IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

No. A103211, consolidated with A105309

PEOPLE, ex rel. ROCKARD J. DELGADILLO, as City Attorney, et. al.	)	[Judicial Council Coordinated Proceeding No. 4095]
Plaintiffs/Appellants,	)	[San Francisco Superior Court No. 303753]
vs.	)	[Los Angeles Superior Court No. BC210894, BC214794]
B & B GROUP, INC., et al.	)	
Defendants/Respondents.	)	[Honorable Vincent P. DiFiglia Judge]

BRIEF OF RESPONDENT-MANUFACTURERS
BERETTA U.S.A. CORP. AND
FABBRICA d'ARMI PIETRO BERETTA S.p.A.

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INTRODUCTION

Five years ago, plaintiffs sued defendants,[1] claiming their distribution practices facilitated the acquisition of firearms by criminals in California. After four years of discovery and the production of thousands of pages of police incident reports concerning guns recovered from criminals in California, plaintiffs remained unable to substantiate their claims against the manufacturer and distributor defendants with any hard evidence.

Faced with an issue preclusion motion, plaintiffs argued that they should be given an opportunity to prove causation through their experts. The experts, however, proved uninterested in facts. Not one of them had examined the extensive factual evidence relating to guns recovered in California. Not one of them could testify that any firearm sold by a manufacturer or distributor defendant was acquired by a criminal in California through any of the methods alleged by plaintiffs,[2] much less that any defendant had caused such an acquisition to occur.

After four years of discovery, the best and only evidence the experts could offer was trace data which the federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") – the agency charged with screening and licensing members of the firearms industry and enforcing their compliance

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[1] Defendants were manufacturers, distributors, and retail sellers of firearms, and three trade associations. This brief is submitted on behalf of two of the respondent-manufacturers, defendants below, Beretta U.S.A. Corp. and Fabbrica d'Armi Pietro Beretta S.p.A. (together, "Beretta"). As used throughout this brief, "defendants" means those defendants that are respondents in this appeal.

[2] The sole exception was for lawful multiple sales. *See* n.9, *infra*.

with firearms laws – had gathered over the years and which ATF uses as a *starting point* for its own law enforcement investigations into possible criminal firearms diversion.[3] The experts conceded in deposition that trace data does not disclose anything about the nature of the retail sale of the traced firearms or whether the retailer did anything wrong. Significantly, the experts, who had reviewed the trace data at the time of their depositions, were unable to conclude that any manufacturer, distributor, or retailer had engaged in wrongdoing.

In opposing defendants' summary judgment motion, and now on appeal, plaintiffs argue strenuously that the trace data, whose limitations their experts conceded in deposition, really shows which retailers are "high risk" or "irresponsible" and that the manufacturers and distributors should be held liable for failing to discover and root them out. But this argument and the *post hoc* expert declarations on which it is based are speculation piled on speculation, and fly in the face of ATF's repeated statements that trace data does *not* permit conclusions about wrongdoing. In the absence of evidence that any manufacturer or distributor in fact knew of a retailer's wrongdoing and was complicit in that wrongdoing or (presupposing a legal duty which the trial court properly found does not exist) could have detected a retailer's wrongdoing and prevented it from happening but did not, there can be no liability on the part of the manufacturers or distributors.

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[3] Tracing is the process by which ATF reconstructs the distribution history of a gun that has been recovered by police by contacting the manufacturer, distributor, and retail seller of the gun, each in turn. *See* 26JA07414-16. ATF enters the data (including the identities of each seller and the first retail purchaser) in a National Trace Database which ATF uses to investigate and solve crimes. *Id.*

Plaintiffs cannot prove by conclusory assertion and conjecture what they cannot substantiate with even one specific fact.

Beyond causation, there are several legal grounds for affirming the court's judgment. With respect to plaintiffs' California Business & Professions Code Section 17200 ("Section 17200" or "17200") unfair practices claim, plaintiffs have failed to allege the type of injury encompassed by the statute, and thus cannot state a claim as a matter of law. Moreover, there is no liability under 17200 for failing to do what one has no legal duty to do, and defendants have no duty to prevent retailers or other third parties beyond their control from selling guns to criminals. Plaintiffs' public nuisance claim, and the 17200 unlawful practices claim that is based upon it, fail because (1) nuisance law does not apply to the distribution of products and (2) defendants do not control the nuisance plaintiffs seek to have them abate.

Finally, the court is the wrong institution to grant the relief sought by plaintiffs. Where, as here, a comprehensive regulatory scheme already exists and the duties plaintiffs seek to impose on defendants are legislatively-delegated to a governmental agency, plaintiffs' relief lies with that agency or the legislature, not the courts. To involve the court in fashioning the type of remedy plaintiffs seek here would pull it deep into the thicket of economic policy-making that is properly reserved to the legislative branch of government.

STATEMENT OF FACTS

Plaintiffs' Claims

In 1999, plaintiffs filed three lawsuits, seeking to hold defendants liable for gun violence in California under theories of public nuisance and unfair competition in violation of Section 17200. 1JA00001-167.

Following coordination, defendants filed demurrers (1JA00168-269), which the court denied. 11JA03042-58.

The gist of plaintiffs' claims is that defendants engage in unfair and unlawful business practices under 17200, and create a public nuisance in California, by distributing firearms in a manner that enables criminals to acquire those firearms through straw purchases (1JA00145, ¶¶ 90-92),[4] multiple sales (*id.*, ¶ 93), illegal sales by federally licensed retail dealers (1JA00161, ¶ 144), sales at gun shows (1JA00147, ¶¶ 97-98), sales by so-called kitchen-table dealers (1JA00146-147, ¶¶ 95-96), and thefts from retail dealers (1JA00154, ¶ 120).[5]

Plaintiffs do not contend that the manufacturer and distributor defendants, themselves, sell guns to criminals. Rather, plaintiffs complain that they fail to monitor, supervise, or train downstream retailers to ensure that the retailers' sales are lawful and their inventory safely secured against theft. 1JA00144, ¶ 86; 1JA00145, ¶ 90; 1JA00146, ¶ 94; 1JA00146-47, ¶ 96; 1JA00147, ¶ 98; 1JA00161, ¶¶ 144-46. Plaintiffs seek injunctive relief and civil penalties. 1JA00165.

Defendants' Efforts To Discover The Factual Basis of Plaintiffs' Claims

In an effort to discover whether there were any facts to support plaintiffs' claims, defendants moved, early on, for an order compelling plaintiffs to disclose facts and documents showing the acquisitional history

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[4] The allegations of the three complaints are largely identical. Citations here are to the Los Angeles County Complaint, 1JA00129-167.

[5] Plaintiffs also claimed that defendants defectively designed their firearms and engaged in fraudulent practices and false and deceptive advertising in violation of Sections 17200 and 17500. However, plaintiffs have abandoned these claims on appeal. *See* Pltfs-Brief 5 n.1.

of firearms recovered in California by plaintiffs in their law enforcement capacities. 12JA03418-29. Specifically, defendants sought to learn what guns were recovered from criminals in California and how the criminals acquired those guns – information plaintiffs' law enforcement departments frequently gather in the course of investigating and prosecuting violations of firearm laws and other crimes. Defendants sought this information to test plaintiffs' claims that criminals acquire firearms through the avenues alleged by plaintiffs and that defendants bear responsibility for those acquisitions.

For example, with respect to plaintiffs' claim that manufacturers facilitate the acquisition of guns by criminals through straw purchases, defendants sought to learn, with respect to each defendant manufacturer, (1) whether any of the manufacturer's firearms was acquired by a criminal in California through a straw purchase and, if so, (2) whether the retailer was at fault[6] and (3) whether there was any evidence to suggest that the manufacturer, through its acts or omissions, caused the sale to occur.

By Order dated March 26, 2001, the trial court required plaintiffs to produce documents "reflect[ing] how criminals and others acquired the firearms manufactured and/or sold by defendants and previously identified

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[6] A straw purchase occurs when a lawful purchaser buys a gun for a criminal or other unauthorized person. Every straw purchaser commits a federal felony and violates California law by falsely stating that he is not buying the gun for someone else. *See* 18 U.S.C. § 924(a)(1)(A), (a)(3); Cal. Penal Code § 12072. But unless the retailer knows the straw purchaser is buying the gun for an unauthorized person, the retailer is duped and does not act unlawfully. *Id.* A bare assertion of a "straw purchase" does not lead to a reasonable inference of wrongdoing by any retailer, and it certainly does not implicate a remote distributor or manufacturer.

by plaintiffs and *whether the manner of acquisition has a factual nexus to defendants' alleged conduct.*" 13JA03568-69 (emphasis added). After fifteen months and five additional orders compelling compliance (14JA3902-03, 14JA3924-3951), plaintiffs completed their production, consisting of thousands of pages of police incident reports and related documents pertaining to recovered firearms.

Upon review of that production and other discovery, the manufacturers moved, at the close of fact discovery, for an order precluding evidence that their conduct caused the acquisition of firearms by criminals in California. 14JA03896-3982. Defendants argued that plaintiffs had failed to produce evidence showing that more than a *de minimis* number of defendants' firearms recovered in California were the subject of straw purchases, illegal sales by retail dealers, sales at gun shows, sales by so-called kitchen-table dealers, or thefts from retail dealers; more importantly, plaintiffs failed to produce *any* evidence whatsoever that any defendant *caused* such a sale or acquisition to occur or had knowledge of its occurrence.[7] Without evidence establishing a factual nexus between defendants' conduct and the acquisition of firearms by criminals in California through the methods alleged by plaintiffs, defendants argued that plaintiffs' claims were legally insufficient.

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[7] A description of the handful of firearms reflected in the incident reports as having had some connection to one of the methods of acquisition identified by plaintiffs is set forth, generally, in the issue preclusion motion at 14JA03903-06, and, specifically, in the declarations of counsel submitted with that motion and defendants' summary judgment motion. 21JA06002-22JA06152.

In opposing the motion, plaintiffs did not dispute their failure to come forward with evidence showing a causal link between the criminal acquisition of even a single firearm in California and the act or omission of even a single defendant. Instead, plaintiffs argued that they planned to prove causation, not through incident reports and related documentation, but through their experts. 22JA06175-76. The court denied defendants' motion "without prejudice to the issues being renewed in the form of a motion for summary judgment," 21JA06002-03, 22JA06153-54, to afford plaintiffs the opportunity to present their experts' testimony.

Plaintiffs' Experts' Testimony

Plaintiffs presented five experts on defendants' distribution practices. Despite lengthy depositions, not a scintilla of evidence of causation emerged. Indeed, what was most striking about plaintiffs' experts was their total indifference to causation or the need for factual evidence generally.

Not one of the experts had reviewed the factual evidence relating to the acquisition of firearms by criminals which the trial court ordered plaintiffs to produce in discovery.[8] Not one of them was able to testify that any firearm sold by a manufacturer or distributor defendant was subsequently acquired by a criminal through a straw purchase in California, an illegal sale by a California retail dealer, a California gun show sale, a so-called kitchen table dealer in California, or a theft from a California retail

[8] Nunziato Depo. (22JA06195, 243:8-15; 22JA06207, 695:10 – 696:12); Vince Depo. (22JA06257, 171:18 – 172:17); Fox Depo. (22JA06214, 214:7 – 215:12; 22JA06218, 503:10-15); Higgins Depo. (22JA06237, 308:8-13).

dealer's premises.[9] Needless to say, not one of them could provide evidence that the act or omission of a particular defendant caused such a sale or acquisition to occur. *See* 21JA05989-95.

