action, to which the State of California has demurred, asserts a single  
4 cause of action for declaratory and injunctive relief, based on the alleged impossibility of  
5 implementing the firearm microstamping requirements set forth in Penal Code section 31910,  
6 subdivision (b)(7)(A). The State’s demurrer should be summarily rejected because it is premised  
7 not only on a plain misapplication of law, but also on a fundamental misapprehension of the  
8 claims asserted in the complaint. According to the State, plaintiffs have not stated a cause of  
9 action because their claim must be based on either a “constitutional violation of rights, a breach of  
10 contract, or a tort.” (Dem. P&A, 1:15.) Not surprisingly, the State cites no authority for this  
11 legally incorrect statement.

12 Plaintiffs’ cause of action for declaratory relief is significantly broader and more robust  
13 than the State appreciates. The State bases much of its demurrer on the complaint’s lack of a  
14 Second Amendment claim, which of course dooms its demurrer from the outset because it relies  
15 on matters not alleged in the pleadings. Moreover, by focusing on the Second Amendment claim  
16 that plaintiffs do not assert, the State completely fails to address the primary thrust of the  
17 complaint, namely that it is impossible to comply with the firearm microstamping requirements of  
18 Penal Code section 31910, subdivision (b)(7)(A). Statutes with which no one can possibly comply  
19 are invalid as a matter of law, and courts have the authority to enjoin their enforcement.

20 Finally, the State challenges plaintiffs’ standing to assert a cause of action for declaratory  
21 and injunctive relief on behalf of its members. Here, the State simply ignores the controlling  
22 impact of plaintiffs’ status as trade associations for their manufacturer, distributor, retailer and  
23 individual members. Plaintiffs’ members would have standing to sue in their own right; the  
24 interests plaintiffs seek to protect are germane to their organizational purposes; and neither the  
25 claim plaintiffs assert nor the relief they request requires the participation of plaintiffs’ members.  
26 Plaintiffs therefore satisfy all of the elements necessary to show associational standing on behalf  
27 of their members.

28 ///

1 As explained in further detail below, the complaint alleges facts sufficient to establish a  
2 basis for declaratory and injunctive relief. The State’s demurrer should therefore be overruled.

3  
4 **II. THE COMPLAINT PROPERLY ALLEGES A CAUSE OF ACTION FOR**  
5 **DECLARATORY RELIEF BASED ON THE IMPOSSIBILITY OF COMPLYING**  
6 **WITH PENAL CODE SECTION 31910, SUBDIVISION (b)(7)(A).**

7  
8 The State pretends not to understand the theory of the complaint, asserting that “[i]t is  
9 unclear under what theory this claim is asserted.” (Dem. P&A, 1:7.) Likewise, the State asserts  
10 that “[t]he Complaint does not specify a legal theory by which plaintiffs seek [declaratory] relief.”  
11 (*Id.*, 6:18-19.) But even the State recognizes that “[p]laintiffs seek a judicial declaration that the  
12 provisions of Penal Code section 31910, subdivision (b)(7)(A) ‘are invalid and cannot be  
13 enforced’ *based on the alleged impossibility of implementing microstamping technology.*” (*Id.*,  
14 5:1-3; emphasis added.) Indeed, paragraph 13 of the complaint, which the State itself cites,  
15 alleges that

16  
17 [p]ursuant to California Code of Civil Procedure section 1060,  
18 NSSF and SAAMI seek a judicial declaration of the respective  
19 rights and duties of the parties with respect to this controversy. In  
20 particular, *NSSF and SAAMI seek a judicial declaration that the*  
21 *provisions of California Penal Code section 31910, subdivision*  
22 *(b)(7)(A), are invalid and cannot be enforced because it is*  
23 *impossible for a firearm manufacturer to implement microstamping*  
24 *technology in compliance therewith, since no semi-automatic pistol*  
25 *can be designed or equipped with a microscopic array of characters*  
26 *identifying the make, model and serial number of the pistol that are*  
27 *etched or otherwise imprinted in two or more places on the interior*  
28 *surface or internal working parts of the pistol, and that can be*

