CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION ONE

No. A103211

THE PEOPLE, EX REL. ROCKARD J. DELGADILLO
AS CITY ATTORNEY, et al.,

Plaintiffs/Appellants,

vs.

B & B GROUP, INC., et al.,

Defendants/Respondents

APPELLANTS' OPENING BRIEF

Appeal from the Superior Court of the
State of California for the County of San Diego
The Honorable Vincent P. DiFiglia
Judicial Council Coordinated Proceeding No. 4095

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INTRODUCTION

Every year, more than 10,000 crime guns are recovered in California and traced by law enforcement. The guns recovered are just the visible tip of the crime gun problem, as most guns used in crime are never recovered. This flood of guns causes serious harm to California communities that strain to cope with the crippling effects of violent gun crime and the criminal gun market.

This continuous stream of crime guns is not inevitable. It is not unavoidable. It stems, in part, from business practices used by the gun manufacturer and distributor defendants in this case who choose to sell guns to the public by indiscriminately supplying the universe of federally-licensed gun dealers, even though some of these dealers sell vast numbers of crime guns. Experts in this case have concluded that a small number of high-risk dealers supplied by defendants are, more likely than not, either engaged in sales to gun traffickers or in other dangerous business practices that facilitate the diversion of guns into the criminal market in California. The gun industry defendants know who the irresponsible gun sellers are or could easily know if they examined crime gun tracing data readily available to them, yet they have pretended not to know and have deliberately adopted an industry-wide policy of continuing to sell through these dealers regardless of how many guns they supply to the criminal market, all the while rejecting repeated requests by the U.S. Department of Justice ("DOJ") and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to screen out problem dealers and not supply them. Defendants, through their trade associations, have even gone so far as to punish industry members who tried to change this dangerous policy.

The central issues in this case are: (1) whether it is an "unfair" business practice to continue selling guns through irresponsible intermediaries when you know or should know the result is to steadily

supply an illegal underground crime gun market in California and (2) whether this practice contributes to a public nuisance.

Business and Professions Code §17200 provides alternate tests to determine whether a business practice is "unfair." One test assesses whether the gravity of the harm to the public outweigh[s] the utility of the conduct to the defendant. An alternative test inquires whether the practice "offends an established public policy or [is]...immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Op. at 19(61JA17858).

The lower court, based primarily on an analysis of crime gun tracing data supplied by plaintiffs' experts, found issues of material fact that the ***dealer*** defendants were engaged in "high risk business practices that facilitate the diversion of guns into the underground market" and therefore could be liable under the unfairness prong of §17200. Op. at 43-44 (61JA17867.F-17867.G). The court, however, inexplicably found, with respect to the ***manufacturer*** and ***distributor*** defendants ***who supplied those dealers and thereby supported their high-risk practices***, that "no expert could opine that any specific manufacturer or distributor had engaged in wrongdoing based on their analysis of the data." Op. at 19(61JA17858).

Not only is this conclusion a mischaracterization of plaintiffs' expert testimony, it is plainly inconsistent with the court's prior conclusion. On summary judgment, the court credited the expert crime gun trace analyses of former ATF agents Joseph Vince Jr. and Gerald Nunziato that each defendant dealer was more likely than not either engaged in sales to gun traffickers or employed high-risk sales practices that facilitated crime gun diversion, Op. at 43-44(61JA17867.F-17867.G), while improperly rejecting or ignoring their parallel analyses that each manufacturer and distributor defendant supplies firearms traced to crime in California through these high-risk dealers as well as other identifiable gun dealers more likely than

not engaged in similar high-risk practices. Op. at 18-20(61JA17857A-17858A). The court is not the trier of fact at this stage and certainly cannot draw inferences adverse to plaintiffs. Moreover, given the strong public policy of California to keep guns ***out*** of the hands of criminals, supplying and enabling these high-risk suppliers of California crime guns is clearly "wrongdoing" or unfair under either §17200 test, given that defendants know or should know from the trace data who the high-risk dealers are. Just as certainly, this conduct contributes to a public nuisance.

Intertwined with these errors, the lower court grafted a new and unwarranted "duty" requirement onto plaintiffs' §17200 and public nuisance claims. This radical holding is unsupported by legal authority. Under §17200, the statute itself establishes a "duty" to follow its strictures – *i.e.*, not engage in unfair or unlawful business practices. The public nuisance statute also has no "duty" element apart from the "duty" not to contribute to a public nuisance. Further, even if some additional duty were required, the lower court failed to recognize the Legislature's clear policy pronouncement that "[t]he design, ***distribution***, or marketing of firearms and ammunition is not exempt from the ***duty*** to use ordinary care and skill that is required by this section." Cal. Civ. Code §1714(a)(emphasis added). The court did not engage in the multi-factor analysis of *Rowland v. Christian* that would be required if duty were an element of these claims.

The lower court compounded its errors by proclaiming that no duty exists because the manufacturer and distributor defendants' deliberate misconduct must be characterized as "nonfeasance." Op. at 18-20 (61JA17857A-17858A). This conclusion is incorrect on the facts and the law. The continued profitable supply of thousands of guns through a distribution pipeline defendants know or should know feeds an illegal underground market in California cannot reasonably be characterized as doing nothing. There is also no support in California law for exculpating

parties who engage in unfair trade practices or who contribute to a public nuisance based on the semantic distinction between "misfeasance" and "nonfeasance."

Plaintiffs introduced overwhelming evidence in opposition to summary judgment that raises material issues of fact regarding defendants' alleged misconduct. In addition to extensive analyses of trace data establishing that each defendant has sold its guns through high-risk dealers associated with large quantities of guns used in crimes in California, plaintiffs introduced testimony of industry insiders, proof of how each defendant operates its distribution system, and testimony from former top ATF officials regarding how defendants' practices supply the criminal gun market. Defendants did not rebut this evidence, and the court committed legal error by ignoring it. The lower court's order should therefore be reversed.

Presented with similar evidence, a New York court recently found ***after a trial*** against many of the companies who are defendants here that "[c]areless practices and lack of appropriate precautions on the part of some retailers lead to the diversion of a large number of handguns from the legal primary market into a substantial illegal secondary market." *NAACP v. AcuSport, Inc.*, 271 F.Supp.2d 435, 450 (E.D.N.Y. 2003). Further, the court found that "[t]he flow of guns into criminal hands in New York would substantially decrease if manufacturers and distributors insisted that retail dealers who sell their guns be responsible." *Id.* Plaintiffs' evidence has raised material issues of fact that the same is true in California.

STATEMENT OF THE CASE

In 1999, twelve California jurisdictions filed three separate suits against firearm manufacturers, distributors and dealers alleging that they engaged in unfair and unlawful business practices in violation of the California Business and Professions Code and contributed to a public

nuisance. (1JA40, 1JA85, 1JA129.) Plaintiffs sought declaratory and injunctive relief and civil penalties pursuant to the Code. The suits were consolidated under Judicial Council Coordination Proceeding No. 4095.[1]

On March 7, 2003, the lower court heard five motions for summary judgment brought by defendants and motions for summary adjudication brought by plaintiffs and defendant MKS Supply. (61JA17849A.)