The heart of the experts' testimony was that defendants are on notice, through trace requests they receive from ATF, that their firearms are used in crime, and they should have a duty to obtain more complete trace data and use that data to monitor and supervise downstream independent retailers.[10] The experts conceded, however, that trace data does not reveal anything about the nature of the retail sale or whether the retailer did anything wrong; nor does the data indicate how a traced firearm made its way from the first retail purchaser to the criminal, or how many times it changed hands.[11] At most, trace data provides "indicators" of *possible*

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[9] Nunziato Depo. (22JA06202, 606:7 – 607:22; 22JA06203, 610:12 – 613:7); Vince Depo. (22JA06263-65, 345:19 – 350:9); Fox Depo. (22JA06224:10-20; 22JA06225-29, 634:18 – 638:22); Gundlach Depo. (22JA06277, 826:7 – 829:18; 22JA06278, 845:5-20). The only showing regarding acquisitions through *any* means alleged by plaintiffs was for lawful multiple sales. Multiple sales, which involve the sale of more than one handgun to a consumer in a five-day period (18 U.S.C. § 923(g)(3)(A)), are subject to close law enforcement scrutiny and must be reported to federal and state authorities by close of business on the day of sale. *Id.*; 27 C.F.R. § 478.126a; 26JA07423, ¶¶ 32-33. Multiple sales were permitted in California until January 1, 2000, when California's one-gun-a-month law took effect. Cal. Penal Code § 12072(a)(9)(A). Even as to multiple sales, plaintiffs made no showing of a connection between defendants' conduct and the acquisitions of firearms by criminals as part of a multiple sale.

[10] Nunziato Depo. (22JA06185-87, 81:15 – 87:8; 22JA06192-93, 143:8 – 146:18); Vince Depo. (22JA06261-62, 337:2 – 341:1).

[11] Nunziato Depo. (22JA06189, 98:1-17; 22JA06192, 143:8-11; 22JA06197, 458:3 – 461:9; 22JA06200, 559:13 – 561:16); Vince Depo. (22JA06263, 344:10 – 345:18; 22JA06264-66, 348:9 – 357:18); Fox Depo.

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misconduct, requiring further investigation to determine whether the retailer or someone outside the licensed distribution chain (*e.g.*, a lawful purchaser, gun trafficker, or criminal) was responsible for the diversion.[12] Those investigations are complex and intensive,[13] and plaintiffs' experts admitted that ATF is uniquely qualified to undertake them[14] and has, in fact, already done so.[15] Significantly, plaintiffs' experts who analyzed the comprehensive trace data that plaintiffs obtained from ATF did not, themselves, reach any conclusion that any manufacturer, distributor, or retailer had engaged in wrongdoing.[16]

Defendants' Motion for Summary Judgment

Defendants moved for summary judgment on the ground that plaintiffs could not prove causation. Additionally, defendants argued that the court should not engage in the legislative task of imposing new

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(22JA06210 at 104:7 – 105:4; 22JA06221:12-19; 22JA06220:11-21; 22JA06211, 106:2 – 107:7; 22JA06213, 156:6-10).

[12] Nunziato Depo. (22JA06188-89, 96:20 – 98:17; 22JA06203, 610:12 – 612:21); Vince Depo. (22JA06263, 343:13 – 345:18).

[13] Nunziato Depo. (22JA06191, 106:2-11).

[14] Nunziato Depo. (22JA06190 , 105:10-22; 22JA06191, 107:2-11, 108:8-21).

[15] Nunziato Depo. (22JA06193, 147:14 – 148:3); Vince Depo. (22JA06259-60, 241:13 – 242:16); 38JA10991-92.

[16] Nunziato Depo. (22JA06188-89 at 96:20 – 98:17; 22JA06198-99 at 503:17 – 506:22); Vince Depo. (22JA06262 at 338:2 – 341:1); Fox Depo. (22JA06211 at 106:2 – 107:7; 22JA06219-20 at 627:16 – 628:21; 22JA06228-29 at 637:20 – 638:22; 22JA06232-33 at 712:3 – 713:15; 22JA06216 at 320:16 – 321:10; 22JA06215 at 298:16 – 300:15).

requirements on a heavily regulated industry. 21JA05914-45. The court granted judgment to defendants. 61JA17849, 61JA17857A-59, 61JA17882-85. This appeal followed. 61JA17886-91.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163. The Court may "affirm the summary judgment if it is correct on any legal ground applicable to th[e] case, whether that ground was the legal theory adopted by the trial court or not, and whether it was raised by defendant in the trial court or first addressed on appeal." *Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal.App.4th 398, 404-05 (citation omitted).

ARGUMENT

I. TO PREVAIL ON THEIR CLAIMS, PLAINTIFFS MUST ESTABLISH A CAUSAL CONNECTION BETWEEN DEFENDANTS' BUSINESS PRACTICES AND THE ACQUISITION OF FIREARMS BY CRIMINALS IN CALIFORNIA.

Section 17200 defines "unfair competition" as including "any unlawful, unfair or fraudulent business act or practice." Because 17200 is written in the disjunctive, it "establishes three varieties of unfair competition – acts or practices which are unlawful, or unfair, or fraudulent." *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647. There are separate lines of authority construing each variety. *Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 851. Thus, in analyzing a 17200 claim, it is important to identify the type of practice alleged.

Here, plaintiffs contend that defendants have engaged in unfair business practices under 17200 by distributing firearms in a manner that facilitates their acquisition by criminals. Plaintiffs also contend that defendants' practices are unlawful under 17200 because they create a public

nuisance in violation of Civil Code § 3479.[17] Finally, plaintiffs assert a separate claim for public nuisance. Causation is an element of each claim.

A. Causation Is An Element Of Plaintiffs' Claim That Defendants Have Engaged In Unfair Practices Under Section 17200.

Section 17200 does not define the term "unfair," and the California Supreme Court has yet to define it in cases involving consumer (as opposed to competitor) injury.[18] Courts have formulated two definitions of "unfair," which plaintiffs cite as controlling. *See* Pltfs-Brief 28, 38. Under the first, "the determination of whether a particular business practice is unfair necessarily involves an examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." *Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 740. Under the second test, borrowed from the Federal Trade Commission's former guidelines for construing parallel language in section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a) ("FTC Act"), "an 'unfair' business practice occurs when it offends an established public

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[17] On appeal, plaintiffs appear to predicate their 17200 "unlawful" claim solely on defendants' alleged creation of a public nuisance. *See* Pltfs-Brief 1-2, 27, 43, 46. Plaintiffs do not contend on appeal that any defendant sold a firearm unlawfully. While the trial court found there were triable issues of fact as to whether certain retailer and distributor defendants violated certain laws, those claims were subsequently settled and are not before this Court.

[18] Because plaintiffs have not alleged injury to competition, Beretta will treat the case as one involving consumer injury for purposes of the causation analysis. However, as explained in Section III.A., *infra*, this case does not fit within either category of injury – consumer or competitor – encompassed by 17200 and therefore fails to state a claim.

policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 530.

In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, the Supreme Court criticized these standards as being "too amorphous" and "provid[ing] too little guidance to courts and businesses." *Id.* at 185. The court devised "a more precise test for determining what is unfair under the unfair competition law" by borrowing law developed under section 5 of the FTC Act. *Id.* at 185-86 & n.11. However, the court limited the new test to claims by competitors, *id.* at 187 n.12, leaving open the question of what standard defines unfair business practices in claims brought by, or on behalf of, consumers.

Although a few courts have continued to apply the old tests of unfairness to 17200 claims by consumers after *Cel-Tech*,[19] as plaintiffs urge here, that approach is misguided. The Supreme Court's criticism of the old tests logically applies to consumer claims as well as competitor claims. In light of this criticism, other courts – including this Court – have properly recognized that *Cel-Tech* "may signal a narrower interpretation of the prohibition of unfair acts or practices in all unfair competition actions and provides reason for caution in relying on the broad language in earlier decisions that the court found to be 'too amorphous.'" *Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 854. *Accord Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940.

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[19] *See, e.g.*, *Smith v. State Farm Mutual Auto. Ins. Co.* (2001) 93 Cal.App.4th 700, 720 n.23; *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 887 n. 24.

While no Court of Appeal has formulated a new test for "unfair" practices in consumer cases, this Court has aptly noted that "the willingness of the court [in *Cel-Tech*] to follow the federal lead in defining 'unfairness' under the UCL for competitors indicates the court would also follow the federal lead in determining the standard for unfairness relating to consumers, absent clear language in the statute or in case law refusing to do so." *Lavie v. Procter & Gamble Co.*(2003) 105 Cal.App.4th 496, 512 n.8.

The federal standard for unfairness relating to consumers is codified at 15 U.S.C. § 45(n) and incorporates causation into its definition:

> The Commission shall have no authority to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice *causes or is likely to cause substantial injury to consumers* which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

15 U.S.C. § 45(n) (emphasis added).[20] *See also FTC v. J.K. Publications, Inc.* (C.D. Cal. 2000) 99 F. Supp. 2d 1176, 1201 (applying current test for

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[20] This provision, which was added to the FTC Act in 1994, was intended to codify the principles embodied in the FTC's December 17, 1980 policy statement on unfairness in consumer cases. *See* S. Rep. 103-130, at *12 (1993). The 1980 Policy Statement, in turn, refined the FTC's earlier guideline on unfairness which had been approved by the United States Supreme Court in *FTC v. Sperry & Hutchinson Co.* (1972) 405 U.S. 233, 244 n.5, and by the California court in *Casa Blanca Convalescent Homes*, 159 Cal.App.3d at 530. The 1980 Policy Statement did so by providing that the most important of the three factors for determining unfairness was consumer injury, and that the other two factors – (1) whether a practice "offends public policy" or (2) is "unethical or unscrupulous" – should rarely, if ever, provide an independent basis for establishing unfairness. *See* 4 Trade Reg. Rep. (CCH) ¶ 13,203, at 20,908 – 20,909-3 (reprinting 1980 Policy Statement). *See also American Financial Services Ass'n v. FTC*

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unfairness contained in 15 U.S.C. § 45(n)); *FTC v. The Crescent Publishing Group, Inc.* (S.D.N.Y. 2001)129 F. Supp. 2d 311, 322 (same).

Even the old test of unfairness – relied on by plaintiffs and criticized in *Cel-Tech* – incorporates causation into its definition, requiring "an examination of *[the practice's] impact on its alleged victim*, balanced against the reasons, justifications and motives of the alleged wrongdoer," in other words, a "weigh[ing] [of] the utility of the defendant's conduct against *the gravity of the harm to the alleged victim*." *Motors, Inc.,* 102 Cal.App.3d at 740 (emphasis added). In light of the express language of these tests – which require the court to determine what harm to the victim was caused by defendant's practice – plaintiffs' argument that causation is not an element of their claim is untenable.[21]

Plaintiffs attempt to confuse the issue of causation by citing 17200's liberal standing provisions, arguing that "[a] plaintiff suing under 17200 does not have to prove he or she was directly harmed by the defendant's business practices." Pltfs-Brief 41 (quoting *Saunders v. Super. Ct.* (1994) 27 Cal.App.4th 832, 839). While it is true that a 17200 plaintiff need not prove that the practice in question caused injury to *herself*, she must at least

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(D.C. Cir. 1985) 767 F.2d 957, 969-72 (tracing history of FTC's unfairness standard); *Orkin Exterminating Co. v. FTC* (11th Cir. 1988) 849 F.2d 1354 (same).

