

<b>SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO</b> Civil Department, Central Division 1130 "O" Street Fresno, CA 93724 (559) 457-1900	FOR COURT USE ONLY
TITLE OF CASE: <b>National Shooting Sports vs. State of California</b>	
<b>CLERK'S CERTIFICATE OF MAILING</b>	CASE NUMBER: <b>14CECG00068 DSB</b>

Name and address of person served:

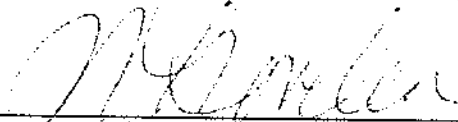
**Daniel C. Decarlo**  
**221 N. Figueroa St. #1200**  
**Los Angeles, CA 90012**

**CLERK'S CERTIFICATE OF MAILING**

I certify that I am not a party to this cause and that a true copy of the minute order and tentative ruling was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at, Fresno California, on:

Date: **May 22, 2014**

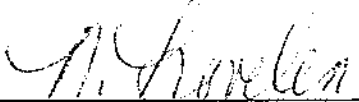
Clerk, by \_\_\_\_\_



**N. Loveless**

, Deputy

Susan K. Smith, Deputy Attorney General, 300 South Spring St, Ste. 1702, Los Angeles CA 90013  
**Daniel C. Decarlo, 221 N. Figueroa St. #1200, Los Angeles CA 90012**

<b>SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO</b> <b>Civil Unlimited Department, Central Division</b>	Entered by:
TITLE OF CASE: <b>National Shooting Sports Foundation, Inc vs State of California</b>	
<b>MINUTE ORDER</b>	Case Number: <b>14CECG00068</b>

**Date:** May 22, 2014

**Re:** Decision

Department: **502**

Judge/Temporary Judge: **Donald S. Black**

Court Clerk: **N. Loveless**

Reporter/Tape: **N/A**

Appearing Parties:

**Plaintiff:**

appearing on behalf of Plaintiff

**Defendant:**

appearing on behalf of Defendant

Off Calendar

Continued to \_\_\_\_\_ at \_\_\_\_\_ Dept \_\_\_\_\_ for \_\_\_\_\_

The Court having taken both the defendant's demurrer and plaintiff's motion for preliminary injunction under submission on May 21, 2014, the Court now takes the matters out from under submission and issues the following ruling:

Having considered the comments of counsel the court denies plaintiffs' request to submit further briefing regarding the legislative history of the statute. Plaintiffs have not shown that the statute is unclear or ambiguous; hence, it is unnecessary to resort to the legislative history to interpret the statute. The court therefore adopts its tentative ruling as the final order on both defendants' demurrer and plaintiffs' motion for preliminary injunction. A copy of the tentative ruling is attached hereto.

## **Tentative Rulings for Department 502**

(23)

### **Tentative Ruling**

Re: ***National Shooting Sports Foundation, Inc. and Sporting Arms and Ammunition Manufacturers' Institute, Inc. v. State of California, et al.***  
Superior Court No. 14CECG00068

Hearing Date: Wednesday, May 21, 2014 (**Dept. 502**)

Motions: (1) Defendants' Demurrer to Plaintiffs' Complaint  
(2) Plaintiffs' Motion for Preliminary Injunction

### **Tentative Ruling:**

To overrule defendants' demurrer

To deny plaintiffs' motion for preliminary injunction.

### **Explanation:**

#### **Defendants' Demurrer to Plaintiffs' Complaint**

First, defendants contend that plaintiffs' entire complaint fails to allege any viable cause of action against them because plaintiffs have no standing to bring this action. "A litigant's standing to sue is a threshold issue to be resolved before the matter can be reached on the merits. ... Standing ' " 'goes to the existence of a cause of action.' " ' " (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000.)

"Standing requirements will vary from statute to statute based upon the intent of the Legislature and the purpose for which the particular statute was enacted." (*Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1385.) "The issue of whether a party has standing focuses on the plaintiff, not the issues he or she seeks to have determined." (*Torres v. City of Yorba Linda, supra*, 13 Cal.App.4th 1035, 1040.) "A person who invokes the judicial process lacks standing if he, or those whom he properly represents, 'does not have a real interest in the ultimate adjudication because [he] has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented.' " (*Schmier v. Superior Court* (2000) 78 Cal.App.4th 703, 707.)

Plaintiffs contend that they have proper associational standing to bring this declaratory relief action on behalf of their members. Associational standing is particularly appropriate in cases in which an association seeks declaratory or other prospective relief. (*Warth v. Seldin* (1975) 422 U.S. 490, 515 ["*Warth*"]) ["If in a proper

case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.".) "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (*Hunt v. Washington State Apple Advertising Com'n* (1977) 432 U.S. 333, 343 ["*Hunt*"]; see also *Warth*, 422 U.S. at p. 511; *Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd.* (1987) 190 Cal.App.3d 1515, 1522.)