1 legibly, reliably, repeatedly, consistently and effectively transferred  
2 from both such places to a cartridge case when the firearm is fired.  
3 [Emphasis added.]<sup>1</sup>  
4

5 The cause of action that plaintiffs allege for declaratory relief based on the impossibility of  
6 complying with Penal Code section 31910, subdivision (b)(7)(a), is legally meritorious. The  
7 impossibility challenge that plaintiffs assert arises initially from the equitable maxim that “[t]he  
8 law never requires impossibilities.” (Civ. Code, § 3531.) “Consistent with this maxim, the law  
9 recognizes exceptions to statutory requirements for impossibility of performance.” (*Board of*  
10 *Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 300.) The State nevertheless faults  
11 plaintiffs for “fail[ing] to allege that the statute is unconstitutional” (Dem., 6:9-10), but a statute or  
12 ordinance that is otherwise void need not also be unconstitutional to be subject to challenge.

13 For instance, in *San Diego Tuberculosis Association v. City of East San Diego* (1921) 186  
14 Cal. 252, 255, an injunction was granted against the enforcement of a penal ordinance that  
15 declared every hospital for the treatment of persons afflicted with a contagious or infectious  
16 disease to be a nuisance. The California Supreme Court stated in that case that “[t]he doctrine  
17 that an action will lie to enjoin the enforcement of an [invalid] municipal ordinance in cases where  
18 such enforcement will cause substantial and irreparable injury to private property or private  
19 property rights and in which there is no adequate remedy in the ordinary course of law, is now too  
20 well settled to require discussion.” Likewise, in *Neary v. Town of Los Altos Hills* (1959) 172  
21 Cal.App.2d 721, enforcement of an ordinance prohibiting the operation of a truck weighing more  
22 than twelve tons on the defendant town’s streets was enjoined because it was unreasonable. As  
23

---

24 <sup>1</sup> The State also asserts that “plaintiffs have not alleged that a declaratory action is  
25 appropriate pursuant to any specific provision in the Code of Civil Procedure.” (Dem. P&A, 6:14-  
26 15.) As just noted, plaintiffs have alleged their cause of action for declaratory relief pursuant to  
27 Code of Civil Procedure section 1060, which provides in pertinent part that “[a]ny person ... who  
28 desires a declaration of his or her rights or duties with respect to another ... may, in cases of actual  
controversy relating to the legal rights and duties of the respective parties, bring an original action  
... in the superior court for a declaration of his or her rights and duties in the premises....” That of  
course is exactly what plaintiffs have done by means of their complaint.

1 the court explained, the inquiry in the case was “*whether the ordinance is so unreasonable as to*  
2 *make it void.*” (*Id.* at p. 726; emphasis added.) No issue of constitutionality was present in either  
3 *San Diego Tuberculosis Association* or in *Neary*.

4 Perhaps the State actually understands that plaintiffs have alleged a meritorious cause of  
5 action for declaratory relief based on the impossibility of complying with Penal Code section  
6 31910, subdivision (b)(7)(a). As if to deflect attention away from the statute itself, the State notes  
7 that “the Department of Justice has promulgated detailed regulations regarding the microstamping  
8 process,” which “are not challenged in this lawsuit.” (Dem. P&A, 2:19-23.) But administrative  
9 regulations exist only by grace of their enabling statutes. “Whenever by the express or implied  
10 terms of any statute a state agency has authority to adopt regulations to implement, interpret, make  
11 specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or  
12 effective unless consistent and not in conflict with the statute and reasonably necessary to  
13 effectuate the purpose of the statute.” (Gov. Code, §11342.2.) Thus, “no regulation is valid if its  
14 issuance exceeds the scope of the enabling statute.” (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d  
15 190, 205 (interpreting the statutory predecessor to Government Code section 11342.2).) As a  
16 result, in *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 738, the California Supreme Court  
17 held that an administrative board could only adopt such regulations “as are *validly* included in the  
18 Civil Code.” (Emphasis added.) Accordingly, if Penal Code section 31910, subdivision (b)(7)(a),  
19 is invalid by reason of impossibility of compliance as plaintiffs have properly alleged, then the  
20 regulations promulgated thereunder are likewise invalid to the same extent.