[21] Plaintiffs' contention also flies in the face of their own allegations. Apart from the legal requirements of 17200, plaintiffs allege that defendants' business practices cause criminals to acquire firearms. *See, e.g.*, 1JA00160-61, ¶¶ 143, 144. This is the very heart of plaintiffs' claims. Defendants' practices are allegedly unfair and unlawful under 17200 and allegedly create a public nuisance *precisely because* (according to plaintiffs) they cause criminals to acquire guns.

show that the practice causes harm *to the general public or competition.* *Saunders*, 27 Cal.App.4th at 841 ("because plaintiff has sufficiently alleged injury due to defendants' conduct," plaintiff had standing *and* stated claim under 17200); *Pines v. Tomson* (1984) 160 Cal.App.3d 370, 380-81 (rejecting argument that plaintiffs, who were not competitors of defendants, lacked standing where plaintiffs alleged that "as a direct and proximate result of defendants' unfair business practice, members of the general public" suffered injury).

Plaintiffs argue that, if they must show causation, it is not "tort-based causation" but some lesser standard which does not require a showing of "actual harm to identifiable victims" or "individualized proof of deception, reliance, and injury," but only that the practice "create[s] a heightened risk of harm." Pltfs-Brief 38-40. However, the cases plaintiffs cite concern the test for the *fraudulent* prong, not the *unfairness* prong, which is different.[22]

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[22] Even the fraudulent and deceptive advertising cases do not support the "heightened risk of harm" standard advanced by plaintiffs. Pltfs-Brief 39. Under the fraudulent prong, plaintiffs must show *probable*, not just possible or "a heightened risk of" deception. *See, e.g.*, *Haskell v. Time, Inc.* (E.D. Cal. 1997) 965 F. Supp. 1398, 1407; *Lavie*, 105 Cal.App.4th at 508. Nor does *American Philatelic Society v. Claibourne* (1935) 3 Cal.2d 689 support plaintiffs' argument that it is sufficient to show the practice "creates a risk or danger." Pltfs-Brief 39. The defendant in *Claibourne* produced counterfeits of rare, valuable stamps and urged stamp dealers to sell these "tools of fraud" to the unsuspecting public for a profit. *Id.* at 692-93, 695. The causal connection between the defendant's practice and the threatened harm to the public and plaintiffs (other stamp collectors and dealers) was direct, and the likelihood of harm virtually certain: flooding the market with counterfeit stamps would inevitably defraud those who bought the counterfeits and depreciate the value of the genuine stamps. *Id.* at 692, 693. Here, by contrast, there is no evidence that a manufacturer's lawful sale of a firearm to a distributor or retailer likely will result in a criminal acquiring it.

These cases do not support plaintiffs' effort to weaken the causation requirement under the *unfairness* prong.

More fundamentally, plaintiffs' argument that they do not have to show that specific persons have been injured, only that a risk or threat of future injury exists, misses the point. Whether the allegedly unfair business practices have caused actual injuries or threaten future injuries or both, plaintiffs must show that it is *defendants' business practices* that cause the injuries or the threat. Because plaintiffs seek to hold manufacturers and distributors liable for the acquisition of firearms by third-party criminals from other third parties (retailers, purchasers, other criminals), plaintiffs must show that it is *the manufacturers' and distributors' conduct* that causes such acquisitions to occur. If defendants do not cause the acquisitions, then punishing them through civil penalties is unjustified and granting injunctive relief against them will serve no useful purpose.

Lastly, if causation were not an element, defendants could be held vicariously liable for the acts of independent third parties like retailers, without any showing of complicity on their part. But the concept of vicarious liability has no application to 17200. *Emery v. Visa Int'l Serv. Ass'n* (2002) 95 Cal.App.4th 952, 960 (citing *People v. Toomey* (1984) 157 Cal.App.3d 1, 14). "A defendant's liability must be based on his personal 'participation in the unlawful practices' and 'unbridled control' over the practices that are found to violate sections 17200 or 17500." *Id.* at 960, 962 (quoting *Toomey*, 157 Cal.App.3d at 15). Absent evidence that a defendant has engaged in wrongdoing, aided and abetted wrongdoing, or has an agency relationship with and control over the wrongdoer – evidence that is completely lacking here – there can be no liability for that wrongdoing under 17200. *See Emery*, 95 Cal.App.4th at 960-64 (VISA not liable under 17200 for solicitation of foreign lottery chances by merchants using VISA

logo and accepting VISA payments where VISA exercised no control over preparation and distribution of solicitations, had no agency relationship with merchants who did, and did not "aid and abet" solicitations). Causation is plainly an element of plaintiffs' unfair business practices claim.

B. Causation Is An Element Of Plaintiffs' Claim That Defendants Have Engaged In Unlawful Practices Under Section 17200.

Under the unlawful prong of 17200, plaintiffs must prove that defendants engaged in business practices that violated some underlying law. *See Saunders*, 27 Cal.App.4th at 838-39 (unlawful practices include "any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made"). Whether a practice is unlawful is determined by looking to the elements of the underlying law, and any defenses to an alleged violation of that law are also defenses to the 17200 claim. *Hobby Indus. Ass'n of America, Inc. v. Younger* (1980) 101 Cal.App.3d 358, 371. Because plaintiffs' claim of unlawfulness is based on defendants' alleged creation of a public nuisance (*see* 11 n.17, *supra*), a showing of causation is clearly required, as causation is an element of a public nuisance claim.

C. Causation Is An Element Of Plaintiffs' Public Nuisance Claim.

It is settled in California that proximate cause is an element of public nuisance:

> Whether liability is based upon nuisance or negligence, the scope of that liability has been similarly measured: It extends to damage which is proximately or legally caused by the defendant's conduct, not to damage suffered as a proximate result of the independent intervening acts of others.

Martinez v. Pacific Bell (1990) 225 Cal.App.3d 1557, 1565.[23]

In *Martinez*, a parking lot attendant sued a telephone company in public nuisance for failing to remove a public telephone that allegedly attracted criminals, several of whom shot him during a robbery. The court affirmed dismissal for lack of proximate cause: "Assuming arguendo that the public telephone could be said to constitute a nuisance, it was not the legal or proximate cause of the robbery of [the plaintiff] by third persons on other premises." *Id.* at 1566. *See also Ileto v. Glock Inc.* (9th Cir. 2003) 349 F.3d 1191, 1212 (agreeing with lower court that "if the California Supreme Court were confronted with this issue, it would require a showing of legal or proximate causation" to establish public nuisance claim against gun-makers, but reversing grant of motion to dismiss claim at pleadings stage).

D. To Establish Causation, Plaintiffs Must Prove That Criminals Acquire Defendants' Firearms Through The Methods Alleged And That Defendants Cause Those Acquisitions To Occur.

Causation requires proof of two essential points. First, plaintiffs must prove that firearms sold by each specific defendant have in fact been acquired by criminals in California in the manner alleged. For example, if

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[23] The Restatement explains that causation is an element of public nuisance, just as it is an element of private nuisance. *See* Restatement (Second) of Torts § 822 (1979) (for private nuisance, defendant's conduct must be legal cause of invasion of plaintiff's protected interests) and *id.* at § 822, cmt. a (subject to certain inapplicable exceptions, "the tort law of public nuisance is consistent with this Section") and cmt. e. (concept of "legal cause" in this section is the same as for negligent and intentional torts). The Restatement was adopted by the California Supreme Court in *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1104-05 & n.3.

plaintiffs cannot show that even one Beretta firearm was acquired by a criminal in California through a straw purchase, plaintiffs cannot possibly succeed in holding Beretta liable for selling firearms which were later sold by third parties to straw purchasers. Second, and more importantly, plaintiffs must prove that acquisitions by criminals were caused by some act or omission of Beretta. Plaintiffs failed to produce evidence to meet either requirement.

II. PLAINTIFFS FAILED TO PRODUCE ANY EVIDENCE THAT DEFENDANTS' BUSINESS PRACTICES CAUSE CRIMINALS IN CALIFORNIA TO ACQUIRE FIREARMS.

A. Plaintiffs Failed To Dispute Defendants' Statement Of Undisputed Material Facts.

Defendants stated ten undisputed material facts in support of their summary judgment motion. 21JA05989-96. The first seven addressed plaintiffs' claims that defendants' distribution practices caused criminals in California to acquire firearms through specific avenues (straw purchases, gun show sales, etc.):

> There is no evidence of any incident in which the act or omission of a specific manufacturer or distributor defendant caused a criminal in California to acquire a specific firearm through [each of the specified means and a catch-all of 'any other means'].

Id. As support, defendants cited the testimony of plaintiffs' own experts and the declarations submitted in connection with defendants' issue preclusion motion. *Id. See also* pp. 6-9, *supra.*

In opposition, plaintiffs purported to dispute each fact but offered as support only (1) legal argument that plaintiffs are not required to prove causation on an incident-by-incident basis and (2) citations to evidence purporting to constitute "examples." 26JA07296-7308. Clearly, plaintiffs'

legal argument is not admissible evidence sufficient to dispute defendants' material facts. Nor do plaintiffs' citations create a triable issue of fact on causation.

Nearly all of plaintiffs' "examples" concern instances of illegal conduct by *retailers*, most of whom were prosecuted, convicted, and sent to prison for their crimes. *See* 58JA16818-33. Not one of the citations contains evidence that any *manufacturer or distributor* had any connection to the alleged illegal retailer conduct. *Id.*

For example, in response to defendants' Fact 1 concerning straw purchases, plaintiffs identified three retailers who allegedly sold firearms to straw purchasers (Slims Gun Shop, RNJ Guns & Ammo, and Trader Sports) and one straw purchaser (Christopher Wheeler). 26JA07297-99. Even assuming Slims Gun Shop, RNJ Guns & Ammo, or Trader Sports knowingly (and, therefore, illegally) participated in the straw purchases, plaintiffs' complaint is with those third parties, not defendants. In none of the examples is there any evidence that any manufacturer or distributor defendant knew of these straw purchases, was complicit in the straw purchases, or caused the straw purchases to occur through any act or omission. The only alleged "link" to defendants is that the three retailers had, at some point, sold some firearms that were manufactured or sold by some of the defendants. Such evidence is plainly insufficient to create a triable issue of fact as to whether any manufacturers or distributors caused these straw purchases – let alone any other straw purchase – to occur.

Similarly, in response to Fact 5 concerning thefts, plaintiffs identified one retailer that reported a theft of over 500 firearms in 1992, three years before the start of the relevant discovery period in this case, and a manufacturer that lost approximately three firearms a year to theft. 26JA07302-03; 46JA13452. However, plaintiffs offered no evidence about

the factual circumstances of the thefts, and certainly no evidence to suggest they were due to inadequate security or misconduct by the retailer or manufacturer. To the contrary, the record shows that the manufacturer was extremely diligent in its security efforts. 50JA14445. Again, plaintiffs' evidence is insufficient to create a triable issue of fact as to whether any manufacturer or distributor caused these thefts – let alone any other theft – to occur.

Plaintiffs' responses to the remaining facts suffer from similar defects. Plaintiffs' failure to dispute defendants' statement of undisputed material facts is, alone, sufficient to sustain the court's judgment.

B. The "Evidence" Cited In Plaintiffs' Counter-Statement Of Facts, Including Plaintiffs' Expert Declarations, Fails To Contain Specific Material Facts Sufficient To Raise A Triable Issue Of Fact On Causation.

Plaintiffs' counter-statement of "facts" fails to show any causal connection between the act or omission of any specific defendant and the acquisition of firearms by criminals in California. The declarations of "gun industry insiders" Robert Ricker, Robert Hass, Carol Bridgewater and others are replete with conclusory assertions that "the gun industry knows" of the diversion of firearms through irresponsible dealers (who are never identified) and "the gun industry" refuses to undertake the duty to find and root them out. *See* Pltfs-Brief 13-16. Though rich in rhetoric, these declarations are devoid of fact. Conclusory assertions of wrongdoing by "the industry" as a monolith or unnamed bad actors within it cannot create a triable issue of fact as to any individual defendant.