Initially, while defendants argue that plaintiffs do not have associational standing because their individual hunter and recreational target shooter members have only alleged a generalized grievance and not a specific injury, the first element of associational standing only requires that an association have at least one member who would have standing to sue in his or her own right. (*Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.* (2005) 132 Cal.App.4th 666, 673.) By alleging that it is impossible for a firearm manufacturer to implement microstamping technology in compliance with Penal Code section 31910, subdivision (b)(7)(A) and that the application of Penal Code section 31910, subdivision (b)(7)(A) is currently preventing plaintiffs' firearm manufacturer members from selling any semi-automatic pistols that do not comply with the statute, because any sales would subject them to criminal prosecution pursuant to Penal Code section 32000, subdivision (a), plaintiffs have sufficiently alleged that plaintiffs' firearm manufacturer members are suffering an injury that would give them standing to sue in their own right. (Plaintiffs' Complaint, ¶¶ 13-14.)

Further, the Court determines that plaintiffs' attempt to remedy this injury and to secure their firearm manufacturer members' ability to sell semiautomatic pistols in California is pertinent and relevant to plaintiffs' purpose of promoting, protecting, and preserving hunting and the shooting sports and promoting safe and responsible use and ownership of firearms and ammunition. (Plaintiffs' Complaint, ¶¶ 1-2.)

Finally, defendants argue that plaintiffs do not have associational standing because individual firearm manufacturer members will have to participate in their suit by explaining how they cannot comply with Penal Code section 31910, subdivision (b)(7)(A). However, the fact that some of plaintiffs' firearm manufacturer members will be involved in the suit and will submit declarations and testimony during the litigation is not what the third criteria discussed in *Warth* and *Hunt* is referring to. The third criteria was actually created to prevent associational standing when the "injury ... suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof." (*Warth, supra*, 422 U.S. 490, 515-516.) Here, since the fact and extent of the alleged injury to plaintiffs' firearm manufacturer members from the application and enforcement of Penal Code section 31910, subdivision (b)(7)(A) does not require individualized proof, plaintiffs' cause of action for declaratory and injunctive relief is "properly resolved in a group context." (*Hunt*, 432 U.S. 333, 344.)

Therefore, the court concludes that plaintiffs have sufficiently alleged all of the criteria necessary to establish associational standing.

Second, defendants contend that plaintiffs' entire complaint fails to state facts sufficient to constitute any viable cause of action against defendants. Plaintiffs' complaint alleges a single cause of action for declaratory and injunctive relief. Defendants argue that plaintiffs have failed to allege a viable cause of action for declaratory relief because plaintiffs only seek a declaration that Penal Code section 31910, subdivision (b)(7)(A) is invalid because it is impossible for firearm manufacturers to comply with the statute and have not alleged that they are challenging the statute on constitutional grounds. However, "[a]n action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation[.]" (*Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1723; see also *Californians for Native Salmon and Steelhead Assn. v. Dept. of Forestry* (1990) 221 Cal.App.3d 1419, 1427 ["Declaratory relief is appropriate to obtain judicial clarification of the parties' rights and obligations under applicable law."].) "A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties ... and requests that these rights and duties be adjudged by the court." (*Maguire v. Hibernia Savings and Loan Soc.* (1944) 23 Cal.2d 719, 728.) "If these requirements are met and no basis for declining declaratory relief appears, the court should declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to [a] favorable declaration." (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606.)

In their complaint, plaintiffs allege that Penal Code section 31910, subdivision (b)(7)(A) is invalid as a matter of law and cannot be enforced because it is impossible for a firearm manufacturer to implement microstamping technology in compliance therewith because no semiautomatic pistol can be designed or equipped with a microscopic array of characters identifying the make, model, and serial number of the pistol that are etched or otherwise imprinted in two or more places on the interior surface or internal working parts of the pistol and that can be legibly, reliably, repeatedly, consistently, and effectively transferred from both such places to a cartridge case when the firearm is fired. (Plaintiffs' Complaint, ¶¶ 10 & 13.) Further, plaintiffs assert that the application of Penal Code section 31910, subdivision (b)(7)(A) is currently preventing plaintiffs' firearm manufacturer members from selling any semiautomatic pistols in California that do not comply with the statute because if the firearm manufacturers sold any non-compliant semiautomatic pistols in California, each sale would subject them to potential criminal prosecution pursuant to Penal Code section 32000, subdivision (a). (Plaintiffs' Complaint, ¶ 14.) Finally, plaintiffs allege that defendants contend that Penal Code section 31910, subdivision (b)(7)(A) is valid and enforceable. (Plaintiffs' Complaint, ¶¶ 7-8 & 10.) Therefore, the court finds that plaintiffs have sufficiently alleged a viable cause of action for declaratory relief against defendants.