On April 10, 2003, the court granted summary judgment to the defendant firearm trade associations, manufacturers and distributors. This order became final on May 2, 2003, and is the subject of this timely appeal. (61JA17849.)

Also on April 10, 2003, the court denied motions for summary adjudication and summary judgment brought by gun dealers Traders' Sports and Andrews Sporting Goods and gun distributors Ellett Brothers, MKS Supply and Southern Ohio Gun. (61JA17866, 61JA17867.F.) In October 2003, defendants MKS Supply, Traders' Sports, Southern Ohio Gun and Andrews Sporting Goods agreed to settlements before trial dismissing all claims against them in exchange for agreements to reform their gun sales practices. (71JA20608-20707.) Traders' Sports, for example, agreed to improve its inventory tracking, train its employees to prevent straw purchases, and provide detailed crime gun trace information to manufacturers and distributors upon request. These four defendants are not parties to this appeal. Ellett Brothers settled claims related to the sale of assault weapons in California, but not claims related to its general distribution practices. A separate appeal has been taken from the October 6, 2003, judgment related to it.

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[1] Plaintiffs also alleged that defendants engaged in unfair advertising in violation of Bus. & Prof. Code §17500 and in the unfair practice of designing guns without safety devices, but do not pursue these claims on appeal.

STATEMENT OF FACTS

I. DEFENDANTS SUPPLY A CONTINUOUS STREAM OF GUNS TO THE UNDERGROUND MARKET IN CALIFORNIA THROUGH HIGH-RISK DEALERS

Law enforcement agencies within California recover and trace, on average, more than 10,000 crime guns per year.[2] Most of these weapons are handguns. A large percentage of them are new. *Fox* ¶27(26JA7475); *Zimring* ¶6(26JA7570).[3] The presence of these crime guns throughout California has caused widespread public harm and created a public nuisance that plaintiffs are forced to abate.

Federal studies and reports spanning almost 30 years have shown that a very significant percentage of the guns recovered in crime, including those in California, have been diverted into criminals' hands from corrupt or irresponsible federal firearms licensees ("FFLs") who sell guns to the public. *Vince* ¶¶17-18(26JA7507), App.A(26JA7529-7540); *Zimring* ¶5 (26JA7569). These same studies have shown that crime gun diversions are concentrated among a small percentage of FFLs. For example, just 1.2% of retail dealers across the country accounted for 57% of crime guns traced to dealers in 1998. *Vince* ¶25(26JA7510), ¶95y(26JA7537).[4]

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[2] More than 80,000 crime guns were recovered and traced within California from 1988-2000, including more than 71,000 from 1995-2000. *Nunziato* ¶29(26JA7422). ATF only traces crime guns, which are defined as firearms that are illegally possessed, used in a crime, or suspected of use in a crime. *Id.* ¶9(26JA7414). To trace a gun, ATF contacts the manufacturer and the business entities through which the manufacturer has sold the gun downstream to the point of the first retail sale. *Id.* ¶10(26JA7415).

[3] To aid the court, declarants and deponents are named when cited.

[4] Professor James Fox, a nationally-acclaimed criminologist, found that each defendant manufacturer's ***California*** crime gun traces were also concentrated among a small number of dealers. *Fox* ¶¶14-17(26JA7471-7472).

Plaintiffs' experts explained that guns are diverted from FFLs into the criminal market in a number of ways, including negligent or intentional sales to straw purchasers, thefts from poorly secured premises, and the transfer of guns the dealer cannot later account for in inventory. *Vince* ¶¶13-18(26JA7506-7507), ¶¶25-33(26JA7510-7512); *Zimring* ¶¶5-9 (26JA7569-7570); *Higgins* ¶¶13-15(26JA7492-7493), ¶¶19-20(26JA7494-7495); *Wachtel* ¶7(26JA7575). Surveys of criminals confirm that they obtain firearms from FFLs using these means. *Fox* ¶¶26-28(26JA7475).

Through the tracing process, ATF can identify which FFLs are most associated with crime gun diversion by analyzing a series of gun trafficking indicators, including:

- multiple crime guns traced to an FFL or first retail purchaser;
- short time-to-crime for crime guns traces to an FFL or first retail purchaser;
- incomplete trace results, due to an unresponsive FFL or other causes;
- significant or frequently reported firearms losses or thefts by an FFL;
- frequent multiple sales of handguns by an FFL or multiple purchases of firearms by a non-licensee, combined with crime gun traces; and
- recovery of firearms with obliterated serial numbers.

Vince ¶36(26JA7513). Plaintiffs' experts testified that FFLs linked to a significant number of these indicators are more likely than not either engaged in sales to gun traffickers or in high-risk business practices that facilitate the diversion of guns into the criminal market. *Vince* ¶25 (26JA7510).

Defendant manufacturers and distributors, who are notified of the make, model, and serial number of crime guns sold by them and traced, could gather from their own downstream business partners the same kind of information that is used by ATF if they cared to know which of their

business partners exhibit indicators of crime gun diversion. *Vince* ¶¶19-23(26JA7508-7509); *Higgins* ¶23(26JA7496).[5]

Both DOJ and ATF have repeatedly urged defendant manufacturers to "self-police" their distribution chains, stating that they "could substantially reduce the illegal supply of guns" by ensuring that downstream sellers are responsible. *Gun Violence Reduction: National Integrated Firearms Violence Reduction Strategy* (2001) (39JA11429); *Nunziato* ¶19(26JA7419). DOJ provided specific steps that defendants should take, including:

> identify[ing] and refus[ing] to supply dealers and distributors that have a pattern of selling guns to criminals and straw purchasers...and develop[ing] a code of conduct for dealers and distributors, requiring them to implement inventory, store security, policy and record keeping measures to keep guns out of the wrong hands.

(39JA11429.) Further, ATF has said it would encourage and assist the gun industry in this effort by providing tracing information to each manufacturer "to build sounder and safer businesses." *Vince* ¶83 (26JA7525-7526).[6] Defendants, however, have refused to follow federal law enforcement's suggested practices.[7]

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[5] When ATF conducts a trace, it is gathering information from gun industry members in the distribution chain. Manufacturers and distributors could require by contract the same basic information from those they supply. *Nunziato* ¶20(26JA7419-7420); *Gundlach* ¶¶82-84(26JA7458-7459).

[6] For example, an ATF Special Agent in Charge at the National Tracing Center informed defendant Taurus that it could use tracing data to determine whether "there is an unusually high number of Taurus firearms being traced to certain Federal firearms licensees" and suggested that in such an instance Taurus "look at their business practices more carefully." (43JA12625-12629.) ATF gave similar recommendations to Sturm Ruger. (49JA14260); *Vince* ¶84(26JA7526).