Plaintiffs also rely on their experts' post-discovery declarations in which they conclude, based on trace data alone, that each defendant has contributed to gun crime in California by selling through so-called "high

risk dealers." Pltfs-Brief 1, 9-12. Because these declarations are unsupported by facts, contradicted by the experts' previous sworn testimony, and premised on speculation, they are insufficient to remedy the fatal gap in plaintiffs' proof.

The gist of the declarations is that, if manufacturers and distributors had obtained confidential ATF trace data and used it to monitor and supervise downstream retailers, they would have prevented criminals from acquiring guns. Setting aside the issue of whether the manufacturers and distributors have a *duty* to do what the experts urge,[24] the experts' conclusions as to causation are speculative on their face, based on multiple suppositions, *i.e.*, that: (1) retailers with high trace rates are likely engaged in wrongdoing – a proposition ATF itself rejects (see below)[25]; (2) the manufacturers and distributors would have been able to acquire confidential ATF trace data identifying retail sellers of traced firearms – information previously unavailable to them;[26] (3) by analyzing and following up on trace

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[24] An expert cannot create a duty of care where none otherwise exists. *Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1438 n.6. In a closely analogous case, New York's highest court, on appeal following trial, rejected such a duty. *Hamilton v. Beretta U.S.A. Corp.* (N.Y. 2001) 750 N.E.2d 1055, 1065 (it is "neither feasible nor appropriate for the manufacturers" to use trace data "to investigate and identify corrupt dealers").

[25] There is no evidence that the experts considered, *e.g.*, any dealer's *volume* of sales in looking at the number of traces attributable to it.

[26] ATF's policy has been to withhold information identifying the retailers associated with traces for a period of five years. Nunziato Decl. (26JA07420-21, ¶¶ 23, 27; 26JA07426 n. 6). As municipalities, plaintiffs were able to acquire more complete trace data relating to their own jurisdictions from ATF. *Id.* (26JA07421-22, ¶ 28).

data with investigations, defendants would have been able to determine which retailers were engaged in wrongdoing – a task plaintiffs' experts admit is extremely difficult, even for law enforcement, which has better resources and training to conduct such investigations (26JA07523, ¶¶ 74, 75; pp. 8-9 n.13-14, *supra*); and (4) by training and supervising retailers, or terminating sales to those identified as a result of defendants' investigations, defendants would have prevented even a single criminal in California from acquiring a gun.

Moreover, the very first premise in plaintiffs' syllogism – the hook on which they seek to hang liability – is completely lacking in foundation. Traces cannot be used, as plaintiffs' experts would now use them, as a proxy for misconduct. ATF has emphasized repeatedly that traces, alone, do not suggest any wrongdoing by the retailer who sold the traced gun, let alone the manufacturer or distributor two steps removed from that transaction:

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

Dept. of Treasury/ATF, *Commerce in Firearms in the United States* at 22-23 (2000) (emphasis added) (38JA10983-84).[27]

Plaintiffs' own experts admitted in deposition that trace data does not reveal the nature of the retail sale or whether the retailer did anything wrong. *See* p. 8 n.11, *supra*. Trace data does not show whether a traced gun was sold lawfully or unlawfully. *Id.* At most, trace data may provide law enforcement leads requiring further investigation to determine whether the retailer or someone outside the licensed distribution chain was responsible for the gun's diversion to crime. *Id.* at 8-9 n.12. Significantly, none of the experts could opine in deposition that any manufacturer, distributor, or retailer had engaged in wrongdoing based on the trace data. *Id.* at 9 n.16.

Although these experts now claim, based on trace data alone, that many of the retailers "more likely than not . . . have either engaged in sales to gun traffickers or . . . high-risk business practices [that] have facilitated the diversion of guns into the underground market," 26JA07516, ¶ 45, the experts know nothing more about the circumstances of the sales of the traced guns than they did in deposition. Now, as then, they cannot identify which, if any, of these sales was lawful or unlawful or which, if any, of these sales was responsible or negligent. Their *post hoc* assertions that some or all of these sales by the retailers were wrongful is unsupported by any fact. Their conclusion that, if defendants had implemented their

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[27] *See also* Dept.of Treasury/ATF, *The Youth Crime Gun Interdiction Initiative – Crime Gun Trace Analysis Reports: The Illegal Youth Firearms Markets in 27 Communities* at 17 (Feb. 1999) (38JA10862); Memorandum from Chief of Oakland Police to Office of City Manager, at 5 (57JA16784).

proposed measures, fewer criminals would have acquired guns is pure conjecture.[28]

"An expert's speculations do not rise to the status of contradictory evidence, and a court is not bound by expert opinion that is speculative or conjectural. Plaintiffs cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation or reasoning." *McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th 1098, 1106 (internal citations omitted). *See also Lupash*, 75 Cal.App.4th at 1438 n.6 ("plaintiff cannot use expert testimony as a conduit for speculative, remote or conjectural testimony or to create the facts upon which a conclusion is based"); *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775 ("where there is no factual basis for the expert's opinion or for [the plaintiff's] general assertion of causation, the conclusion is unavoidable that summary judgment [is] properly granted").

The conclusions in the experts' post-discovery declarations should be ignored for the additional reason that they contradict the experts' previous sworn testimony. *See, e.g., Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 860 ("[T]he well settled rule [is] that a party cannot create an issue of fact by a declaration which contradicts his prior discovery responses. In determining whether any triable issue of material fact exists, the trial court may, in its discretion, give great weight to admissions made in deposition and disregard contradictory and self-serving affidavits of the party.") (citation and quotation marks omitted); *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 653 ("The

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[28] There is no empirical support for the efficacy of the experts' proposed measures, which remain untested in the real world.

assertion of facts contrary to prior testimony does not constitute substantial evidence of the existence of a triable issue of fact.").

III. PLAINTIFFS' CLAIM THAT DEFENDANTS HAVE ENGAGED IN UNFAIR BUSINESS PRACTICES IN VIOLATION OF SECTION 17200 FAILS AS A MATTER OF LAW.

A. Plaintiffs Have Failed To State A Claim For Unfair Business Practices Under Section 17200 Because Plaintiffs Do Not Claim Harm Or Threatened Harm To Competitors, Consumers, Or Members Of The Public In Their Business Dealings With Defendants.

California's Unfair Competition Law, Section 17200 *et seq.* ("the UCL") is designed to protect against two types of injuries: injuries to competition and injuries to consumers. *See Barquis v. Merchants Collection Ass'n.* (1972) 7 Cal.3d 94, 110 (the UCL "demonstrates a clear design to protect consumers as well as competitors"); *Cel-Tech.*, 20 Cal.4th at 180 (the UCL "governs 'anti-competitive business practices' as well as injuries to consumers"). Its dual purposes are the "protection [of the public] from fraud and deceit" or "sharp business practices" and "the preservation of fair business competition." *Barquis,* 7 Cal.3d at 110, 111 (citations and quotations omitted).

Here, plaintiffs bring their unfair[29] business practices claim under the UCL on behalf of the people of California, *not* to protect them from alleged unfairness in their business dealings with defendants but, rather, to protect them from the harm or threat of harm resulting from the acquisition and misuse of defendants' lawful, non-defective products by criminals. In so

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[29] Plaintiffs' claim under the unlawful prong is discussed in Section IV, *infra.*

doing, plaintiffs seek to apply the UCL in a manner in which it has never been applied and which is outside the legislative intent of the statute.

The unfairness prong of the UCL was not enacted, and has never been interpreted, as a means to enjoin a defendant's business practice, not because it was misleading or unfair to the person or class of persons at whom the practice was directed, but because the practice might have an indirect effect on others toward whom the practice was not directed and with whom the defendant has no business dealings. Because plaintiffs have failed to allege the type of harm the UCL was designed to protect against, plaintiffs have failed to state a claim as a matter of law.

1. The UCL protects members of the public from unfairness in their business dealings or contacts with others.

The legislature enacted the UCL in 1933 by amending Civil Code § 3369 to allow courts to enjoin acts of "unfair competition," defined to include any "unfair or fraudulent business practice" as well as false advertising. *See* Howard, *Former Civil Code Section 3369 – A Study in Judicial Interpretation*" 30 Hast. L.J. 705, 706 (1979). Despite this broad definition, the UCL was not widely used for consumer protection actions until the late 1950s, but was confined almost exclusively to cases of competitor injury. *Id.* at 707-09, 720; *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 130.

In 1972, the United States Supreme Court held that a 1938 amendment to the FTC Act, 15 U.S.C. § 45(a) – adding "unfair acts and practices" to the proscription against "unfair competition" – extended the FTC Act's protection beyond competitors to consumers. *FTC v. Sperry and Hutchinson Co.* (1972) 405 U.S. 233, 244. The California Supreme Court, relying on *Sperry,* came to the same conclusion regarding the UCL: "the

addition of this 'unfair . . . practices' language [to the FTC Act], represented 'a significant amendment showing Congress's concern for Consumers as well as for competitors' . . . Section 3369's parallel broad proscription of 'unlawful or unfair . . . business practices' illustrates no less a concern for wronged consumers." *Barquis*, 7 Cal.3d at 109-10 (citations omitted). Accordingly, the UCL's protections now extend to the "entire *consuming* public." *Id.* at 109 (emphasis added).

Although the UCL is called a "consumer protection" statute,[30] and the vast majority of cases brought under it and the FTC Act have involved classic "consumer protection" issues,[31] there is a surprising dearth of authority defining "consumer." Some cases suggest that, for an unfair practices claim to lie, there must be an allegation of injury to a competitor or consumer in the traditional sense of the word. *See, e.g.*, *Plotkin v. Tanner's Vacuums* (1975) 53 Cal.App.3d 454, 460 (retailer did not state claim under unfairness prong of UCL against manufacturer because retailer and manufacturer were not competitors and retailer did not allege injury to a consumer); *Burt v. Danforth* (E.D. Mo. 1990) 742 F. Supp. 1043, 1053 (in derivative suit by minority shareholder against corporation and directors for, *inter alia*, violation of UCL, plaintiff did not qualify for restitution

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[30] *See, e.g.*, *Cel-Tech*, 20 Cal.4th at 180; *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213, n.12; *Barquis*, 7 Cal.3d at 109; *O'Connor v. Super. Ct.* (1986) 177 Cal.App.3d 1013, 1017.

[31] Examples include a defendant's "(1) withholding material information; (2) making unsubstantiated advertising claims; (3) using high-pressure sales techniques; and (4) depriving consumers of various post-purchase remedies." *American Financial Services Ass'n,* 767 F.2d 957 at

(continued...)

under § 17203: "Plaintiff is not a competitor of [defendant]; nor is he a 'customer' as that term is commonly understood. . . . Thus, plaintiff does not fall within the class of individuals that the statute was meant to protect.") (internal citations omitted); *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 618-619 (retailer did not state claim against distributor because retailer was not in competition with distributor and retailer failed to describe with particularity how retailer's customers were injured); *Rosenbluth Int'l, Inc., v. Super. Ct.* (2002) 101 Cal.App.4th 1073, 1077 (plaintiff lacked standing to pursue UCL claim on behalf of defendant's customers because customers were sophisticated corporations and not "general public" for purposes of UCL).