21

22 **III. THE STATE’S DEMURRER FAILS FROM THE OUTSET BECAUSE IT IS**  
23 **BASED ON MATTERS NOT ALLEGED IN THE COMPLAINT.**

24

25 The State asserts that plaintiffs’ allegation that it is impossible to comply with the  
26 microstamping requirements of Penal Code section 31910, subdivision (b)(7)(a), is not sufficient  
27 by itself to state a cause of action. According to the State, “[t]he Complaint does not specify a  
28 legal theory by which plaintiffs seek [declaratory] relief,” and “[c]ertain facts and allegations,

1 which have not been specified in the Complaint, would have to be assumed in order to find a valid  
2 cause of action.” (Dem. P&A, 6:18-19, 6:25-27.) Thus, the State maintains that “if plaintiffs are  
3 trying to assert a constitutional claim, they have not done so in this Complaint as they have not  
4 asserted that their Second Amendment rights have been infringed.” (*Id.*, 6:27 – 7:1.) An entire  
5 section of the State’s memorandum of points and authorities then follows, discussing Second  
6 Amendment claims that plaintiffs did not make in their complaint. (*Id.*, 7:4 – 9:18.) But there is  
7 no need to discuss the Second Amendment or for the Court to resolve any phantom Second  
8 Amendment claims, because plaintiffs are not advancing any claims premised on the Second  
9 Amendment.

10 The very first rule applicable to demurrers is that they may be interposed only when the  
11 grounds for objection to the complaint appear on the face of the pleading itself or in matters that  
12 are subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) “It is an elementary rule that  
13 the sole function of a demurrer is to test the sufficiency of the challenged pleading. It cannot,  
14 properly, be addressed to or based upon evidence or other extrinsic matters.” (*Cravens v. Coghlan*  
15 (1957) 154 Cal.App.2d 215, 217.) The primary ground that the State offers in support of its  
16 demurrer is just such an extrinsic matter. The State argues that plaintiffs have not effectively  
17 asserted a Second Amendment claim, but plaintiffs never intended to assert a Second Amendment  
18 claim, and the complaint does not even mention the Second Amendment. The complaint to which  
19 the State has demurred is not the complaint that plaintiffs have filed in this action.

20 Moreover, despite its heavy reliance on the Second Amendment, the State plainly  
21 understands that plaintiffs have not asserted a Second Amendment claim. The State notes that  
22 “even if the Court *assumes* that plaintiffs are attempting to assert a constitutional claim under the  
23 Second Amendment, *even though one was not alleged*, plaintiffs have failed to specify how the  
24 microstamping regulations violate an individual’s Second Amendment rights.” (Dem. P&A, 9:16-  
25 18; emphasis added.) Thus, the State’s demurrer is premised on a classic straw man argument. It  
26 is the State itself, not plaintiffs, which has introduced the Second Amendment concept, and it is  
27 the State which then attacked that concept.

28 ///



1 In short, the State's view about the merits of a Second Amendment challenge to Penal  
2 Code section 31910, subdivision (b)(7)(a), does not matter, because no Second Amendment  
3 challenge has been alleged. By contrast, the State maintains its silence on the merits of the  
4 impossibility challenge that plaintiffs actually did assert, which as noted above is not surprising in  
5 light of the clear law that supports that challenge. The State's demurrer thus tries to recast  
6 plaintiffs' complaint into a different pleading than it is. Perhaps the demurrer does so because the  
7 State actually recognizes that plaintiffs' complaint effectively alleges a cause of action for  
8 declaratory relief based on the impossibility of complying with Penal Code section 31910,  
9 subdivision (b)(7)(a).