[7] *See, e.g.*, *Higgins* ¶¶27-29(26JA7497-7499); *Vince* ¶81(26JA7525); *Bloom* 71:24-73:8(49JA14399-14401); *Campbell* 128:8-18(50JA14519); *Garrison* 62:20-24(50JA14676), 115:11-25(50JA14683); *Hood* 53:10-

Plaintiffs introduced extensive tracing analyses from two former high-level ATF officials to show that defendants' firearms recovered in crime in California have been sold through FFLs that exhibit most if not all of ATF's gun trafficking indicators. Gerald Nunziato, former head of ATF's National Tracing Center, used data obtained by plaintiffs from ATF on more than 35,000 crime guns recovered in California from 1995-2001 as well as other national crime gun data to prepare a series of profiles on traces of each defendant's guns and the FFLs through which those guns were sold. *Nunziato* ¶38(26JA7424). Joseph Vince Jr., former Chief of ATF's Firearms Enforcement Division and Crime Gun Analysis Branch, analyzed these profiles and offered a series of expert opinions as to how defendants' distribution networks have fueled the crime gun market in California.[8]

Mr. Nunziato prepared three sets of profiles:

- **Defendant Manufacturer and Distributor-and-Dealer Profiles.** Provides each defendant's crime gun tracing totals within California and nationwide.
- **California Dealer and Dealer Final Sale Profiles.** Examines crime gun tracing indicators for more than 6,000 dealers that sold crime guns recovered in California and traced. Data from these profiles were incorporated into separate profiles tracking defendant manufacturer and distributor crime gun traces through these dealers.
- **Defendant Manufacturer-to-Dealer and Distributor-to-Dealer Profiles.** Analyzes how each defendant manufacturer and distributor

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58:14(51JA14768-14773); *Jannuzzo* 131:9-132:2(51JA14796-14797); *Kellgren* 117:9-118:2(51JA14972-14973); *Kloetzer* 143:6-18(52JA15189), 148:3-154:19(52JA15190-15192), 190:19-192:15(52JA15198), 252:19-253:4(52JA15208); *Steger* 134:8-16(54JA15714).

[8] The data released by ATF to plaintiffs and presented to the lower court is representative of overall crime gun tracing patterns, *Vince* ¶35(26JA7513), but undercounts the problem as it comprises only about half of ATF's California crime gun traces during this period. *Nunziato* ¶30(26JA7422); *Vince* ¶43(26JA7515).

sold guns traced to crime through dealers associated with significant gun trafficking indicators.

Nunziato ¶¶38-49(26JA7424-7430).[9]

Nunziato found that each of the defendant manufacturers and distributors sold traced California crime guns through high-risk dealers associated with significant indicators of gun trafficking or diversion of guns into the underground market. *Id.* ¶54(26JA7431). Each defendant could have obtained data from their downstream business partners and conducted the same analysis with more complete data than ATF supplied plaintiffs, thereby enabling even more clear identification of high-risk dealers. *Id.* ¶55(26JA7431). Had defendants cared to gather and analyze this data they could have used it to establish a simple distribution standard: "If you want to be a seller of our handguns, you cannot be linked to significant indicators of gun trafficking or diversion." *Id.* ¶56(26JA7432). Because over 85% of gun dealers nationwide are associated with few, if any, crime gun traces or other gun trafficking or diversion indicators, *Vince* App.A ¶95j(26JA7532), ¶95y(26JA7537); (38JA10984); (42JA12246, 12251), defendants can certainly choose more responsible distribution partners. Nunziato concluded that each defendant could have substantially reduced the supply of handguns to the underground market in California if it had implemented such a standard. *Nunziato* ¶56(26JA7432).

Joseph Vince provided further analyses of the data and profiles assembled by Nunziato. Vince concluded from the Manufacturer and Distributor Profiles that guns sold by each defendant manufacturer and distributor have contributed significantly to the crime gun problem in California. *Vince* ¶¶37-41(26JA7514). He concluded from the California Dealer and Final Sale Profiles that it is more likely than not that many of

[9] *See* profiles at (32JA9129-34JA9869).

the dealers that sold guns recovered in California engaged in sales to gun traffickers or utilized high-risk business practices that facilitated the diversion of guns into the criminal market in California. *Id.* ¶¶42-53 (26JA7514-7519). Taking this one step further, Vince concluded from the Manufacturer- and Distributor-to-Dealer Profiles that each defendant manufacturer and distributor has engaged in the high-risk practice of selling its guns through dealers associated with significant indicators of trafficking or diversion. *Id.* ¶¶54-73(26JA7519-7523).

Vince offered several examples of specific dealers he concluded were high-risk and showed how each defendant manufacturer and distributor sold guns traced to crime through one or more of these dealers.[10] Vince found, for example, that Traders' Sports has overwhelming gun trafficking indicators associated with it. *Id.* ¶46(26JA7515). Traders' averaged more than 100 crime gun traces per year in California alone. *Id.*[11] Many of these guns had a short "time-to-crime," regarded by ATF as a strong indicator of trafficking activity. *Id.* Between 1995 and 1999, Traders' also engaged in more than 1,400 multiple sale transactions involving more than 3,100 guns. *Id.* Further, Traders' was associated with "suspect completion codes" in 66 of its traced guns, which suggests lost or missing inventory or other suspect activity at the dealership. *Id.*; *Nunziato* ¶43, n.7(26JA7427). Based on these and other statistical data reflected in

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[10] Julius Wachtel, a supervisor of ATF's California gun trafficking investigations and author of the 1998 study *Sources of Crime Guns in Los Angeles, California*, also submitted a declaration identifying more than fifteen dealers in California involved in gun trafficking that he investigated for ATF. *Wachtel* ¶7(26JA7575-7576). He added that trace data is very useful in identifying these kinds of dealers, but that manufacturers and distributors ignore it and pay no attention to trafficking indicators like high numbers of traces. *Id.* ¶¶9-10(26JA7577).

[11] In contrast, more than 85% of dealers nationwide had *zero* gun traces in 1998, and only 0.2% (132 out of 83,272) had 50 or more. (38JA10984.)

the profiles, Vince concluded that Traders' either engages in sales to gun traffickers or employs high-risk sales practices that facilitate diversion of guns to criminals. *Vince* ¶46(26JA7516). Moreover, the profiles established that defendant manufacturers like Beretta, Glock, Sturm Ruger, Smith & Wesson, and Taurus, and defendant distributors like Southern Ohio Gun sold substantial numbers of guns to Traders' that were recovered by police in California and traced, despite the presence of indicators that it was a high-risk enterprise to sell guns through Traders'. *Id.* ¶56(26JA7519-7520). Using similar analyses, Vince identified other high-risk California dealers through which defendant manufacturers and distributors sold their guns. *Id.* ¶¶47-53(26JA7516-7519), ¶¶57-62(26JA7520-7521).[12]

Defendants are fully aware that continuing to sell guns through high-risk dealers fuels an underground market in crime guns. Moreover, Professor James Fox testified that the gun industry profits immensely from crime gun diversion. He estimated that more than 12% of handguns produced or imported into the United States in 1995 and more than 25% of handguns produced or imported in 1991 had been used in crime by the end of 2001. *Fox* ¶¶5-12(26JA7468-7470).

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[12] The lower court held that this data was sufficient to raise material issues of fact under §17200 that two defendant dealers – Andrews Sporting Goods and Traders' Sports – were engaged in "high risk business practices that facilitate the diversion of guns into the underground market," Op. at 43-44 (61JA17867.F-17867.G), but failed to acknowledge that defendant manufacturers' and distributors' supply of these dealers with the very guns they were diverting raised similar issues of material fact under §17200. Op. at 19(61JA17858).