Other courts have allowed UCL claims to proceed based on injuries to persons having business dealings with a defendant, whether or not the injured party was a "consumer" in the traditional sense. *See, e.g., Allied Grape Growers v. Bronco Wine Co.* (1988) 203 Cal.App.3d 432, 449-50 (sustaining UCL claim by grape sellers against buyer and rejecting argument that a mere buyer cannot be liable for unfair practices); *People v. James* (1981) 122 Cal.App.3d 25 (sustaining UCL claim on behalf of people against towing company for abuses in towing cars); *Pines v. W.R. Tomson* (1984) 160 Cal.App.3d 370, 380 (sustaining UCL claim by non-Christian businesses against Christian Yellow Pages which would not accept advertisements from non-Christians; holding that "injury to the consuming public" was alleged because public included non-Christian

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979 (citing Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 Wis. L. Rev. 107, 109).

business persons who were subject to defendants' discriminatory practice and wrongfully excluded from advertising with defendants).

What emerges from these cases is that the "consumers" the UCL protects, most broadly defined, are those persons who have been or will be adversely affected in their business dealings with a defendant – whether the defendant is currently engaged in business with them (as a seller, buyer, or otherwise) or the defendant is merely attempting to deal with them (*i.e.*, by directing advertising toward them) – and the type of injury the UCL protects against is the unfairness of that actual or proposed business transaction.[32] No case has been found where a defendant was held liable for an unfair business practice, not because the practice was unfair to those toward whom it was directed, but because such practice might have some indirect effect on the public at large.[33]

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[32] This is different from standing. Under the UCL's liberal standing provisions, anyone can bring suit on behalf of the public, whether or not they have been personally injured. However, in order to state a substantive claim, the plaintiff must allege that the practice causes harm to competition or consumers or other members of the public *in their business dealings* with the defendant.

[33] In most cases, the business dealing involves a direct contact between the defendant and the injured consumer. However, the business dealing may also be indirect, through an intermediary. *See, e.g.*, *American Philatelic Society v. Claibourne* (1935) 3 Cal.2d 689, 698-99 (defendant's practice of producing counterfeit stamps and urging dealers to sell them to public at a profit threatened to defraud consuming public and destroy competitive market by deflating value of genuine stamps). This scenario is clearly distinguishable from the case at hand. The injury plaintiffs claim here does not result from the public's involvement, direct or indirect, in the purchase or sale of defendants' firearms, but, rather, from criminals' misuse of those firearms.

The UCL's focus on the people toward whom a defendant directs its business practices is highlighted in *Lavie v. Procter & Gamble Co.*(2003) 105 Cal.App.4th 496, 512. Applying the fraudulent prong of the UCL,[34] this Court held that if the "advertising or practice is targeted to a particular group or type of consumers, either more sophisticated or less sophisticated than the ordinary consumer, the question whether it is misleading to the public will be viewed from the vantage point of *members of the targeted group*, not others to whom it is not primarily directed." *Id.* In other words, the standard is defined by those people toward whom the advertising is directed, because it is those people whose interests the UCL protects.[35]

2. Plaintiffs have not alleged the type of injury covered by the UCL.

Plaintiffs do not claim that members of the California public have been injured in their business dealings with defendants by being misled, defrauded, overcharged, sold defective goods, discriminated against, or

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[34] The argument here applies equally to the unfair and fraudulent prongs.

[35] Beretta is mindful that the judicial interpretation of the *unlawful* prong of the UCL extends the statute's protection beyond those persons having actual or proposed business dealings with the defendant. *See, e.g., People v. K. Sakai Co.* (1976) 56 Cal.App.3d 531 (grocery store's practice of selling whale meat in violation of endangered species protection statute was unlawful). However, analysis under the unlawful prong is clearly different from the analysis under the unfairness prong. *See Gregory*, 104 Cal.App.4th at 851. Under the unlawful prong, a plaintiff need only show that a business practice violated some law. *See People v. McKale* (1979) 25 Cal.3d 626, 632. If the practice violates a law, the analysis ends. That framework does not apply to cases brought under the *unfairness* prong, in which the plaintiff must demonstrate that the practice caused injury or the threat of injury to those toward whom it was directed.

subjected to sharp practices. Instead, plaintiffs claim that defendants' distribution practices are unfair because defendants fail to prevent criminals from acquiring their lawful, non-defective products and then using them to harm California residents. Protecting the non-consuming public from this type of indirect physical harm is simply not within the UCL's ambit.[36]

"Although the unfair competition law's scope is sweeping, it is not unlimited." *Cel-Tech*, 20 Cal.4th at 182. Plaintiffs seek to extend the consumer protection branch of the UCL to reach any practice that may contribute in any way (however indirectly) to any harm (whatever its nature) suffered by the public. To extend the unfairness prong as plaintiffs propose would render it virtually limitless. Plaintiffs' claim should be rejected as outside the scope of the UCL.

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[36] A business practice that directly causes a health or safety risk to those targeted by the practice or who come into direct contact with it may be unfair under the UCL or FTC Act. *See, e.g., In re Philip Morris, Inc.* (1973) 82 F.T.C. 16 (company's promotion of razor blades by including samples in advertising supplements to home-delivered newspapers without any protective packaging was unfair because it created health risk to small children who could find blades); *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057 (cigarette manufacturer's advertising that targeted minors was unfair because it encouraged minors to start smoking). Here, plaintiffs claim a health and safety risk which arises only through the intervening criminal acts of multiple third parties and which threatens members of the public irrespective of whether defendants have had business dealings with them or even attempted such dealings.

B. Defendants Cannot Be Liable, Under The Unfairness Prong Of Section 17200, For Failing To Prevent Independent Third Parties From Selling Firearms To Criminals Because Defendants Have No Legal Duty To Do So.

1. Liability for unfair business practices under Section 17200 cannot be premised on a defendant's failure to do something the defendant has no legal duty to do.

The trial court correctly held that defendants could not be liable under 17200 for failing to prevent retailers from selling guns to criminals where defendants have no legal duty to do so. 61JA17858-58A. This common sense principle is firmly rooted in California law. *See, e.g.*, *Korens v. R.W. Zukin Corp.* (1989) 212 Cal.App.3d 1054, 1057, 1060 (landlord's failure to pay interest on tenants' security deposits could not be unfair business practice under 17200 because landlord had no legal duty to pay interest on deposits); *Sumitomo Bank of Calif. v. Taurus Developers, Inc.* (1986) 185 Cal.App.3d 211, 223 (developer that defaulted on loan not liable under 17200 for failing to disclose property defects to bank, as purchaser, because developer had no duty, as defaulting trustor, to disclose defects at trustee's sale). *Cf. Glenn K. Jackson Inc. v. Roe* (9th Cir. 2001) 273 F.3d 1192, 1203 (where negligence and fraud claims failed for lack of duty and justifiable reliance, plaintiff could not recast claim as one for unfair practices under 17200).[37]

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[37] This is not to suggest that duty is an element of every 17200 unfair practices claim. But where the alleged unfairness is a defendant's failure to take action the defendant has no duty to take, liability will not lie. The cases plaintiffs cite for the proposition that duty is not an element of 17200, Pltfs-Brief 34, do not hold otherwise. In *Quelimane Co., Inc. v. Stewart*

(continued...)

The cases plaintiffs cite for the proposition that 17200 can be premised on nonfeasance, Pltfs-Brief 27-28, 30-31, are distinguishable. Those cases involved claims under the unlawful prong, not the unfairness prong. Moreover, in each case, the defendant's failure to act violated a statutory duty to act or other statutory prohibition. *See Stevens v. Super. Ct.* (1999) 75 Cal.App.4th 594 (defendants failed to obtain licenses for transacting insurance as required by Insurance Code); *Quelimane Co., Inc.,* 19 Cal.4th at 43, 50 (title insurance companies' collective refusal to issue insurance for certain properties was unlawful conspiracy that violated Cartwright Act); *People v. McKale* (1979) 25 Cal.3d 626, 632, 634 (defendants failed to maintain proper mechanical, electrical, and safety installations in park, as required by Mobilehome Parks Act and Administrative Code); *AICCO, Inc. v. Insurance Co. of N. Am.* (2001) 90 Cal.App.4th 579, 588-89 (insurance company failed to obtain insureds'

Title Guaranty Co. (1998) 19 Cal.4th 26, 43, the 17200 claim was based on the unlawful prong and affirmative misfeasance – defendants' alleged conspiracy to restrain trade. Duty was irrelevant to the 17200 claim (there is an obvious duty not to break the law). Similarly, in *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, the 17200 claim was based on the fraudulent prong and, for the most part, misfeasance – defendants' misleading advertising of sugared breakfast cereals. To the limited extent the court touched on nonfeasance – defendants' alleged failure to disclose certain information – the case actually *supports* Beretta's argument. "We have not reviewed the allegations . . . to determine whether every alleged misrepresentation and nondisclosure is actionable. Some of the representations may constitute nonactionable expressions of opinion; *likewise some nondisclosures may involve matters which defendants had no duty to disclose.*" *Id.* at 213 n.15 (emphasis added). This language suggests the Supreme Court, like the trial court below, would find "nonactionable" under 17200 a defendant's failure to do something he "had no duty to" do.

consent before transferring policies, as required by Civil Code § 1457); *People v. Murrison* (2002) 101 Cal.App.4th 349 (ranch owner failed to notify Department of Fish and Game before diverting creek, as required by Code). In sharp contrast, plaintiffs here cannot point to any statute requiring defendants to police the downstream distribution of their products to ensure that retailers do not transfer guns to criminals.[38] As set forth below, there is no duty under the common law either.

2. Defendants have no legal duty to police the downstream sales of independent retailers to prevent them from selling firearms to criminals.

a. Where, as here, plaintiffs' claim is based on defendants' alleged nonfeasance, there is no duty absent a special relationship.

Whether a defendant owes a duty is a question of law for the court. *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 465.

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[38] The relevant statutes place that duty, not on manufacturers and distributors, but on ATF. It is ATF that screens retailers' applications for federal firearms licenses (18 U.S.C. § 923(a); 27 C.F.R. §§ 478.44, 478.47; 38JA10973-74), issues and renews those licenses (27 C.F.R. §§ 478.45, 478.47), and has the right to inspect retailers' books (27 C.F.R. § 478.23). ATF sends retailers educational materials, tells them how to avoid sales to prohibited persons, and provides them with regular summaries of firearms laws. 38JA10990; 27 C.F.R. § 478.24. When there is reason to suspect a retailer is engaged in misconduct, it is ATF that initiates a regulatory inspection or criminal investigation. 18 U.S.C. § 923(g)(1)(A); 27 C.F.R. § 478.23; 38JA10991. In performing its mission, ATF draws on a number of resources unavailable to manufacturers and distributors: comprehensive computer databases, undercover agents, and confidential informants. 38JA10979; p. 9 n.15, *supra*. When a retailer violates the law, it is the responsibility of ATF and federal and state law enforcement to revoke the retailer's license and/or prosecute the responsible individuals under the criminal laws. 18 U.S.C. §§ 924, 923(e); 27 C.F.R. § 478.73; 38JA10991.

> As a general rule one has no duty to control the conduct of another, and no duty to warn those who may be endangered by such conduct. A duty may arise, however, where (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection. This rule derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter.

Hoff v. Vacaville Unified School Dist. (1998) 19 Cal.4th 925, 933 (internal citations and quotation marks omitted).

"Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., defendant has created a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention." *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716 (citation and quotation marks omitted). For examples, *compare Lugtu*, 26 Cal.4th at 717 (misfeasance where police officer's affirmative conduct in directing plaintiff to stop his car in center median of freeway placed plaintiff in dangerous position); *Pamela L. v. Farmer* (1980) 112 Cal.App.3d 206, 209 (misfeasance where wife, who knew of husband's history of child molestation, encouraged, invited, and enticed several young girls to use the swimming pool at her house while she was at work and her husband at home) *with City of Sunnyvale v. Super. Ct.* (1988) 203 Cal.App.3d 839 (nonfeasance where police failed to prevent motorist, whom they had temporarily detained, from driving away intoxicated); *Wise v. Super. Ct.* (1990) 222 Cal.App.3d 1008, 1014-15 (nonfeasance where defendant wife failed to prevent her emotionally disturbed husband from mounting sniper attack); *Avis Rent A Car System, Inc. v. Super. Ct.* (1993) 12 Cal.App.4th 221, 222, 233 (nonfeasance where car rental company,

which left keys in rental cars for as long as 45 minutes in lot without fence, wall, or guarded gate, failed to take precautions to prevent theft of vehicles).

