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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL

YISROEL GOLDSTEIN, ISRAEL DAHAN, L.D.1, a minor, by and through his Guardian Ad Litem, EDEN DAHAN, L.D.2, a minor, by and through her Guardian Ad Litem, EDEN DAHAN, SHIMON ABITBUL, DANNY ALMOG, N.A., a minor, by and through his Guardian Ad Litem, HILA ALMOG, Y.A., a minor, by and through her Guardian Ad Litem, HILA ALMOG,

Plaintiffs,

v.

JOHN T. EARNEST, an individual; LISA C. EARNEST, an individual, JOHN A. EARNEST, an individual, STATE OF CALIFORNIA, DEPARTMENT OF FISH AND WILDLIFE, STATE OF CALIFORNIA, DEPARTMENT OF, JUSTICE; SAN DIEGO GUNS, a California Limited Liability Company, AMERICAN OUTDOOR BRANDS CORPORATION, a Nevada Corporation, SMITH & WESSON BRANDS, INC., a Nevada Corporation, and DOES 1 through 100,

Defendants.

No. 37-2020-00016638-CU-PO-CTL

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT SMITH & WESSON'S DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Date: June 8, 2021
Time: 10:00 a.m.
Dept.: C-66
Judge: Hon. Kenneth J. Model

Date Action Filed: May 26, 2020

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

ARGUMENT 7

I. The First Amendment does not require dismissal of Plaintiffs' common-law claims. 7

A. Plaintiffs' common-law claims directed at Smith & Wesson's course of conduct do not implicate the First Amendment. 7

B. To the extent that Plaintiffs' common-law claims are directed at Smith & Wesson's advertising, they satisfy the First Amendment standards applicable to the regulation of commercial speech. 9

II. Plaintiffs' UCL claim does not raise constitutional concerns because the First Amendment does not protect false or misleading commercial speech. 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

American Beverage Ass'n v. City & County of San Francisco,
916 F.3d 749 (9th Cir. 2019) 6

Barr v. American Ass'n of Political Consultants, Inc.,
140 S. Ct. 2335 (2020) 8

Bigelow v. Virginia,
421 U.S. 809 (1975) 14

Bolger v. Youngs Drug Products Corp.,
463 U.S. 60 (1983) 14, 15

Brandenburg v. Ohio,
395 U.S. 444 (1969) 13, 14, 15

Carey v. Population Services International,
431 U.S. 678 (1977) 14

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,
447 U.S. 557 (1980) 10, 11, 12, 13, 14, 15

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 13

Cohen v. Cowles Media Co.,
501 U.S. 663 (1991) 7

CTIA—The Wireless Ass'n v. City of Berkeley,
928 F.3d 832 (9th Cir. 2019) 13

Edenfield v. Fane,
507 U.S. 761 (1993) 15

Expressions Hair Design v. Schneiderman,
137 S. Ct. 1144 (2017) 6, 9

Florida Bar v. Went For It, Inc.,
515 U.S. 618 (1995) 10

FTC v. Superior Court Trial Lawyers Ass'n,
493 U.S. 411 (1990) 9

Giboney v. Empire Storage & Ice Co.,
336 U.S. 490 (1949) 9

Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 10, 11

Holder v. *Humanitarian Law Project*,
561 U.S. 1 (2010) 8, 10

In re R.M.J.,
455 U.S. 191 (1982) 12

Kasky v. Nike, Inc.,
27 Cal. 4th 939 (2002)...12

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) 6, 15

Matal v. Tam,
137 S. Ct. 1744 (2017) 15

Milavetz, Gallop & Milavetz, P.A. v. United States,
559 U.S. 229 (2020) 10, 12

National Institute of Family & Life Advocates v. Becerra,
138 S. Ct. 2361 (2018) 8

Nicopure Labs, LLC v. FDA,
944 F.3d 267 (D.C. Cir. 2019)..12

Ohralik v. Ohio State Bar Ass'n,
436 U.S. 447 (1978) 15

Pittsburgh Press Co. v. Human Relations Commission,
413 U.S. 376 (1973) 10

Retail Digital Network, LLC v. Prieto,
861 F.3d 839 (9th Cir. 2017)...6

Rockwood v. City of Burlington,
21 F. Supp. 2d 411 (D. Vt. 1998) 15

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 13

Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,
547 U.S. 47 (2006) 8

Snyder v. Phelps,
562 U.S. 443 (2011) 13

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011) 7, 10, 15

United States v. Stevens,
559 U.S. 460 (2010) 13

United States v. Williams,
553 U.S. 285 (2008) 10

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,
425 U.S. 748 (1976) 14

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,
471 U.S. 626 (1985) 10, 12