II. GUN INDUSTRY INSIDERS HAVE ACKNOWLEDGED THAT DEFENDANTS ENGAGE IN HIGH-RISK SALES PRACTICES

According to the sworn testimony of gun industry insiders, defendants know that their continuous supply of high-risk dealers fuels an underground market in illegal guns.

Robert Ricker worked for nearly twenty years representing the interests of gun manufacturers, distributors, and dealers in California and elsewhere with the National Rifle Association, California Rifle and Pistol Association, Gun Owners of California, National Alliance of Stocking Gun Dealers, and American Shooting Sports Council ("ASSC"). *Ricker* ¶¶1-5 (26JA7551-7552). In his declaration, Ricker states that "[t]he firearms industry, including the defendants in this action, has long known that the diversion of firearms from legal channels of commerce to the illegal black market in California and elsewhere, occurs principally at the distributor/dealer level" as "firearms pass quickly from licensed dealers to juveniles and criminals through such avenues as straw sales, large-volume sales to gun traffickers and various other channels by corrupt dealers or distributors who go to great lengths to avoid detection by law enforcement authorities." *Id.* ¶8(26JA7554). He noted "straw purchases, often of large volumes of guns, were a primary avenue by which a relatively small number of federally licensed firearms dealers supplied the criminal market." *Id.* ¶9(26JA7554). Although these diversions could be stopped through proper oversight and training, Ricker said that it has been a common practice of gun manufacturers and distributors to adopt a "see-no-evil, hear-no-evil, speak-no-evil" approach regarding those who sell their guns that "encourages a culture of evasion of firearms laws and regulations." *Id.* Rather than cutting off sales to dealers that sell guns into the illegal market, Ricker said manufacturers and distributors "hide behind

the fiction" that they have no responsibility as long as their gun seller holds an FFL. *Id.* ¶12(26JA7557). To underscore that defendants know who these dealers are, Ricker added that "[f]irearm manufacturers have long been aware that the number of ATF crime gun traces associated with a particular dealer can be an important indicator that illegal gun trafficking is occurring." *Id.* ¶14(26JA7559).

Robert Hass, Smith & Wesson's former senior vice-president of marketing and sales, also has given sworn testimony that:

> [Smith & Wesson] and the industry are...aware that the black market in firearms is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal firearms licensees. In spite of their knowledge, however, the industry's position has consistently been to take no independent action to insure responsible distribution practices....

Hass ¶¶20-21(51JA14721). In his deposition, Hass confirmed that others in the gun industry, including defendants, "[s]hould have, could have, would have" known that manufacturers sold through high-risk dealers and that the industry could be more active in "analyzing the tracing of its guns" and "pinpointing those dealers who are involved in a significantly higher percentage of traces than the average." *Hass* 36:14-37:24(51JA14729-14730), 39:15-40:7(51JA14731-14732).

Dealers have also warned the industry that it should clean up its distribution systems. Carole Bridgewater served as secretary/treasurer of the National Alliance of Stocking Gun Dealers ("NASGD"), and her husband Bill Bridgewater was its executive director. *Bridgewater* ¶1(26JA7543). NASGD's membership included more than 8,000 retail firearms dealers, as well as manufacturers and distributors like defendants Colt's, Glock, Heckler & Koch, Smith & Wesson, Sturm Ruger, and Taurus. *Id.* ¶2(26JA7543).

In statements submitted to Congress in 1993 and published in the magazine it distributed widely throughout the industry, NASGD acknowledged that the firearms industry includes many dealers "who divert the flow of firearms from the legitimate trade into the more lucrative firearms black market." *Id.* ¶4(46JA7543), ¶6(26JA7544); (43JA12425). NASGD openly declared that "[w]e as an industry have failed to 'police' ourselves in the past" and "[w]e must do so now." (43JA12403.)

In her declaration, Carole Bridgewater affirms that "[t]he gun industry has known for a long time that there are serious problems in the way it distributes its products" because "[m]anufacturers and distributors are willing to sell guns to any 'dealer' with a Federal Firearms License." *Bridgewater* ¶5(26JA7543-7544). According to Bridgewater, the majority of those with licenses "are not real, legitimate, responsible businesses," but manufacturers and distributors continue to actively sell guns through them, thereby "feed[ing] the black market for guns." *Id.* NASGD repeatedly and forcefully warned the industry about these problems, but to no avail. *Id.* ¶¶6-14(26JA7544-7548).

Sturm Ruger received similar warnings from its dealers in a 1993 survey asking them what it could do to increase their sales. Many dealers responded that legitimate dealers were tired of the manufacturers and distributors tolerating and continuing to supply guns to dealers who engaged in illegal and irresponsible sales practices and asked Sturm Ruger to exercise greater control over its distribution system. *Wiley* 25:4-31:25(54JA15808-15809); (49JA14167-14212). Sturm Ruger's marketing manager informed William Ruger Sr. about what the dealers had said but was told to drop "the whole thing." *Wiley* 26:19-27:9(54JA15808).

More recently, Robert Lockett, former winner of NASGD's "Dealer of the Year" award, wrote an article for *Shooting Sports Retailer* that called on manufacturers and distributors to "wake-up" and control their

distribution systems to curb widespread diversion, including requiring that distributors and dealers "adhere to some strict guidelines." (42JA12217-12219); (43JA12147). In his deposition, Lockett admitted that the industry essentially does nothing to oversee distribution: "Once you receive a Federal Firearms License from the Federal Government, the industry has generally said, okay, that's good enough for us, you are good to go." *Lockett* 23:3-6(52JA15249), 25:11-21(52JA15251). For speaking out, Lockett suffered retaliation from several distributors. *Lockett* 37:18-23 (52JA15256).

III. DEFENDANTS, THROUGH THE TRADE ASSOCIATIONS, HAVE CONSISTENTLY STIFLED INDUSTRY REFORM

It is no accident that defendants have each continued to sell guns through high-risk FFLs that divert guns into the illegal market. Through the influence of the defendant trade associations – National Shooting Sports Foundation ("NSSF") and the Sporting Arms and Ammunition Manufacturers' Institute ("SAAMI") – this harmful practice has been industry policy for a long time. During trade association meetings throughout the 1990s, members of the industry deliberated whether to change the way firearms were distributed in order to address diversion problems. At every instance they consciously chose to continue their dangerous practices.

In 1993, Doug Painter, NSSF Marketing Director, wrote a memo to Robert Delfay, NSSF Executive Director, discussing an important ATF Report entitled *Operation Snapshot*. (47JA13555-13557). Painter offered a scathing critique of gun manufacturers' distribution systems and strongly called for a "***proactive industry strategy***" to: (1) address the serious "potential for illegal firearms transactions through ostensibly 'legal' FFL channels," and (2) "minimiz[e] the possibility of illegal transactions through unscrupulous FFL holders." (47JA13555-13556) (emphasis in

original). Painter also strenuously warned that "[t]here are literally tens of thousands of FFL holders throughout the country whose firearms transactions are not subject to regular inspection or proper oversight" because ATF lacks the resources to oversee them. (47JA13556.) Painter noted that 34% of FFLs who were inspected by ATF had Gun Control Act violations. (47JA13555.)