Plaintiffs strain in arguing that their claim is based on misfeasance, rather than nonfeasance. Pltfs-Brief 31-33. Plaintiffs do not, and could not, contend that defendants sell guns to criminals, are complicit in unlawful sales by others, or entice or encourage illegal sales. The heart of their claim is that defendants fail to police retailers to determine whether their sales are lawful. *See, e.g.*, Pltfs-Brief 8, 10 (defendants fail to gather, analyze, and use trace data to set standard for retailers); *id.* at 16-22 (defendants have failed to voluntarily undertake duty to police retailers, despite suggestions by some that they do so).

If a police officer does not commit misfeasance by failing to prevent a motorist he has temporarily detained from driving away intoxicated, a wife does not commit misfeasance by failing to prevent her husband from mounting a sniper attack, and a car rental company does not commit misfeasance by failing to prevent vehicles within its custody and control from being stolen, then surely a manufacturer does not commit misfeasance by failing to prevent independent retailers and other third parties outside the licensed distribution chain from selling guns to criminals.

The trial court's conclusion that there were triable issues of fact as to whether certain retailer defendants engaged in misconduct does not compel the conclusion that the *manufacturer and distributor defendants* engaged in misfeasance, as plaintiffs contend. Pltfs-Brief 32. Retailers have direct control over the sales they make to the public. There is a fundamental difference between plaintiffs' claim that the retailer defendants knowingly sold guns to criminals (misfeasance) and their claim that the manufacturer and distributor defendants, one or two steps removed from the retailers on

the distribution chain, failed to prevent it from happening (nonfeasance). Because plaintiffs' claim against defendants is based on nonfeasance, there is no duty absent a special relationship.

b. There is no special relationship giving rise to a duty.

An exception to the rule that a defendant has no duty to prevent the misconduct of others arises when (1) there is a special relationship between the defendant and the wrongdoer which imposes a duty on the defendant to control the wrongdoer's actions or (2) there is a special relationship between the defendant and the person exposed to harm which requires the defendant to provide protection. *See Hoff*, 19 Cal.4th at 933. Examples of the first include a parent and child or a master and servant. *See Wise*, 222 Cal.App.3d at 1013. Examples of the latter include a carrier and its passenger or a landowner and persons coming onto the land. *See Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707, 712-13.

"In all of the above relationships, the *ability* to control the third party is essential." *Wise*, 222 Cal.App.3d at 1013. Where control is lacking, there is no duty, even if a special relationship exists. *See, e.g., Todd v. Dow* (1993) 19 Cal.App.4th 253, 259 (parents' inability to control son, an adult, was "fatal to a claim of legal responsibility" for son's negligent use of firearm); *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 386 (while landowner owes duty to protect invitees from foreseeable harm on property, courts "have consistently refused to recognize a duty to persons injured in adjacent streets or parking lots over which the defendant does not have the right of possession, management and control").

Here, there is no special relationship either (1) between defendants and the third party wrongdoers who sell or transfer guns to criminals (corrupt retailers, gun traffickers, those who steal guns from retailers and

common carriers) or who criminally misuse guns or (2) between defendants and members of the California public who are harmed by criminals' misuse of guns. *See Casillas v. Auto-Ordnance Corp.* (N.D. Cal. May 17, 1996) No. C 95-3601 FMS, 1996 WL 276830, at *3 (victims of criminal shooting failed to state negligence claim against manufacturer of gun used in shooting: "[T]here is no legal authority for imposing a duty in this case. Plaintiffs present no evidence of a special relationship between [the manufacturer] and [the shooter] or between [the manufacturer] and plaintiffs.").[39] There is no evidence that defendants have an agency

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[39] Some authorities mention, as a special relationship, a "manufacturer or supplier of goods and buyer or user." *See* Witkin, *Summary of California Law*, Torts § 859 (9th ed. 1990) ("Witkin"); *Rodriguez*, 186 Cal.App.3d at 712. However, this exception is limited to claims involving defective products. *See* Witkin at Torts § 948 *et seq.* Plaintiffs have abandoned their defective design claims here.

A special relationship may also exist when one supplies "a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others." *Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 115 (citations omitted). California courts have been loathe to apply this "negligent entrustment" theory, even to retailers of dangerous products who directly entrust the chattel to the buyer/user. *Id.* at 118-19 (firearm retailer did not owe duty to refuse to sell rifle to young man who used it to commit suicide); *Holmes v. J.C. Penney Co.* (1982) 133 Cal.App.3d 216 (retailer not liable for selling CO2 cartridges to minor who used them in pellet gun). The theory, which is premised on the entrusting party's specific knowledge of the irresponsible nature of the party to whom he entrusts the chattel, has no application to remote manufacturers and distributors who do not sell firearms directly to consumers. *See, e.g., Kyte v. Philip Morris Inc.* (Mass. 1990) 556 N.E.2d 1025, 1029 (tobacco company not liable for supplier's unlawful sale of cigarettes to minors); *Salinas v. General Motors Corp.* (Tex. App. 1993) 857 S.W.2d 944, 947-48 (car manufacturer had no duty to

(continued...)

relationship with downstream retailers which would give them the legal authority and practical ability to control the latter's conduct. Needless to say, defendants have no control over criminals.

Plaintiffs' reliance on *Ileto v. Glock Inc.*(9th Cir. 2003) 349 F.3d 1191 (petition for rehearing en banc pending), Pltfs-Brief 36-38, is misplaced. That decision, which Beretta submits was wrong, was made on a motion to dismiss. The court held that allegations that the defendants "created an illegal secondary firearms market that was intentionally directed at supplying guns to prohibited [buyers]" were "sufficient to raise a factual question as to whether the defendants owed the plaintiffs a duty of care." *Id.* at 1204. Here, the trial court had the benefit of a voluminous summary judgment record which showed there was absolutely no evidence that defendants caused the "creat[ion of] an illegal secondary firearms market" and therefore no triable issue of fact as to duty.

c. The *Rowland* policy factors counsel rejection of a duty.

Plaintiffs complain that the trial court failed to analyze the policy factors of *Rowland v. Christian* (1968) 69 Cal.2d 108, 113, in determining whether a duty exists. Pltfs-Brief 34-37 & n.23. Where, as here, plaintiffs' claim is based on defendants' failure to control the conduct of third parties and there is no special relationship, that analysis is unnecessary. *See Eric J.*

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prevent its dealers from selling cars to incompetent drivers; "[n]o jurisdiction has gone [so] far" as to impose negligent entrustment liability on manufacturer); *Earsing v. Nelson* (N.Y. App. 1995) 629 N.Y.S.2d 563 (manufacturer of air gun not liable for negligent entrustment based on retailer's illegal sale to minor).

v. Betty M. (1999) 76 Cal.App.4th 715, 729-30. In any event, the *Rowland* factors counsel against a duty here.

First, plaintiffs' claim of foreseeability is based on the trace data they contend defendants should gather, but do not. Pltfs-Brief 36. Even if defendants were able to obtain this data, it would not provide a basis for foreseeing which sales will result in criminals acquiring guns. *See* pp.8-9, 22-25, *supra*. If fully analyzed trace data is insufficient for ATF and plaintiffs' experts to conclude that a retailer is engaged in misconduct, it is plainly insufficient for a manufacturer or distributor to foresee that selling to that retailer will result in criminals acquiring guns.[40] *Id.*

Second, the causal connection between defendants' conduct and the acquisition of firearms by criminals in California is nonexistent on this record and, on its face, is remote and attenuated, not close. As New York's highest court observed in refusing to impose a duty on gun manufacturers:

> [T]he connection between defendants, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief. Such broad liability, potentially encompassing all gunshot crime victims, should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in

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[40] Plaintiffs' suggestion that defendants cut off dealers on the basis of trace data alone, Pltfs-Brief 10, is tantamount to mandating a private revocation of those dealers' federal licenses without any inquiry into the reason for the traces or whether there was any relationship between the dealers and any crimes. This Court should not countenance a duty which would enlist private parties – on pain of massive liability – to do that which the appropriate governmental authorities could not do.

> plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs.

Hamilton, 750 N.E.2d at 1061-62.

Several appellate courts, confronted with lawsuits against gun-makers similar to the case at bar, have affirmed dismissal, as a matter of law even at the pleadings stage, based on the remoteness of the causal connection. *See, e.g.*, *Ganim v. Smith & Wesson Corp.* (Conn. 2001) 780 A.2d 98; *City of Philadelphia v. Beretta U.S.A. Corp.* (3d Cir. 2002) 277 F.3d 415, 422-24 (Pennsylvania law); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.* (3d Cir. 2001) 273 F.3d 536, 541 (New Jersey law); *People v. Sturm, Ruger & Co., Inc.* (N.Y. App.) 761 N.Y.S.2d 192, 200-03, *appeal denied*, (N.Y. 2003) 801 N.E.2d 421.

Third, any moral blame for the problem of gun violence rests with those who sell guns to criminals in violation of the law and with the criminals who misuse them. Fairness mandates that this Court reject a duty that would make defendants responsible, not only for their own acts (which are admittedly in compliance with applicable laws), but also for the acts and omissions of numerous third parties over whom they have no control, including those who deliberately sell guns to criminals. *See Wise*, 222 Cal.App.3d at 1015-16 ("[T]he responsibility for tortious acts should lie with the individual who commits those acts.").

Finally, the burden to defendants, the consequences to the community, and the policy of preventing future harm all counsel rejection of the duty urged by plaintiffs here. Retail sellers of firearms already have sufficient incentives to sell their products responsibly – and a federally-mandated scheme to monitor their conduct already exists – without

imposing a duty on manufacturers and distributors to police their sales.[41] Courts should be cautious about creating new duties where, as here, a comprehensive regulatory scheme already exists, particularly when the duty sought to be imposed has been legislatively-delegated to a governmental agency – ATF – which is better equipped to perform it. *See* Section V, *infra*. On a record utterly devoid of evidence that defendants cause criminals to acquire guns or that the measures proposed by plaintiffs' experts, even if adopted, would prevent criminals from acquiring guns, the duty should be rejected as a matter of law and sound policy.

IV. PLAINTIFFS' PUBLIC NUISANCE CLAIM – AND THE UNLAWFUL BUSINESS PRACTICES CLAIM THAT IS PREMISED UPON IT – FAIL AS A MATTER OF LAW.

Plaintiffs' failure to adduce evidence creating a triable issue of fact on causation is fatal to all of plaintiffs' claims, including nuisance.[42] The nuisance claim fails for independent reasons as well: (1) nuisance law does not apply to the distribution of products and (2) defendants cannot be liable

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[41] If retailers are unwittingly selling firearms to straw purchasers and gun traffickers, there is little the retailer – much less a remote manufacturer – can do to prevent it. If retailers are knowingly selling firearms in violation of the law, then they should be arrested, prosecuted, and convicted, and their licenses revoked, but a duty should not be imposed on the *manufacturers* to prevent it or to act as insurers against their criminal misconduct.

[42] Plaintiffs complain that the trial court did not specifically mention nuisance in the "discussion" portion of its opinion. Pltfs-Brief 26, 42. However, the court discussed nuisance – including the necessity of proving causation – earlier in its opinion, 61JA17850A-51, and the court's ruling that there was no triable issue of fact on causation (61JA17858A) was dispositive of all claims.

in nuisance for, or ordered to abate, a condition over which they have no effective control. Because plaintiffs' 17200 unlawful practices claim is premised on the nuisance claim, it, too, fails.