CONSTITUTION

U.S. Const. amend. I 7

STATUTES

California Business & Professions Code § 17200 .... 6, 16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTEREST OF AMICUS CURIAE[*]

Amicus curiae Public Citizen, a nonprofit consumer advocacy organization with members in all 50 states, appears before Congress, administrative agencies, and courts on a wide range of issues, and works for the enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in First Amendment issues—particularly those raised when corporations assert that enforcing valid consumer-protection laws infringes freedom of speech—and has long played a role in the development of commercial-speech doctrine. Public Citizen has appeared as amicus curiae to address commercial-speech issues in many cases concerning public health or other important government and public interests. *See*, *e.g.*, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Am. Bev. Ass'n v. City & County of San Francisco*, 916 F.3d 749 (9th Cir. 2019); *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839 (9th Cir. 2017).

Public Citizen is concerned that, in recent years, corporations have sought to use the First Amendment as a tool to stifle legitimate economic regulatory measures and consumer protections. Attempts by industry to blur or erase the distinctions that commercial-speech doctrine draws between regulation of conduct and regulation of speech, as well as between commercial speech and fully protected speech, threaten to tilt the First Amendment balance against laws and regulations that serve important public interests and to hamstring the government's ability to regulate commerce for the protection of consumers. In this case, for example, defendant Smith & Wesson Brands and its amici raise the First Amendment as a basis for granting Smith & Wesson's demurrer to the plaintiffs' claims against the company arising under the common law and California's unfair competition law (UCL), Cal. Bus. & Prof. Code § 17200. Public Citizen respectfully submits this brief to discuss the proper framework for applying First Amendment principles to plaintiffs' claims.

[*] This brief is submitted pursuant to a motion for leave to file, filed concurrently herewith, and the Court's order dated February 18, 2021, providing for submission of amicus briefs in support of plaintiffs. This brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief; and no person other than the amicus curiae or its counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. The First Amendment does not require dismissal of Plaintiffs' common-law claims.

Plaintiffs are congregants of the Chabad of Poway synagogue who allege physical and emotional injuries arising from a shooting that occurred at the synagogue by an individual using a Smith & Wesson M&P 15 rifle. First Amended Complaint (FAC) ¶¶ 1–3, 22–30. They bring three common-law claims against Smith & Wesson for its role in manufacturing and distributing the weapon: (1) defective design, FAC ¶¶ 174–82 (first cause of action); (2) negligence, *id*. ¶¶ 195–209 (third cause of action); and (3) public nuisance, *id*. ¶¶ 228–42 (sixth cause of action).

Smith & Wesson and its amici argue that the First Amendment requires dismissal of the negligence and public nuisance claims because Plaintiffs' allegations rest in part on Smith & Wesson's advertising. That argument is incorrect. Plaintiffs' common-law claims do not raise First Amendment concerns to the extent they are directed to Smith & Wesson's overall course of conduct, rather than its speech. To the extent that Plaintiffs' claims are directed to Smith & Wesson's advertising, those claims pass muster under the First Amendment standards applicable to regulation of commercial speech.

A. Plaintiffs' common-law claims directed at Smith & Wesson's course of conduct do not implicate the First Amendment.

The First Amendment denies the government the power to "abridg[e] the freedom of speech." U.S. Const. amend. I. "[R]estrictions on protected expression," however, "are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). When the restriction at issue is "directed at commerce or conduct," the First Amendment generally permits the government to impose the restriction even if it "impos[es] incidental burdens on speech." *Id*.; *see also Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (explaining that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"). Accordingly, in evaluating the First Amendment arguments

presented by Smith & Wesson and its amici, the initial question that this Court must address is the extent to which the First Amendment applies to Plaintiffs' claims. *See Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020) (plurality op.) (stating that courts must "distinguish impermissible content-based speech restrictions from traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech"); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) ("While drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it, and the line is long familiar to the bar," citations and internal quotation marks omitted).