#### Plaintiffs' Motion for Preliminary Injunction

Code of Civil Procedure section 527, subdivision (a) provides that "[a] preliminary injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show

satisfactorily that sufficient grounds exist therefor." "In deciding whether to issue a preliminary injunction, a trial court must evaluate two interrelated factors: (i) the likelihood that the party seeking the injunction will ultimately prevail on the merits of his claim, and (ii) the balance of harm presented, i.e., the comparative consequences of the issuance and nonissuance of the injunction." (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441.) "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. [Citation.] Of course, '[t]he scope of available preliminary relief is necessarily limited by the scope of the relief likely to be obtained at trial on the merits.' [Citation.] A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim." (*Buff v. State of California* (1992) 4 Cal.4th 668, 678.)

In this motion, plaintiffs move for a preliminary injunction enjoining defendant State of California from enforcing Penal Code section 31910, subdivision (b)(7)(A) pending entry of judgment in this action.

After considering all of the papers filed in favor of, and in opposition to, plaintiffs' motion for preliminary injunction, the court finds that plaintiffs have failed to establish a reasonable probability that they will succeed on the merits of their case. Specifically, plaintiffs have failed to establish that Penal Code section 31910, subdivision (b)(7)(A) is invalid and cannot be enforced because it is impossible for a firearms manufacturer to implement microstamping technology in order to comply with the statute.

Civil Code section 3531 succinctly states the traditional equitable maxim that: "The law never requires impossibilities." In *Klauber v. San Diego St. Car Co.*, (1892) 95 Cal. 353, 358, the California Supreme Court held that: "To warrant the application of the principle [the contract defense of impossibility of performance], the impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it[.]" .... "Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse non-performance." Modernly, the definition of impossibility is broader:

impossibility means not only strict impossibility but also impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. [Citation.] Consistent with this maxim, the law recognizes exceptions to statutory requirements for impossibility of performance. (*People v. Lake County* (1867) 33 Cal. 487, 492 [impossibility of performance makes mandatory statutory duty directory]; *County of San Diego v. Milotz* (1953) 119 Cal.App.2d Supp. 871, 883-884; see 73 Am.Jur.2d, Statute, § 15, p. 278 ["[W]here strict compliance with the terms of a statute is impossible, compliance as near as can be has been permitted on the principle that the law does not require impossibilities."].)

(*Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 299-300.)

Here, plaintiffs attempt to establish a reasonable likelihood of success through the declaration of Frederic Andre Tulleners, a forensic scientist who specializes in forensic firearms identification. (Declaration of Frederic Tulleners, ¶¶ 2-9 ["Tulleners Decl."].) While defendants argue that this declaration is insufficient to establish impossibility because Mr. Tulleners is not an expert in engineering or firearms manufacturing, the court determines that Mr. Tulleners has adequately established that he is a firearms expert qualified to discuss the impossibility of complying with Penal Code section 31910, subdivision (b)(7)(A), and that plaintiffs did not need to submit the declaration of either an engineer or a firearm manufacturer.

In his declaration, Mr. Tulleners states that it is his opinion, based on his professional experience in the field of forensic firearm identification and his research in micro serial number technology, that it is not possible to etch or otherwise imprint on any interior surface or internal working part of a semi-automatic pistol other than its firing pin, a microscopic array of characters that identify the make, model, and serial number of the pistol, and that can be transferred by imprinting on each cartridge case when the pistol is fired. (Tulleners Decl., ¶¶ 11-13, 16-24.) Further, Mr. Tulleners asserts that there are only a limited number of internal surfaces or parts in a semi-automatic pistol other than the firing pin on which micro-stamped characters might be etched or imprinted – the breech face, chamber wall, extractor, and ejector – and none of those surfaces or parts would effectively transfer micro-stamped characters to the cartridge case upon firing. (Tulleners Decl., ¶¶ 25-32.)

However, the court notes that Mr. Tulleners' declaration states that his opinion is based on the statute's legislative intent, as expressed by the bill's author, that the second place for etching or otherwise imprinting the microstamped information be on an interior surface or internal working part of the pistol other than the firing pin. (Tulleners Decl., ¶¶ 14-15 and Exhibit B.) Specifically, plaintiffs want the court to consider statements made by the author of the bill that created Penal Code section 31910, subdivision (b)(7)(A) as reported in a May 30, 2007 article by San Francisco Chronicle reporter Michael Yi that "his bill" requires microstamping etching on more than just one place inside the gun because the firing pin can be removed and defaced or replaced. (*Id.*)

The court only resorts to legislative history and other aids outside of the plain words of the statute "when the language of a statute is susceptible to more than one reasonable construction[.]" (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29.) Here, plaintiffs have failed to argue that the plain language of Penal Code section 31910, subdivision (b)(7)(A) is susceptible to more than one reasonable construction and that the court should consider the legislative history of the statute in interpreting the statute. Further, plaintiffs have failed to demonstrate that the cited legislative history is proper and applicable in this case because there is no evidence that that the authoring legislator made his views known to the Legislature as a whole. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1175 n.5 [" 'In construing a statute we do not consider the objective of an authoring legislator when