Robert Delfay's response to Painter's alarming memo was a handwritten note: "10/1/93, Doug–You may want to file for future reference. Arlen not keen on doing anything right now." (47JA13555.) The "Arlen" referred to is Arlen Chaney, at the time the Chairman of the Board of Governors of NSSF. *Bridgewater* ¶2(26JA7543). Nothing further was done in reference to Painter's memo or this important ATF report. Indeed, Painter never read another ATF report again. *Painter* 150:21-153:13(53JA15390). Delfay did not even read *Operation Snapshot* or any of the dozens of subsequent ATF reports, *Vince* App.A(26JA7529-7540), that expanded upon the serious problems described in *Operation Snapshot*. *Delfay* 57:4-72:23(50JA14586-14601); (47JA13555-13557).

Throughout 1993 and 1994, NASGD published industry-wide warnings similar to Mr. Painter's regarding the diversion of firearms from firearms licensees supplied by manufacturers, the inability of ATF to prevent diversion, and the need for the industry, especially manufacturers, to take action to address what one dealer called "a big, non-professional, mess." *Bridgewater* ¶¶7-14(26JA7545-7548); *Jannuzzo* 661:24-662:24 (51JA14828-14829); (43JA12403). In 1995, Bill Bridgewater, president of NASGD, was forced off the ASSC board by major SAAMI members for expressing these views. *Ricker* ¶¶11-12(26JA7555-7558).

A mid-1994 SAAMI meeting agenda asked "Can or Should We 'Pro-Act'" with respect to a firearms retailer "Code of Ethics." It was decided that SAAMI should develop and promote such a code, though the

recommendations memo noted that "[c]ertain elements of this code would be obvious and easy to draft and others would be more sensitive." (43JA12439-12442.) By February 1995, SAAMI and NSSF had drafted a "Responsible Firearms Retailer Code of Practice" that called for dealers to go "beyond the law" to block straw purchases. This code was never implemented. (48JA13938-13939); (48JA14041); (47JA13560); *Sanetti* 298:7-15(53JA15610); *Delfay* 98:12-99:5(50JA14616-14617), 101:9-102:17(50JA14619-14620).

In the mid-1990s, SAAMI published a brochure entitled "A Responsible Approach to Public Firearms Ownership and Use," in which "SAAMI members pledge to sell our products to ***only legitimate retail firearms dealers***," adding: "we feel such action would result in fewer of our products ending up in the hands of ***unethical*** dealers." (48JA14122-14128.) This pledge was never implemented. In subsequent editions of the brochure, the pledge was deleted. (47JA13807-13818); *Delfay* 76:17-85:8 (50JA14604-14613).

Between 1992 and 1997, according to Robert Ricker, lawyers and key executives for the gun industry and trade associations, including inside and outside counsel, held "informal" meetings to discuss various legal, legislative, and policy issues facing the industry. *Ricker* ¶16(26JA7561). While Ricker and Richard Feldman, Executive Director of ASSC, suggested at these meetings that the industry would be better served by dealing with the problems of firearm diversion, the prevailing view was that action by the industry would be an admission of responsibility for the problem. *Id.* Ultimately, the meetings themselves were considered "dangerous" and after 1997 were stopped. *Id.*

Industry leaders, through NSSF and SAAMI, also began to meet with ATF, which continually urged the industry to address the crime gun diversion problem. One of the first meetings was in December 1995.

Robert Scott, then Smith & Wesson's Marketing Vice President, took notes highlighting a litany of matters identified by ATF that remain critical today: "straw man purchasing is a major emphasis," "believe trafficking is a critical area for attention," "commerce of guns (dangerous commodity) very unregulated versus pharmaceuticals for example," "juveniles buy through the black market," and "theft from FFLs" is a concern. (47JA13717-13724); *Scott* 57:17-70:9(54JA15659-15671). The defendants continued supplying guns in the same reckless manner without addressing any of these problems. *Delfay* 162:4-12(50JA14627). In August 1999, NSSF pledged to ATF officials to "look for ways to help identify problem dealers." (49JA14252-14254.) NSSF never followed through. *Delfay* 162:4-12(50JA14627). In November 1999, NSSF drafted letters that it told ATF it intended to send to FFLs. The letters urged FFLs not sell firearms until background checks were completed in order to help end problems that arise when checks cannot be completed in the time allotted under federal law. (46JA13529); (46JA13531-13535). NSSF never sent these letters. *Delfay* 210:9-21(50JA14632); (46JA13516). Also in November 1999, NSSF, recognizing the problem of "very poor inventory management" on the part of retailers, discussed with ATF "NSSF playing a role in urging retailers to do regular inventories." (46JA13531-13533.) NSSF failed to follow through. *Delfay* 172:24-173:14(50JA14628-14629).

In addition to quashing ideas for reform, when any member of the industry tried to break from the status quo, defendants, through NSSF and SAAMI, sought to punish them. In October 1997, Feldman and Ricker enlisted member companies to join an accord with President Clinton to provide child safety locks with new firearms. *Ricker* ¶18(26JA7563). The initiative drew the immediate fire of Robert Delfay, Executive Director of SAAMI and NSSF, who tried to torpedo the agreement. (47JA13656-13657); (47JA13665-13667); *Ricker* ¶18(26JA7562). Feldman and Ricker

were summoned to a key SAAMI committee meeting and raked over the coals by industry members for stepping out of line. *Ricker* ¶19(26JA7564). Nevertheless, Feldman and Ricker began to support measures to keep guns out of criminals' hands, including a proposal they made to NSSF to develop training videos for firearms dealers along with a "dealer certification" program. *Ricker* ¶17(26JA7562); (45JA13157-13166). Delfay ordered in a memo to industry executives: "Someone in a position of authority at ASSC needs to direct Mr. Ricker to become silent." *Ricker* ¶21(26JA7565); (43JA12573). NSSF and SAAMI leaders thereafter engineered the firing of Feldman, the ouster of Ricker, and the dissolution of ASSC. *Ricker* ¶21(26JA7565); (45JA13184-13190); (47JA13656-57); (47JA13658-13664); (55JA16152-16154). Paul Jannuzzo, Glock's general counsel, described the ***"lynch mob mentality"*** by members of NSSF and SAAMI that was going to and did eliminate ASSC. (45JA13208.)

When Smith & Wesson finally broke ranks on March 17, 2000, and agreed to widespread reforms in the way it distributed its handguns, it received even more intense pressure to step back in line with SAAMI and NSSF members' way of doing things.[13] Once Smith & Wesson signed the agreement, Delfay, as head of SAAMI and NSSF, stated to the press that he was "deeply disturbed" by Smith & Wesson's action. (56JA16295.) He added: "***We are confident that no other major manufacturers will desert.***" *Id.* (emphasis added). Delfay also told the press: "I talked to the majority of [the manufacturers], and the unanimous response was, 'No way.'" (56JA16298.) In May 2000, Don Gobel, then head of NSSF's board and a

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[13] Under the agreement, Smith & Wesson would have required that all distributors and dealers selling Smith & Wesson guns be authorized, thereby submitting themselves to a code of conduct critical to curbing the diversion of firearms into the underground market. Smith & Wesson also signed a slightly modified agreement in December 2000 with Boston. (43JA12577-12601, 43JA12603-12623.)