A. Nuisance Law Does Not Apply To The Distribution Of Products.

"Originally, a public nuisance was an offense against the crown, prosecuted as a crime." *People ex. rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103. Later, civil suits were brought in equity to enjoin public nuisances at the instance of public officers, *id.*, although the "jurisdiction of equity was very sparingly exercised." *People v. Lim* (1941) 18 Cal.2d 872, 876. Over time, the development of the private nuisance tort action led to the application of a substantially similar analysis in public nuisance actions. *Acuna*, 14 Cal.4th at 1105 n.3.

In *Lim*, the court placed an important limitation on the judicial expansion of public nuisance law. Rejecting the government's effort to shut down a gambling house as a common-law public nuisance, the court held that an activity must fit within the definition of a public nuisance as declared by the legislature, not the courts, for an injunction to issue. 18 Cal.2d at 878-79. The court explained:

> 'Nuisance' is a term which does not have a fixed content either at common law or at the present time. Blackstone defined it so broadly as to include almost all types of actionable wrong. . . . In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity. Activity which in one period constitutes a public nuisance, such as the sale of liquor or the holding of prize fights, might not be objectionable in another. Such declarations of policy should be left for the legislature.

Id. at 880 (internal citations omitted).

In *City of Bakersfield v. Miller* (1966) 64 Cal.2d 93, the court noted the difficulty of applying this precept given the breadth of Civil Code § 3479. *Id.* at 99. To determine whether defendant's hotel constituted a public nuisance, the court turned for guidance to other, more specific statutes and concluded that it was a nuisance because the hotel violated safety standards in the municipal building code. *Id.* at 100-01. The court recently reaffirmed its resistance to the judicial expansion of nuisance law in *Acuna*, 14 Cal.4th at 1107 ("This lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a 'public nuisance.'").

In keeping with its historical roots in the criminal law (*id.* at 1102-03), its development with the property-based tort of private nuisance (*id.* at 1105 n.3), and courts' reluctance to expand a "standardless" cause of action beyond legislatively-declared boundaries (*id.* at 1107), public nuisance law in California has been confined to two contexts, notwithstanding the broad language of Civil Code § 3479: namely, (1) cases involving a defendant's use of or effect upon real property and (2) cases involving a defendant's violation of a statute or ordinance (or cases involving both). *See, e.g.*, *Acuna*, 14 Cal.4th at 1100, 1120-21 (street gang's obstruction of public streets and illegal activities in four-square-block neighborhood); *People ex. rel. Dept. of Transp. v. Maldonado* (2001) 86 Cal.App.4th 1225, 1231 (billboard advertisement that violated Outdoor Advertising Act); *County of San Diego v. Carlstrom* (1961) 196 Cal.App.2d 485 (dilapidated, uninhabitable residential structures that created fire hazard); *City and County of San Francisco v. Safeway Stores, Inc.* (1957) 150 Cal.App.2d 327

(supermarket's use of traffic easement in residential area in violation of zoning ordinance).

California courts have refused to extend public nuisance law beyond these two settings to the distribution of products. In *City of San Diego v. U.S. Gypsum* (1994) 30 Cal.App.4th 575, the plaintiff sued several manufacturers and distributors of building materials containing asbestos, seeking damages for the costs of identifying and abating the danger of asbestos contamination in public buildings, which it claimed was a nuisance under Civil Code § 3479. *Id.* at 584. The court affirmed dismissal of the nuisance claim as a matter of law:

> City cites no California decision, however, that allows recovery for a defective product under a nuisance cause of action. Indeed, under City's theory, nuisance 'would become a monster that would devour in one gulp the entire law of tort. . . .'

Id. at 586 (quoting *Tioga Public School Dist. v. U.S. Gypsum* (8th Cir. 1993) 984 F.2d 915, 921). After surveying cases in other jurisdictions, the court concluded:

> [N]uisance cases 'universally' concern the use or condition of property, not products. Prosser agrees: 'If 'nuisance' is to have any meaning at all, it is necessary to dismiss a considerable number of cases which have applied the term to matters not connected either with land or with any public right, as mere aberration. . . .'

Id. (quoting *Detroit Bd. of Educ. v. Celotex Corp.* (Mich. App. 1992) 493 N.W.2d 513, 521, and W. Page Keeton, *Prosser & Keeton on Torts* § 86 at 618 (5th ed. 1984)).

Following Prosser and cases like *City of San Diego*, courts across the country have rejected, as a matter of law, public nuisance claims against

firearm-makers identical to plaintiffs' claim here. *See, e.g., City of Philadelphia v. Beretta U.S.A. Corp.* (3d Cir. 2002) 277 F.3d 415, 420-21 ("The courts traditionally have limited the scope of nuisance claims to interference connected with real property or infringement of public rights. . . . In *Camden County* [(3d Cir. 2001) 273 F.3d 536, 540] we observed that 'no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers [of] lawful products that are lawfully placed in the stream of commerce.'[43] Likewise, the parties here do not present any Pennsylvania case allowing such a claim.") (internal citations omitted); *Sturm, Ruger & Co.,* 761 N.Y.S.2d at 196-97 (affirming dismissal of New York State's public nuisance claim against firearm manufacturers and noting that "to widen the range of common-law public nuisance claims in order to reach the legal handgun industry" would "likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities").

The rationale is two-fold. First, courts are reluctant to extend an ill-defined cause of action into areas where well-developed tort theories provide a remedy. *See City of San Diego*, 30 Cal.App.4th at 585-86; *Tioga Public School Dist.*, 984 F.2d at 921. A party injured by a defective product already has remedies under traditional products liability theories of

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[43] *But see James v. Arms Tech., Inc.* (N.J. App. 2003) 820 A.2d 27, 50-51 (disagreeing with *Camden County* and finding it "premature" to dismiss public nuisance claim against gun-makers at pleadings stage). Notwithstanding *James*, other courts have found the reasoning of *Camden County*, which comports with California law, compelling.

negligence, strict liability, or breach of warranty. *Detroit Bd. of Educ.*, 493 N.W.2d at 521. Allowing nuisance claims would enable plaintiffs to avoid many of the defenses available to defendants under traditional tort theories and "significantly expand, with unpredictable consequences, the remedies already available to persons injured by products." *Id.* While plaintiffs here have abandoned their defective design claims, their attempt to apply a nuisance theory to defendants' distribution of products is a transparent effort to avoid the hurdles of a more traditional negligence claim – most notably, the need to prove a duty.

The second rationale is that a manufacturer relinquishes ownership and control of its products when it sells them and thus loses the legal right to abate whatever hazard the products may pose thereafter. *Tioga Public School Dist.*, 984 F.2d at 920. Significantly, courts have used this rationale to bar nuisance claims in asbestos cases even when (1) the plaintiff was seeking damages (not abatement), (2) the contamination caused by the product was confined to a specific piece of property (public buildings), and (3) the hazard posed was the defective nature of the product (a matter within the manufacturer's control, at least to some extent). The rationale is even stronger where, as here, (1) plaintiffs seek *only* abatement, not damages, (2) the harm is not confined to a specific piece of property but allegedly extends across the geographical limits of California and beyond, and (3) the hazard posed by firearms stems, not from their defective nature, but from the criminal actions of third parties beyond the manufacturers' control and ability to abate.

Because California courts have refused to extend nuisance beyond its historical contexts to the sale of products,[44] defendants' demurrer to plaintiffs' nuisance claim should have been sustained.

B. Defendants Cannot Be Liable In Nuisance For Activities They Do Not Control And Cannot Realistically Abate.

Plaintiffs' nuisance claim fails for the related but independent reason that defendants do not control the third parties who sell guns to criminals in violation of the law or the criminals who use guns to harm California residents. A defendant's control over the nuisance is essential to liability, particularly where, as here, plaintiffs seek only abatement. *See, e.g.*, *Longfellow v. County of San Luis Obispo* (1983) 144 Cal.App.3d 379, 384 (county could not be liable in nuisance for allowing dangerous condition on sidewalk where county did not own or control sidewalk at time of injury); *Kelliher v. Fitzgerald* (1921) 54 Cal.App. 452, 458 (while defendants could be liable in nuisance for their own "injurious acts," they could not be compelled, by injunction, "to anticipate or correct the effect of agencies or causes over which they have no control").

The requirement of control runs throughout the nuisance cases, whether explicitly mentioned or not. In typical cases involving property-based claims or statutory violations, the defendant's control is self-evident.

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[44] In *Ileto v. Glock Inc.* (9th Cir. 2003) 349 F.3d 1191, a divided panel allowed a public nuisance claim to proceed against gun-makers. Although the majority held that California law does not limit nuisance to property-based claims, it did not cite a single California case that had applied nuisance law outside the context of property-based claims or statutory violations. A federal court sitting in diversity should not blaze new trails in state tort law. This Court should disregard the Ninth's Circuit departure from settled California law.

In the former, the defendant has control over the property that is causing the nuisance or on which the nuisance is located.[45] In the latter, the defendant has control over his or her own conduct that violates the statute.

While California courts have occasionally held a business accountable for the disruptive conduct of its patrons on or near the premises where the business failed to adequately maintain or supervise the patrons or premises, *see Sunset Amusement Co. v. Bd. of Police Comm'rs* (1972) 7 Cal.3d 64, 84 (collecting cases), no California state court has ever extended nuisance liability to a defendant for failing to control the business practices of independent retailers and other third parties in geographically remote locations.

In *Martinez v. Pacific Bell* (1991) 225 Cal.App.3d 1557, the court rejected as a matter of law the claim of a parking lot attendant who sought to hold a telephone company liable in public nuisance for failing to remove a public telephone that attracted criminals to a near-by lot:

> Public telephones can be reasonably expected to attract users from the criminal element of society. Neither public policy, nor the principles of nuisance or tort

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[45] *Selma Pressure Treating Co. v. Osmose Wood Preserving Co. of Am., Inc.* (1990) 221 Cal.App.3d 1601, is not to the contrary. In that case, which involved a traditional land-based nuisance, a defendant that improperly disposed of hazardous chemicals on its site was permitted to cross-claim against companies that had supplied the chemicals, even though they did not own or control the site, based on their *direct involvement* in creating the nuisance by designing and installing the unsafe disposal system and advising the cross-plaintiff to dispose of the chemicals improperly. *Id.* Because damages were at issue, the court did not reach the question of "whether the absence of control over the offending property insulates one who creates or assists in the creation of a nuisance from liability where the only remedy sought is abatement." *Id.* at 1619 n.7.

> law, require the company providing public telephones to assume the duty of preventing such users from intentionally committing crimes on adjacent property of another, or to bear the vicarious liability therefor.
>
> We reject appellant's contention that venerable nuisance concepts should be manipulated so as to impose that duty and that vicarious responsibility on the owners of nearby property, who lack the legal or practical ability to control such criminal actions of third parties.