10 Finally, a defendant may not make affirmative allegations of fact in a demurrer that are not  
11 disclosed on the face of the complaint. (*Harboring Villas Homeowners Association v. Superior*  
12 *Court* (1998) 63 Cal.App.4<sup>th</sup> 426, 429.) The State's demurrer violates this rule, too. The State  
13 argues that "[p]resumably, some manufacturers can or will be able to comply with the statute  
14 [Penal Code section 31910, subdivision (b)(7)(a), so] the allegation that manufacturers cannot  
15 comply does not allege a valid cause of action under any theory." (Dem. P&A, 6:11-12; emphasis  
16 added.) However, that is exactly the opposite of what plaintiffs allege the facts to be. Plaintiffs  
17 contend that no manufacturer can comply with the statute because it is impossible to comply with  
18 the statute. (Compl., ¶ 10.) The State's blithe statement that some manufacturers can  
19 "presumably" comply with Penal Code section 31910, subdivision (b)(7)(a), extends well beyond  
20 simply making disallowed allegations of fact in a demurrer. It is based on pure speculation about  
21 what firearm manufacturers might be able to do, and the State has thus unwittingly framed one of  
22 the key factual issues that is now before the Court.<sup>2</sup>

23  
24 ///

25  
26 <sup>2</sup> The State's demurrer also includes significant background material concerning various  
27 different provisions of California's Unsafe Handgun Act. (Dem. P&A, 1:22 – 3:20.) This  
28 material is not pertinent upon demurrer. Plaintiffs' complaint concerns only one provision of the  
Penal Code, namely section 31910, subdivision (b)(7)(A).

1 **IV. THE COMPLAINT PROPERLY ALLEGES THAT PLAINTIFFS HAVE**  
2 **ASSOCIATIONAL STANDING TO BRING THIS ACTION ON BEHALF OF ITS**  
3 **MEMBERS.**  
4

5 The complaint alleges that plaintiff National Shooting Sports Foundation, Inc. (“NSSF”) is  
6 a nonprofit trade association whose “mission is to promote, protect and preserve hunting and the  
7 shooting sports.” (Compl., ¶ 1.) NSSF’s membership includes “more than 10,000 federally  
8 licensed firearms and ammunition manufacturers, distributors and retailers, companies that  
9 manufacture, distribute and sell shooting and hunting-related goods and services, public and  
10 private shooting ranges, and sportsmen’s organizations, individual hunters and recreational target  
11 shooters.” (*Ibid.*) The complaint also alleges that plaintiff Sporting Arms and Ammunition  
12 Manufacturers’ Institute, Inc. (“SAAMI”) is a nonprofit trade association that “develop[s] and  
13 publish[es] industry recommended practices and voluntary standards pertaining to the safety,  
14 interchangeability, reliability and quality of firearms and ammunition and provide[s] assistance  
15 and expert advice to government agencies on issues relating to the design, operability and  
16 interchangeability of firearms and ammunition.” (*Id.*, ¶ 2.) SAAMI’s membership includes “the  
17 United States’ leading manufacturers of sporting firearms, ammunition, and firearm and  
18 ammunition components.” (*Ibid.*) Finally, the complaint alleges that “NSSF and SAAMI have  
19 standing to bring this action in their representative capacities on behalf of their aforementioned  
20 manufacturer, distributor, retailer and individual hunter and recreational target shooter members.”  
21 (Compl., ¶ 3.)

22 The foregoing allegations notwithstanding, the State inexplicably argues that plaintiffs do  
23 not seem to be suing under an associational standing theory. (Dem. P&A, 10:10.) Of course they  
24 are. Plaintiffs qualify for associational standing on behalf of their members, even under the  
25 authority the State cites in its demurrer. According to *Amalgamated Transit Union, Local 1756 v.*  
26 *Superior Court* (2009) 46 Cal.4<sup>th</sup> 993, “[a]ssociational standing exists when: ‘(a) [the  
27 association’s] members would otherwise have standing to sue in their own right; (b) the interests  
28 [the association] seeks to protect are germane to the organization’s purpose; and (c) neither the

1 claim asserted nor the relief requested requires the participation of individual members in the  
2 lawsuit.” Plaintiffs in this case satisfy all three of those elements, as explained below.