Browning Arms executive, drafted a memo of NSSF "Action Items" he sent to Delfay summarizing gun manufacturers' positions on key issues, including the Smith & Wesson agreement. The memo included: "Why We Stand United Not to Sign the S&W Agreement." (49JA14366-14368); (47JA13592-13593).

Smith & Wesson was aware of efforts by members of NSSF and SAAMI to pressure to the company. For example, certain companies, including Taurus, apparently threatened both *Shooting Times* and Peterson Publishing (publisher of *Handguns* and *Guns & Ammo* magazines) that they would pull ads if the magazines continued accepting Smith & Wesson ads. *Pluff* 79:11-80:4(53JA15439-15440). Taurus also threatened to drop its sponsorship of the Sportsman Team Challenge if Smith & Wesson was allowed to remain a sponsor. (47JA13675A-13675C.)

Pressure on multiple fronts was successful in suppressing Smith & Wesson's handgun sales, and the parent company then sold Smith & Wesson to a group of investors, including former company executive Robert Scott. *Scott* 8:10-10:2(54JA15639-15640), 117:1-22(54JA15690); *Killoy* 537:9-538:3(52JA15145-15146). Under Scott's leadership, Smith & Wesson renounced the settlement agreement entered into with Boston. *Scott* 85:6-86:4(54JA15672-15673), 110:2-12(54JA15686).

In August 2002, Scott admitted that as a consequence of signing an agreement to reform its distribution practices, Smith & Wesson was forced to withdraw from some of the industry "community groups," including NSSF. (25JA7181.) He also said that after scuttling the agreement, Smith & Wesson was readmitted to membership within the firearms industry:

> The firearms industry is a family. We need to be part of that family. We can't be separate from that family. We want to fully, 100 percent, participate in that family. We want to be part of family decision-making.

Id.; *Scott* 115:17-118:15(54JA15688-15691). He added: "I would like to think that the new Smith & Wesson will just be the 'good-old' Smith & Wesson." (25JA7181.) At the same time, Scott received the "Man of the Year" award from NSSF, which he perceived as "speak[ing] volumes about Smith & Wesson's reclaimed place in the firearms community today." (25JA7181-7182); *Scott* 115:17-118:15(54JA15688-15691).

IV. RESPONSIBLE BUSINESS PRACTICES WOULD MARKEDLY REDUCE DEFENDANTS' SUPPLY OF THE CALIFORNIA CRIME GUN MARKET

Evidence in this case, from fact and expert witnesses alike, also demonstrates that defendants could engage in responsible business practices that would reduce the risk of their guns being illegally acquired and used in California. Defendant manufacturers and distributors have the ability to require all dealers selling their guns to follow the same responsible sales practices through their relationships with and control over members of their distribution systems.[14] They could choose the distributors and dealers to which they sell guns, use written agreements to set the terms of their sales, and decide not to sell guns to a distributor or dealer that does not meet their requirements or agree to abide by their terms and conditions. For example, defendants could:

- Collect and use crime gun tracing and multiple sale data to identify high-risk dealers.
- Sell only through authorized and approved dealers.
- Provide training to distributors and dealers about how to block straw purchases.

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[14] Smith & Wesson, for example, agreed to institute a system of selling only through authorized distributors and dealers subject to a strong code of conduct governing where, how, and to whom they sell guns. (43JA12577-12601.) *See also* Killoy 448:23-489:12(52JA15092-15093); *Pluff* 31:4-52:10 (53JA15411-15432), 54:10-18(53JA15433) (discussing efforts to implement Smith & Wesson agreement).

- Limit the number of guns that dealers sell to a customer at one time or on multiple occasions or require dealers to take special precautions in doing so, including asking questions about why the customer is making multiple purchases.
- Impose strong sanctions on distributors or dealers who fail to comply with requirements imposed by the manufacturer or who continue to have significant indicators of trafficking or diversion of guns to the criminal market.[15]

In practice, however, defendants only exercise this sort of control over their distribution partners when their ***financial*** interests are at stake. For example, defendants:

- Screen, investigate, and monitor distributors and dealers regarding their creditworthiness and financial viability.
- Provide training through their sales representatives to dealers about the marketable features of their products and how to promote sales.
- Use written distribution agreements to impose a range of terms and conditions that protect their financial interests, such as requirements that distributors and dealers maintain minimum inventory levels, observe specified price terms, and allow the manufacturer to inspect sales premises and records at any time.

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[15] *See, e.g., Gundlach* ¶¶14(26JA7438), ¶¶20-23(26JA7440-7441), ¶¶26-28(26JA7442), ¶¶80-83(26JA7457-7458), ¶¶85-97(26JA7459-7463); *Higgins* ¶¶28-29(26JA7498-7499); *Vince* ¶12(26JA7505), ¶15(26JA7506), ¶18(26JA7507), ¶¶78-79(26JA7524); *Ricker* ¶15(26JA7560); *Bonaventure* 44:1-16(49JA14420); *Goldman* 101:7-24(50JA14691); *Guevremont* 110:15-111:13(50JA14697); *Hass* 60:1-61:13(51JA14738-14739), 66:19-67:8(51JA14741-14741A), 68:6-21(51JA14742); *Jannuzzo* 267:22-268:11(51JA14818-14819), 272:12-21(51JA14823); *Killoy* 83:17-22 (51JA14992), 262:23-264:5(52JA15045-15047), 312:10-17(52JA15068); *Kloetzer* 113:17-115:22(52JA15181-15182), 122:7-123:10(52JA15184), 137:14-138:6(52JA15187-15188); *Sanetti* 138:2-20(53JA15593), 182:2-23 (53JA15602), 192:10-199:7(53JA15605); *Thompson* 56:4-58:15 (54JA15784-15786), 68:1-69:10(54JA15787-15788); (43JA12444); (46JA13366-13372); (46JA13374-13390); (47JA13653-13654); (47JA13670-13671); (47JA13700-13709); (47JA13727-13736); (47JA13746-13772); (49JA14214); (49JA14248-14251); (49JA14340-14359); (49JA14361-14363); (49JA14366-14368); *see also* defendants' distributor agreements (44JA12690-45JA13083; 63JA18515-65JA18961).