Id. at 1569. Because firearm manufacturers and distributors similarly "lack the legal or practical ability to control [the] criminal actions of third parties" who sell guns to criminals, or misuse guns, this Court should affirm judgment for defendants on plaintiffs' public nuisance claim, and the unlawful business practices claim that is premised upon it.[46]

V. PLAINTIFFS' REMEDY LIES WITH ATF OR THE LEGISLATURE, NOT THE COURTS.

The Court should also affirm judgment because the courts are the wrong institution to remedy the problem at the heart of plaintiffs' case or to impose the sweeping policy changes plaintiffs seek here. In an action in equity, the court has the inherent power to decline to grant relief. *See*

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[46] In *NAACP v. AcuSport, Inc.* (E.D.N.Y. 2003) 271 F. Supp.2d 435, which plaintiffs cite throughout their brief, a federal judge in New York, having found that the NAACP lacked the special injury necessary to assert a public nuisance claim, made extensive findings of fact and conclusions of law that were entirely unnecessary to the outcome and should be disregarded as dicta. More importantly, the decision reflects the court's blatant refusal to follow controlling precedent – *i.e.*, *Hamilton v. Beretta U.S.A. Corp.* (N.Y. 2001) 750 N.E.2d 1055, and *People v. Sturm, Ruger & Co., Inc.* (N.Y. App.) 761 N.Y.S.2d 192 (affirming dismissal of State's public nuisance claim), *appeal denied*, (N.Y. 2003) 801 N.E.2d 421.

Desert Healthcare District v. Pacificare, FHP, Inc. (2001) 94 Cal.App.4th 781, 795 ("[B]ecause the remedies available under the UCL . . . are equitable in nature, courts have the discretion to abstain from employing them."); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 597 & n.2 (Brown, J. dissenting) ("[T]he Courts of Appeal have done an admirable job of reining in the UCL's potential for adverse regulatory effects by declining to grant relief in appropriate cases.") (collecting cases). Regardless of the cause of action asserted, judicial intervention in areas of complex economic policy is inappropriate. *See Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1168 & n.15; *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1502, 1509.

Where, as here, a comprehensive regulatory scheme already exists, courts are loathe to impose additional requirements that the legislature has not seen fit to impose. *See, e.g., Korens v. R.W. Zukin Corp.* (1989), 212 Cal.App.3d 1054, 1058, 1061 (where legislature extensively regulated security deposits but did not require landlords to pay interest on them, court would not impose such requirement "by implication" through UCL action); *Drennan v. Security Pacific National Bank* (1981) 28 Cal.3d 764, 778-79 (where bank complied with comprehensive federal disclosure law, court would not craft additional requirement based on alleged unfairness of underlying rule); *Shvarts v. Budget Group, Inc.* (2000) 81 Cal.App.4th 1153, 1159 (where legislature authorized avoidable fuel service charges in car rentals, court would not impose requirements as to *reasonableness* of those charges through UCL action).

Moreover, where the requirements a plaintiff seeks to impose on a defendant are already delegated to a governmental agency, and the problem the plaintiff seeks to have remedied results from the agency's failure to perform its duties, courts properly direct the plaintiff to the agency or the

legislature for relief. In *Diaz v. Kay-Dix Ranch* (1970) 9 Cal.App.3d 588, migratory farmworkers sought an injunction prohibiting farm operators from knowingly employing illegal aliens, a practice they claimed was unlawful or unfair under the UCL. *Id.* at 590-91. Despite the farmworkers' "undeniable" need for protection, the court recognized that the problem of illegal alien employment was largely the result of "inadequa[te]. . . enforcement budgets for the border patrol of the Immigration and Naturalization Service" and the Social Security Administration's practice of furnishing social security cards to illegal aliens. *Id.* at 596, 597-98.

The court concluded that, while courts could try to remedy the problem by issuing injunctions requiring farm operators to conduct interrogations of prospective workers and demand more adequate proof of citizenship, thereby creating "the cumulative effect of a statutory regulation, administered by the superior courts through the medium of contempt hearings," *id.* at 598-99, it was more appropriate to look to the government for relief:

> A paradox of this lawsuit is plaintiff's discerned need for a decree compelling inquiry by California farm operators when an agency of the federal government – supplied with an apparatus of offices, staff and computerized equipment – is unwilling or unable to conduct that inquiry. Plaintiffs seek the aid of equity because the national government has breached the commitment implied by national immigration policy. It is more orderly, more effectual, less burdensome to the affected interests, that the national government redeem its commitment. Thus the court of equity withholds its aid.

Id. at 599. *See also People ex. rel. Dept. of Transp. v. Naegele Outdoor Advertising Co. of Calif., Inc.* (1985) 38 Cal.3d 509, 523 (even if defendant's conduct was unlawful and violated UCL, the "sound counsel of

the *Diaz* decision" mandated that court withhold relief because federal Department of Interior was appropriate agency to enforce statute).

The court applied a similar rationale in dismissing a lawsuit in *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121:

> [Plaintiff] contends that the Department of Insurance is not adequately performing its legislatively assigned task of regulating surplus line brokers and, indirectly, non-admitted insurers. Yet [plaintiff] seeks not a writ of mandate directing the department to perform a duty mandated by the Legislature, but rather seeks court-created regulation of surplus line brokers as well as nonadmitted insurers through the medium of damage awards, injunctions and 'restitution' orders.
>
> The question of what type or level of regulation is adequate or appropriate is uniquely a question for executive or legislative policy choice. . . . [Plaintiff's] complaints are therefore properly directed either to the Department of Insurance or to the Legislature.

Id. at 137-38.

Here, plaintiffs seek relief compelling defendants to (1) gather trace data that ATF and local law enforcement are already gathering, (2) perform analyses and investigations that ATF and local law enforcement are better equipped to perform and are already performing, and (3) monitor, train, police and discipline downstream independent retailers that ATF is legislatively-charged with screening, licensing, training, and monitoring through regulatory inspections and law enforcement investigations and whose licenses ATF has the legal authority to revoke. *See* pp. 8-9, 22-25, 35 n.38, *supra*.

If ATF and local law enforcement have inadequate resources to perform their legislatively-mandated tasks of identifying and rooting out corrupt retailers and gun traffickers, then Congress and the state legislature

should increase their budgets, but the courts should not be drafted into the legislative task of refashioning the regulatory framework or shifting essentially law enforcement responsibilities to private parties through civil penalties and injunctions. As New York's highest court observed in refusing to impose such a duty:

> Federal law already has implemented a statutory and regulatory scheme to ensure seller 'responsibility' through licensing requirements and buyer 'responsibility' through background checks. While common-law principles can supplement a manufacturer's statutory duties, we should be cautious in imposing novel theories of tort liability while the difficult problem of illegal gun sales in the United States remains the focus of a national policy debate.

Hamilton, 750 N.E.2d at 1065-66.

There are sound policy reasons for this Court to abstain. The problems of gun violence is complex, and the public debate over how best to solve it is heated, to say the least. Legislatures are in a better position than the courts to consider and balance the competing policy interests, both because they have greater fact-finding capabilities and because, as elected representatives, they are directly accountable to the people. *See, e.g., Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 694 n.31; *California Grocers Ass'n, Inc. v. Bank of America* (1994) 22 Cal.App.4th 205, 218.

Deference to the legislature is particularly appropriate, where, as here, both federal and state legislatures have been, and still are, extremely active in regulating firearms. *See Wolfe v. State Farm Fire & Cas. Ins. Co.* (1996) 46 Cal.App.4th 554 (even if insurance companies' refusal to sell new homeowners coverage to avoid writing new earthquake policies was unfair under UCL, court would not intervene in area of complex economic policy, especially where legislature was actively grappling with problem).

Many of the sales and distribution practices identified by plaintiffs as problematic are already the subject of legislation in California or at the federal level. *See* 21JA05946-88.

Other safeguards urged by plaintiffs' experts are so vague and ill-defined that even plaintiffs' experts had difficulty describing their parameters or explaining how they would be implemented, not in theory, but in the real world. For example, plaintiffs argue that defendants should use trace data to identify problem dealers, but plaintiffs' experts cannot say how many traces are too many, or how a manufacturer should determine "whether any given FFL's high incidence of crime gun sales is attributable to irresponsible conduct, or merely reflects a high volume of legal sales or some other activity (such as theft) over which the FFL has no control." *Hamilton*, 750 N.E.2d at 1064 n.5. Plaintiffs suggest that manufacturers should sell only through approved or authorized dealers and should limit the number of firearms a dealer can sell to any one customer, but they cannot say what kind of vertical integration is necessary and how many firearms is too many.

Courts are ill-equipped for the complex task of regulation: "The prospect of judges becoming embroiled in a 'hands-on' fashion in the minutiae of disputes over how numerous companies manufacture and market their products poses insurmountable obstacles as we foresee courts attempting to carefully monitor which models of guns should or should not be designed, which ones may be sold in exactly what quantities, to and by which wholesalers, in which states, and to which individual retailers in which communities." *Sturm, Ruger & Co.,* 761 N.Y.S.2d at 203. *See also Desert Healthcare District*, 94 Cal.App.4th at 795-96 (court would abstain where fashioning remedy would "pull the court deep into the thicket of the

health care finance industry, an economic arena that courts are ill-equipped to meddle in").

Finally, piecemeal regulation through litigation makes little sense. *See California Grocers Ass'n, Inc.*, 22 Cal.App.4th at 218 ("Judicial review of one service fee charged by one bank is an entirely inappropriate method of overseeing bank service fees."). A comprehensive statutory scheme provides order and guidance to all makers and sellers of firearms, and allows them to conform their conduct to the dictates of the law. An amorphous, court-fashioned remedy, enforced by injunction against only a portion of the industry, will disrupt the regulatory scheme and, if other courts follow suit, wreak havoc on the industry:

> [T]he judicial system is, at best, ill-equipped to deal with the emotional issues of handgun control. Certainly, there can be no effective handgun control imposed on an *ad hoc* basis by six or twelve jurors sitting in judgment on a single case. Decisions in these suits – made on the basis of a particular record developing a unique set of facts – will necessarily be inconsistent, and there can only be varying and uneven results in different jurisdictions.

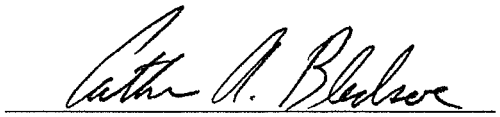
Patterson v. Rohm Gesellschaft (N.D. Tex. 1985) 608 F. Supp. 1206, 1216.

CONCLUSION

For the foregoing reasons, Beretta asks the Court to affirm judgment in favor of defendants-respondents.

Dated: April 19, 2004

Respectfully submitted,



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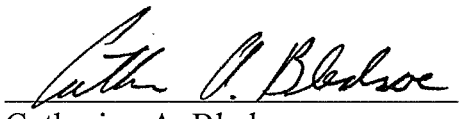
RULE 14 CERTIFICATE OF COMPLIANCE

In compliance with Appellate Rule 14 and the Court's Order dated March 24, 2004, granting an enlargement of the word count for the brief of respondents Beretta U.S.A. Corp. and Fabbrica d'Armi Pietro Beretta S.p.A. to 16,500 words, counsel hereby certifies that the BRIEF OF RESPONDENT-MANUFACTURERS BERETTA U.S.A. CORP. AND FABBRICA d'ARMI PIETRO BERETTA S.p.A. uses a proportionately spaced Time New Roman 13-point typeface, and that the text of this brief contains 16,490 words (as counted by the word count feature on the computer program used to generate this brief), excluding the title page, tables of contents and authorities, signature lines, and this certificate.



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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 Baltimore, Maryland, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC, 233 East Redwood Street, Baltimore, Maryland 21202.

2. That on April 19, 2004, declarant served the **BRIEF OF RESPONDENT-MANUFACTURERS BERETTA U.S.A. CORP. AND FABBRICA d'ARMI PIETRO BERETTA S.p.A. and VOLUMES 1 AND 2 OF THE APPENDIX OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF BRIEF OF RESPONDENT-MANUFACTURERS BERETTA U.S.A. CORP. AND FABBRICA d'ARMI PIETRO BERETTA S.p.A.** by depositing a true copy thereof in a United States mailbox at Baltimore, Maryland 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 19th day of April, 2004, at Baltimore City, Maryland.

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