Here, Plaintiffs' negligence and public nuisance claims allege misconduct that is not based on speech. The negligence claim focuses on Smith & Wesson's alleged violation of its common-law duty to exercise "the highest degree of care to minimize the risk" of its firearms "falling into the hands of dangerous individuals." FAC ¶ 196. And the public-nuisance claim alleges that Smith & Wesson's actions "made it especially likely that members of the dangerous class of consumers to which the Shooter belonged would acquire and use particularly dangerous weapons like the Rifle in unlawful acts of violence." *Id*. ¶ 234. "As a general matter," these claims are directed at Smith & Wesson's conduct, "not what [it] may or may not *say*." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006).

The demurrer emphasizes that Plaintiffs' negligence and public-nuisance claims rest, in part, on Smith & Wesson's marketing practices, *see*, *e.g.*, FAC ¶¶ 197, 198 (alleging that Smith & Wesson "negligently marketed" its rifle by "engaging in a reckless, deceptive and unlawful campaign that attracted a dangerous category of consumers"). A "generally applicable law" regulating conduct triggers First Amendment scrutiny, however, only if, in its application, it is "directed at" a defendant "because of what [its] speech communicated." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). Plaintiffs' common-law claims are not "directed at" Smith & Wesson's advertising. *See*, *e.g.*, FAC ¶ 117 (referring generally to Smith & Wesson's "business practices"), ¶ 196 (alleging that Smith & Wesson acted negligently in "design[ing], market[ing], and sell[ing] [its] firearms"), ¶ 234 (alleging that its "marketing, design, and distribution" of

firearms created a public nuisance). Instead, Plaintiffs assert that Smith & Wesson's advertising formed "an integral part of conduct" by the company "in violation" of its common-law duties. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). The First Amendment does not bar such claims simply because the allegedly wrongful course of conduct was facilitated by speech. *See*, *e.g.*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 431–32 (1990) (rejecting a "rule that requires courts to apply the antitrust laws 'prudently and with sensitivity' whenever an economic boycott has an 'expressive component,'" because it "would create a gaping hole in the fabric of those laws.").

For example, in *Giboney*, the Supreme Court held that a state could apply "its anti-trade-restraint law to labor union activities, and [could] enjoin union members from peaceful picketing carried on as an essential and inseparable part of a course of conduct which is in violation of the state law." *Id*. at 491–92 (footnote reference omitted). The union portrayed the picketing as a peaceful attempt "to publicize truthful facts about a labor dispute." *Id*. at 498. The Court, however, declined to view the picketing "in isolation," recognizing instead that it constituted one element of "a single and integrated course of conduct" that violated state law. *Id*. Although the union's conduct was "in most instances brought about through speaking and writing," the Court explained that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id*. at 502; *see also Expressions Hair Design*, 137 S. Ct. at 1151 (quoting *Giboney*). Likewise here, to the extent that Plaintiffs' negligence and public-nuisance claims rest on Smith & Wesson's course of conduct, the company's use of advertising as part of its alleged wrongdoing is insufficient to raise a First Amendment concern.

B. To the extent that Plaintiffs' common-law claims are directed at Smith & Wesson's advertising, they satisfy the First Amendment standards applicable to the regulation of commercial speech.

Plaintiffs' negligence and public-nuisance claims implicate the First Amendment only to the extent that the claims are "directed at" Smith & Wesson's advertising as such, rather than the

company's course of conduct. *Humanitarian Law Project*, 561 U.S. at 28. Smith & Wesson's advertising is a form of "commercial speech." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). Although commercial speech is protected "from unwarranted governmental regulation," *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 561 (1980), the First Amendment "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression," *id*. at 563. Restrictions on commercial speech are subject to the standard established in *Central Hudson*, which asks whether "restrictions on nonmisleading commercial speech regarding lawful activity" "'directly advance' a substantial governmental interest" and are "'no more extensive than is necessary to serve that interest.'" *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2020) (quoting *Central Hudson*, 447 U.S. at 566 (brackets removed)).

1. The initial question under *Central Hudson* is whether the commercial speech at issue is protected speech. Commercial speech receives no First Amendment protection unless it both "concern[s] lawful activity" and is not false or misleading. 447 U.S. at 566.