- Terminate sales to distributors and dealers when it is in their financial interests to do so.[16]

To protect its foreign sales representatives, Beretta's standard distributor agreement requires the distributor to actively discourage retail dealers from selling Beretta guns to anyone outside the United States. *Campbell* 89:20-97:22(50JA14515-14517); (46JA13245). Beretta regards any such sales that "our distributors know or should have known are occurring" as violations of the agreement. (46JA13245.) In a letter to a distributor, Beretta listed factors that would indicate the distributor should have known or suspected a dealer was making unauthorized international sales, such as "the size of the order, past history of the particular dealer, the size and nature of the order relative to normal buying practices of the dealer, etc." *Id.* According to Beretta's national sales manager, this was done in order to "control the distribution process," to force distributors to keep an eye on dealers' activities, and to prevent distributors from just looking the other way in circumstances suggesting a dealer was making international sales. *Campbell* 97:9-22(50JA14517). Beretta could require distributors to exercise the same vigilance to spot dealers that they should know are supplying the illegal market within the United States, but has not done so. Likewise, when Sturm Ruger became concerned about the

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[16] *See Gundlach* ¶¶21-23(26JA7440-7441); *Bonaventure* 30:2-32:17 (49JA14418), 33:2-34:22(49JA14418-14419); *Brazeau* 92:23-93:21 (50JA14437); *Frane* 113:5-114:17(50JA14666-14667); *Hass* 68:6-21 (51JA14742); *Jannuzzo* 61:19-62:4(51JA14786-14787), 66:14-25 (51JA14788), 70:2-71:4(51JA14789-14790), 103:21-104:6(51JA14791-14792); *Killoy* 407:2-7(52JA15085), 411:6-412:4(52JA15086-15087); *Kloetzer* 58:15-59:12(52JA15172), 66:16-68:7(68JA19994), 76:4-78:22 (52JA15175-15176), 79:9-80:11(52JA15176), 94:3-95:9(52JA15177); *Larsen* 78:10-79:2(52JA15225), 84:6-18(52JA15226); *Meyer* 87:17-22 (52JA15296); *Morrison* 66:12-67:1(53JA15322-15323); *Thompson* 39:13-41:16(54JA15780-15782); (49JA14214); *see also* defendants' distributor agreements (44JA12690-45JA13083; 63JA18515-65JA18961).

potential for rebate fraud by dishonest dealers generating fake documentation to claim rebates for guns they did not sell, Sturm Ruger implemented rules and procedures to scrutinize dealer conduct and to prevent that fraud from occurring. (49JA14341-14359.)

In some instances, those who sell guns have not hesitated to adopt responsible policies that go beyond minimum legal requirements to curb crime gun diversion. For example, Wal-Mart instituted a nationwide policy requiring its stores to refrain from selling a gun prior to the completion of a background check, even when legally permitted to do so, because of problems that arise when a check cannot be completed in the allotted time. *Crow* 10:4-12(50JA14525), 11:19-21(50JA14526), 15:9-15(50JA14530). Felons and other prohibited purchasers have been able to obtain guns via this "delayed denial" problem. *Vince* ¶11(26JA7505). No defendant manufacturer or distributor has required such a policy for dealers selling its guns, however. *See supra* n.15.

Professor Gregory Gundlach, the John W. Berry Sr. Professor of Business at the University of Notre Dame, provided expert testimony in this area. *Gundlach* ¶¶2-6(26JA7435-7436). He examined the distribution methods employed by the defendants and compared the gun industry's actions to those of other industries selling dangerous items such as tobacco, alcohol, chemicals, pyrotechnics, and all-terrain vehicles. *Id.* ¶¶9-67 (26JA7436-7454), ¶¶89-96(26JA7460-7463). Gundlach concluded that gun manufacturers have established distribution systems in which all the incentives favor selling guns to traffickers or others who funnel guns into the criminal market because of the profits to be made by doing so. *Id.* ¶¶97-99(26JA7463-7464); *Vince* ¶15(26JA7506).

Based on his knowledge and study of other industries, Gundlach stated that a responsible corporation can and will implement safety measures that go beyond the bare minimum legal requirements. *Gundlach*

¶¶85-88(26JA7459-7460). Gundlach concluded that there are many changes that each defendant could and should implement that would reduce the supply of its guns to the criminal market. *Id.* ¶¶68-84(26JA7454-7459). Gundlach's expert conclusion that defendants should implement these safeguards is confirmed by accepted criteria for responsible distribution, common standards of practice found in other industries, and basic principles of distribution management. By implementing such safeguards, each defendant could reverse the incentives in its distribution system, using those incentives to favor safe and responsible conduct. *Id.* ¶¶68-84 (26JA7454-7459), ¶¶97-99(26JA7463-7464).

SUMMARY OF ARGUMENT

In granting summary judgment for the defendants, the court made numerous legal errors. Each alone is an independent basis for reversal. First, the court failed to apply the standards under Business and Professions Code §17200 to determine if defendants' business acts or practices were "unfair." Second, the court erred in holding that defendants could not be liable under §17200 for "nonfeasance." Third, the court drew factual conclusions adverse to plaintiffs in violation of the basic principles of summary judgment. Fourth, the court erred in holding that plaintiffs' §17200 claims required proof of an independent "duty" of care. Fifth, the court erred in imposing tort-based causation requirements on plaintiffs' statutory claims. Sixth, the court erred by not even addressing plaintiffs' public nuisance claim. Seventh, the court failed to recognize that defendants' creation of a public nuisance is sufficient to make their conduct "unlawful" under §17200. Eighth, the court improperly granted summary judgment to the trade associations based on its erroneous conclusion they had only engaged in "non-feasance." Each of these errors is addressed below.

ARGUMENT

I. THE LOWER COURT ERRED BY MISCHARACTERIZING DEFENDANTS' WRONGDOING AS "NONFEASANCE" RATHER THAN APPLYING THE TESTS FOR LIABILITY UNDER BUSINESS AND PROFESSIONS CODE §17200 AND BY MISAPPLYING TORT PRINCIPLES TO PLAINTIFFS' STATUTORY CLAIMS

The lower court improperly granted summary judgment to defendant manufacturers and distributors based on an incorrect reading of California law and contradictory evaluation of the summary judgment record. Rather than apply the Business and Professions Code's alternate tests to determine whether defendants' business practices are "unfair" under §17200 or recognizing that such practices are "unlawful" if they contribute to a public nuisance, the court mistakenly characterized defendants' continued sale of firearms through an identifiable and concentrated number of high-risk dealers as "nonfeasance" that could not be held to violate §17200. The court compounded this error by requiring plaintiffs to clear tort-based duty and causation hurdles that have no basis in the statute or in §17200 case law.

A. Defendants Engaged In Business *Acts* Or *Practices* That Violated §17200's Alternate Tests For Unfairness

As discussed below, the lower court applied the wrong legal framework to plaintiffs' summary judgment evidence. To establish a violation of §17200, plaintiffs need show only two elements: (1) that defendants have engaged in a "business act or practice," and (2) that such act or practice is "unlawful, unfair, or fraudulent." *See* Bus. & Prof. Code §17200; *Barquis v. Merchant's Collection Ass'n of Oakland, Inc.*, 7 Cal.3d 94, 111-13 (1972). "[E]ven a single act may create liability." *United Farm Workers of Am. v. Dutra Farms*, 83 Cal.App.4th 1146, 1163 (2000) (citations omitted). It is no defense to claim that the alleged violation is merely an "omission" if the defendant has engaged in a business ***act or***

practice. *Stevens v. Super. Ct.*, 75 Cal.App.4th 594, 604 n.10 (1999) (rejecting contention that §17200, "which provides relief for 'any unlawful, unfair or fraudulent business ***act or practice***' does not include in its reach the omission to act") (emphasis in original).