3 “In general, a party has standing to challenge governmental action if the party is adversely  
4 affected by the action.” (*State Water Resources Control Board v. Superior Court* (2002) 97  
5 Cal.App.4<sup>th</sup> 907, 914.) Included among plaintiffs’ various members are manufacturers,  
6 distributors and retailers of firearms. (Compl., ¶¶ 1, 2.) Those particular members would have  
7 standing to sue in their own right to enjoin Penal Code section 31910, subdivision (b)(7)(a),  
8 because the impossible microstamping requirements of that statute prevent them from selling  
9 semi-automatic pistols in California. (Compl., ¶¶ 10, 13, 14.) Also included among plaintiffs’  
10 members are individual hunters and recreational target shooters, some of whom reside in  
11 California. (*Id.*, ¶ 1.) Those particular members would also have standing to sue in their own  
12 right to enjoin Penal Code section 31910, subdivision (b)(7)(a), because the impossible  
13 microstamping requirements of that statute are preventing them from purchasing newly developed  
14 semi-automatic pistols that include the latest safety features. (Compl., ¶ 15.)

15 The interests plaintiffs seek to protect in this action are the rights of its members not to be  
16 adversely affected as noted above by impossible firearm microstamping requirements with which  
17 they cannot possibly comply. Those interests are plainly germane to plaintiffs’ organizational  
18 purposes, which are to promote, protect and preserve hunting and the shooting sports, and to  
19 develop industry standards pertaining to the safety, quality and reliability of firearms. Indeed,  
20 plaintiffs are ideally situated to protect those interests, because as trade associations they have  
21 broader responsibility for the overall stewardship of the firearms industry than their members  
22 themselves.

23 Neither the declaratory relief claim that plaintiffs assert nor the injunctive relief that  
24 plaintiffs request requires the participation of plaintiffs’ members. The claims plaintiffs allege in  
25 this action will be determined based on the testimony of experts, among them forensic firearms  
26 examiners, who will offer their opinions as to whether it is possible to comply with the  
27 microstamping requirements of Penal Code section 31910, subdivision (b)(7)(a). Indeed, one such  
28 expert declaration is already on file with the Court, in support of plaintiffs’ motion for a

1 preliminary injunction, which is calendared for hearing a week after the hearing on the State's  
2 demurrer. Again, plaintiffs are better situated than their members to present such expert  
3 testimony, because of their superior access to industry resources in their capacity as trade  
4 associations.

5 Finally, being still fixated on the Second Amendment claim that plaintiffs have not alleged,  
6 the State asserts that plaintiffs lack standing because they do not possess any Second Amendment  
7 rights as trade associations. (Dem. P&A, 9:27 – 10:1.) By making that argument, the State reverts  
8 once again to its straw man, because plaintiffs have not asserted a Second Amendment claim. In  
9 any event, the issue of standing is irrelevant with respect to claims that have not been asserted.  
10 Plaintiffs sue herein as the representatives of their members, and they therefore enjoy associational  
11 standing as noted above.

12  
13 **V. CONCLUSION.**  
14

15 For the foregoing reasons, plaintiffs respectfully request that the Court overrule the State's  
16 demurrer and order the State to answer plaintiffs' complaint.

17  
18 DATED: April 16, 2014.

Respectfully submitted,  
  
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25 ARMS AND AMMUNITION MANUFACTUR-  
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**CALIFORNIA STATE COURT PROOF OF SERVICE**

*National Shooting Sports Foundation v. State of California - File No. 33875.02*

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to the action. My business address is 221 North Figueroa Street, Suite 1200, Los Angeles, CA 90012.

On April 16, 2014, I served the following document(s): **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S DEMURRER TO COMPLAINT**

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

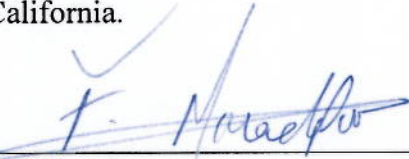
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The documents were served by the following means:

(BY OVERNIGHT DELIVERY) I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 16, 2014, at Los Angeles, California.

  
\_\_\_\_\_  
Farnaz Moradpour