First, "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection." *See United States v. Williams*, 553 U.S. 285, 297 (2008). This category of unprotected speech encompasses "commercial activity promoting or encouraging" conduct that is "illegal," *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982), including conduct prohibited by civil laws, *see Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 389 (1973) (holding that an ordinance could prohibit newspaper advertisements "signal[ing] that the advertisers were likely to show an illegal sex preference in their hiring decisions"); *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 645 n.12 (1985) (stating that a state may prohibit "attorneys to use advertisements soliciting clients for nuisance suits").

In *Hoffman Estates*, for example, the Court considered an ordinance that imposed a licensing requirement on businesses that sold items "designed or marketed" for illegal drug use. 455 U.S. at 492. The Court upheld the ordinance because it "simply regulates the commercial

marketing of items that the labels reveal *may be used* for an illicit purpose." *Id*. at 496 (emphasis added). The Court explained that the only commercial speech interest implicated by the ordinance was "the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires," and that the only speech that the ordinance "appreciably limits" involves "commercial activity promoting or encouraging illegal drug use." *Id*. Citing *Central Hudson*, the Court concluded the "government may regulate or ban" such speech "entirely." *Id*.

Here, Plaintiffs' negligence and public-nuisance claims contain allegations from which a factfinder could conclude that Smith & Wesson's advertising does not "concern lawful activity." *Central Hudson*, 447 U.S. at 566. Specifically, Plaintiffs allege that Smith & Wesson designed its firearm to be easily converted into an assault rifle prohibited by California law, FAC ¶¶ 44-54, and into a machinegun restricted under federal law, *id*. ¶¶ 55, 57, 59, 70; and that Smith & Wesson marketed its weapon through an "advertising campaign that attracted a dangerous category of consumers," *id.* ¶ 197 (negligence claim), which made it "especially likely that members of the dangerous class of consumers to which the Shooter belonged would acquire and use particularly dangerous weapons like the Rifle in unlawful acts of violence," ¶ 234 (public nuisance claim); *see also id*. ¶ 75 (alleging that Smith & Wesson was "aware and had actual or constructive knowledge of the fact that its marketing had the effect of attracting this category of consumers").

Smith & Wesson responds that its advertisements "concern lawful activity—the acquisition of lawfully manufactured and legally owned firearms," *See* Smith & Wesson Dem. to FAC 19 n.15; and its amici worry that accepting the adequacy of Plaintiffs' allegations would "lead to" lawsuits over "any products that are capable of being misused," Professors' Brief 6. But as with the items sold in *Hoffman Estates*, firearms, even if lawfully acquired, "may be used for an illicit purpose." 455 U.S. at 496. Liability, moreover, requires more than a showing that the products at issue "are capable of being misused"; for advertising to be unprotected speech, the evidence must reveal "commercial activity promoting or encouraging" such misuse, *id*., and, further, liability requires a showing of negligence or the creation of a public nuisance. And even if Smith & Wesson is found liable in this case, it will retain ample discretion to design and market

its firearms in ways that do not violate its common-law duties. As in *Hoffman Estates*, Smith & Wesson's liability for the "manner of marketing" at issue would not "appreciably limit" its "communication of information" about the desirability of purchasing its weapons. 455 U.S. at 496.

Second, the government may also "prohibit commercial speech that is false or misleading." *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 946 (2002); *see also Central Hudson*, 447 U.S. at 566. In addition, the government may regulate speech that is "potentially misleading," so long as truthful advertising is not banned outright. *See Zauderer*, 471 U.S. at 644 ("[T]he States may not place an absolute prohibition on certain types of potentially misleading information ... if the information also may be presented in a way that is not deceptive," quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)); *Nicopure Labs, LLC v. FDA*, 944 F.3d 267, 287 (D.C. Cir. 2019) ("The First Amendment test of regulation of potentially misleading commercial speech allows for contextual determination of accuracy based on consumers' understanding.").

Here, Plaintiff's negligence and public nuisance claims rest in part on allegations that Smith & Wesson's marketing was "deceptive," FAC ¶ 197 (negligence); ¶¶ 234, 239 (public nuisance), because the company created "the false impression that [its] products like the Rifle are frequently employed by United States military and law enforcement forces," Pls.' Resp. to Br. of Amicus Curiae Law Professors 15 (citing FAC ¶¶ 71–110). Although Smith & Wesson and its amici argue that the advertisements are not deceptive or misleading, *see* Smith & Wesson Dem. to FAC 19 n.15; Professors' Br. 8–10, they do not dispute that a false impression of the kind that Plaintiffs allege is not protected commercial speech under *Central Hudson*. Thus, for purposes of demurrer, Plaintiffs' claim falls outside the scope of the First Amendment.

2. Where the speech at issue is "nonmisleading commercial speech regarding lawful activity," *Milavetz*, 559 U.S. at 249, *Central Hudson*'s remaining prongs look to whether regulation of that speech "directly advances" a "substantial" governmental interest and is "no more extensive than is necessary to serve that interest,"—a standard typically designated as "intermediate scrutiny," *id*. (internal quotation marks omitted). The state has a substantial interest

in preventing violence, so as to "protect[] the health, safety, and welfare of its citizens." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995); *see also CTIA—The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019) ("protecting the health and safety of consumers is a substantial governmental interest"). And imposing liability for encouraging violence would advance this substantial interest. At least at this early stage of the litigation, where Plaintiffs' UCL and common-law claims have not been fully developed and Smith & Wesson's course of conduct has not yet been fully established, Smith & Wesson cannot establish as a matter of law that the claims would not satisfy *Central Hudson*. *See Snyder v. Phelps*, 562 U.S. 443, 460 (2011) ("We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us."). Indeed, neither Smith & Wesson nor its amici grapple with the question whether Plaintiffs' claims satisfy intermediate scrutiny. *See* Smith & Wesson Dem. to FAC 19 n.15; Professors' Brief 3 (citing *Central Hudson* but not applying the *Central Hudson*'s intermediate-scrutiny test).

3. Rather than focus on *Central Hudson*, Smith & Wesson and its amici argue that Plaintiffs' claims must be dismissed if they do not satisfy the incitement standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Smith & Wesson Dem. to FAC 15–19; Professors' Brief 7–8. Under *Brandenburg*, a state may "forbid or proscribe advocacy of the use of force or of law violation … where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. Advocacy that satisfies the *Brandenburg* test falls within one of "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

Commercial speech that does not rise to the level of constitutionally unprotected incitement, however, does not receive full first a protection but, rather, is subject to *Central Hudson*. In the pre-*Central Hudson* decision in *Bigelow v. Virginia*, for instance, the Court examined a state law prohibiting advertising of lawful abortion services. 421 U.S. 809, 811

(1975). While noting that the advertisement at issue did not constitute incitement under *Brandenburg*, *id*. at 819, the Court nonetheless made clear that "[a]dvertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest," *id*. at 826. The Court later set forth a specific test for considering commercial-speech restrictions: *Central Hudson*'s intermediate-scrutiny framework. *See Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 64 (1983). Indeed, in *Hoffman Estates*, the Supreme Court applied *Central Hudson* to uphold a restriction on "commercial activity promoting or encouraging illegal drug use" without even citing *Brandenburg* or its incitement standard. 455 U.S. at 496.

Smith & Wesson is also wrong to suggest that *Carey v. Population Services International*, 431 U.S. 678 (1977), suggests that *Brandenburg* is the applicable test. *See* Smith & Wesson Dem. to FAC 16–17. In *Carey*—another case that preceded *Central Hudson*—the Supreme Court invalidated a state law that "suppress[ed] completely any information about the availability and price of contraceptives." *Id*. at 700. Applying its then-recent decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the Court first explained that the restriction was invalid because it did not address false or misleading speech, and suppressed information "related to activity with which, at least in some respects, the State could not interfere." *Carey*, 431 U.S. at 701 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 760). The Court then, and only in response to the state's argument that allowing contraceptive advertising would "legitimize sexual activity of young people," cited *Brandenburg*. Rejecting the argument that advertising could be suppressed on this basis, the Court stated: "As for the possible 'legitimation' of illicit sexual behavior, whatever might be the case if the advertisements directly incited illicit sexual activity among the young, none of the advertisements in this record can even remotely be characterized as 'directed to inciting or producing imminent lawless action and … likely to incite or produce such action.'" *Id*. (quoting *Brandenburg*, 395 U.S. at 447). *Carey* thus cannot reasonably be read to suggest that *Brandenburg* may shield a restriction on commercial speech that is justified under *Central Hudson*.

Most of the other decisions on which Smith & Wesson and its amici rely do not involve commercial speech and the intermediate scrutiny afforded commercial-speech restrictions, but rather involve speech entitled to full First Amendment protection against governmental restrictions. *See* Smith & Wesson Dem. to FAC 15–19; Professors' Brief 7–8. Accordingly, these decisions are inapposite here. And the commercial-speech cases that Smith & Wesson does cite apply *Central Hudson*—not *Brandenburg* or strict scrutiny—to assess the constitutionality of the speech at issue. *See Lorillard Tobacco Co.*, 533 U.S. at 553–67 (tobacco advertising); *Bolger*, 463 U.S. at 64–75 (unsolicited mailed contraceptive advertising); *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411, 421–23 (D. Vt. 1998) (tobacco advertising).

Finally, the concern expressed by Smith & Wesson's amici about the possibility of impermissible viewpoint discrimination is misplaced. *See* Professors' Br. 2–3. Amici observe that Smith & Wesson's advertising "express[es] the view" that gun ownership "is proper and can even be righteous and noble." *Id*. at 3. But every commercial advertisement conveys a message, namely, that consumer should purchase the product or service being offered for sale. Nonetheless, because commercial speech "occurs in an area traditionally subject to governmental regulation," *Central Hudson*, 447 U.S. at 562, the government has greater leeway to make distinctions among different types of speech than would be permitted if applied to fully protected speech. Thus, for example, the Supreme Court has upheld the state's authority to ban in-person solicitation of clients by attorneys, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), while rejecting a similar prophylactic ban on in-person solicitation of clients by certified public accountants, *Edenfield v. Fane*, 507 U.S. 761 (1993), because of differences in the potential harm for consumers, *id*. at 776. As the Supreme Court has explained, *Central Hudson*'s standards "ensure" that "the law does not *seek* to suppress a disfavored message." *Sorrell*, 564 U.S. at 572 (emphasis added); *see also Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (principal op. of four justices) (recognizing that the government does not have a substantial interest under *Central Hudson* "in preventing speech expressing ideas that offend"); *id*. at 1767 (concurring op. of four justices, stating that a regulation that "targets speech for its offensiveness" is subject to "heightened scrutiny"). But it is not

impermissible viewpoint discrimination to hold commercial speakers responsible for the harms to the public caused by their marketing practices.

II. Plaintiffs' UCL claim does not raise constitutional concerns because the First Amendment does not protect false or misleading commercial speech.

In addition to common-law claims, Plaintiffs allege that Smith & Wesson violated the UCL, FAC ¶¶ 183–94 (second cause of action), by engaging in "deceptive, untrue or misleading advertising," *id*. ¶ 186 (quoting Cal. Bus. & Prof. Code § 17200). In particular, they assert that Smith & Wesson's advertising falsely represents that its firearms are "utilized or endorsed" by law enforcement, *see*, *e.g.*, *id*. ¶ 85; *see also id*. ¶ 184; Pls. Opp. to Smith & Wesson's Dem. to FAC at 26, 28–29, and they seek an injunction to prohibit Smith & Wesson "falsely representing its products as being commonly used by, endorsed by or associated with United States military/law enforcement." *Id*. ¶ 194.

Plaintiffs' UCL claim raises no First Amendment concerns because it is directed solely at commercial speech that receives no constitutional protection. If Plaintiffs have adequately alleged, and ultimately are able to prove, that Smith & Wesson's advertising contains false or misleading material, this Court may enjoin Smith & Wesson from making such false or misleading advertising without triggering any First Amendment concerns. On the other hand, if Smith & Wesson's advertisements are not false or misleading, then Plaintiffs' UCL claim will fail on its own terms to the extent it rests on such allegations, and no First Amendment analysis will be necessary.

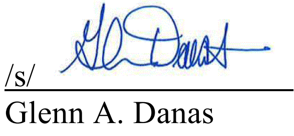
In short, adjudicating Smith & Wesson's alleged violation of the UCL for false or misleading advertising will not require this Court to conduct a First Amendment inquiry that is distinct from the issue of the company's liability under the UCL.

CONCLUSION

For the foregoing reasons, the Court should deny Smith & Wesson's demurrer to the extent it is based on the First Amendment.

Dated: March 23, 2021

Respectfully submitted,



/s/ ______________________
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