Business practices are "unfair" under §17200 if they meet either of two independent tests. A practice is "unfair" if the harm it threatens outweighs its benefits, based on the "impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." *Motors, Inc. v. Times-Mirror Co.*, 102 Cal.App.3d 735, 740 (1980). The question presented by this test is not whether the act has already caused harm to specific individuals through specific transactions, but whether the practice is *likely* to harm the public. *Bank of the W. v. Super. Ct.*, 2 Cal.4th 1254, 1267 (1992); *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.App.4th 861, 877 (1999). Alternatively, a practice is unfair if it "offends an established public policy or...is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," *Community Assisting Recovery, Inc. v. Aegis Sec. Ins. Co.*, 92 Cal.App.4th 886, 894 (2001) (citations omitted), "in other words, [if] it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness." *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal.App.3d 509, 530 (1984). *See also Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal.App.4th 700, 720 n.23 (2001) (reaffirming public policy test).

The lower court correctly cited the tests for unfairness, Op. at 19(61JA17858), but then failed to apply them to plaintiffs' evidence. Certainly there is no question that defendants were engaged in "business acts or practices." Under the first test, the issue is whether the risks inherent in each defendants' decision to distribute its dangerous products through "high risk" dealers exhibiting "significant" and "overwhelming indicators of gun trafficking," as the lower court found, Op. at 43

(61JA17867.F), 45(61JA17867.H), outweigh the utility of this particular distribution system. Clearly they do. Plaintiffs presented expert evidence showing how thousands of defendants' crime guns recovered in California have been funneled through these high-risk dealers and how defendants could easily implement alternate distribution systems that would markedly reduce the diversion of firearms to violent criminals. Statement of Facts ("SOF") §§I, IV, *supra*. Under the second test, defendants should similarly be liable, as California's strong public policy is to keep guns ***out*** of the hands of criminals, not to permit distribution systems that facilitate their steady supply. *See, e.g.*, Cal. Penal Code §12021 *et seq.* Defendants have not only callously chosen to continue utilizing their current distribution schemes, but, through their trade associations, they have stifled reform and punished those who attempted to change these dangerous methods of distribution. SOF §§II-III, *supra*. Considering the substantial damage these practices have caused Californians, plaintiffs have certainly presented triable issues concerning whether defendants' business acts or practices are unfair under §17200. The lower court should have undertaken this simple analysis, but did not do so.

B. Because Defendants' Continued Supply Of Identifiable High-Risk Firearms Dealers Is An Unfair Business Act Or Practice Under §17200, It Matters Not Whether It Is Called "Nonfeasance" Or "Misfeasance"

The lower court strayed from the straightforward application of §17200 by mischaracterizing defendants' creation and maintenance of distribution systems that continuously supply guns, through irresponsible intermediaries, to criminals in California as "nonfeasance" – "namely the manufacturers and distributors' ***failure to prevent*** independent third-party retailers from selling guns to criminals." Op. at 18(61JA17857A) (emphasis added). The court then accorded this erroneous conclusion improper legal significance by holding that plaintiffs' §17200 claims must fail because

defendants had no "duty" to act. Op. at 20(61JA17858A). This was legal error.[17]

First, it does not matter for purposes of §17200 whether "unfair" conduct is characterized as misfeasance – *i.e.*, an affirmative act creating or increasing the risk of harm – or nonfeasance – *i.e.*, the failure to intervene to prevent injury.[18] The issue is whether defendants' continued sale of guns through high-risk dealers is an "***act or practice***" that is "unfair" under the §17200 standards. Bus. & Prof. Code §17200 (emphasis added); *Stevens*, 75 Cal.App.4th at 604 n.10. It clearly is. To date, no court in a §17200 case has required proof of "misfeasance" to establish an unfair business act or practice, apart from the requirement that the defendant engage in a business act or practice that is unfair. Certainly the lower court cited no such authority. *See supra* n.17. In addition, there are numerous instances

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[17] The court cited only two cases, both irrelevant – *FNS Mortgage Service Corp. v. Pacific General Group, Inc.*, 24 Cal.App.4th 1564 (1994) and *King v. National Spa & Pool Institute, Inc.*, 570 So.2d 612 (Ala. 1990) – in holding that nonfeasance cannot support §17200 claims because "liability will be imposed [on manufacturers] only when a party voluntarily adopts standards which later are found to be inadequate." Op. at 20 (61JA17858A). Both cases involve trade associations, not manufacturers, were based in tort and not on §17200, and established no such rule. Because trade associations do not manufacture products, their liability for ***defective*** products – which was central to both cases but is not at issue here – is limited to cases where they adopt industry design standards. Thus, the cases above stand for the unremarkable principle that to be liable in negligence one's conduct must contribute in some way to the harm. That principle is easily met here. *See infra* §I(C).

[18] If this were a negligence case, as the court attempts to treat it, the misfeasance-nonfeasance issue would only be relevant if there were no "special relationship" between defendants and plaintiffs. *See, e.g., Weirum v. RKO Gen., Inc.*, 15 Cal.3d 40 (1975). The law of "special relationships," however, has no relevance to §17200 claims, which are brought on behalf of the "people." *See* Bus. & Prof. Code §17204; *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal.4th 26, 59 (1998) (allowing §17200 claim despite lack of special relationship).

where courts have sustained §17200 claims in which the risks created by the business practice were the result of a failure or refusal to take some action. For example, in *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 42-43, 59-60 (1998), the Court upheld plaintiffs' claim that title insurance company defendants' collective refusal to insure certain properties violated §17200. Likewise, in *People v. McKale*, 25 Cal.3d 626 (1979), the Court held that a §17200 action could be brought against a trailer park owner for "failure to maintain" proper safety installations as well as defendants' failure to enforce certain vehicle requirements within the park. *Id. See also AICCO, Inc. v. Ins. Co. of N. Am.*, 90 Cal.App.4th 579 (2001) (allowing §17200 claim for company's failure to obtain shareholder consent prior to policy transfer); *People v. Murrison*, 101 Cal.App.4th 349 (2001) (allowing §17200 claims for rancher's failure to notify Department of Fish and Game before diverting creek). Thus, the issue in §17200 cases is not whether defendants' unfair conduct is misfeasance or nonfeasance, but whether defendants' ***acts or practices*** violate §17200 standards. The lower court failed to recognize this.

Second, even if the misfeasance/nonfeasance distinction were relevant to a §17200 claim, there is little doubt that defendants' conduct would meet the misfeasance standard. The continued sale of guns through dealers that defendants knew or should have known had extraordinary numbers of crime gun traces and other indicators of firearms diversion cannot reasonably be characterized as doing nothing, especially since defendants were all too happy to pocket the profits from this dangerous enterprise. *Fox* ¶¶5-12(26JA7468-7470); *Ricker* ¶¶8-14(26JA7554-7559). Plaintiffs do not seek to hold defendants liable for their ***"failure to prevent"*** third party misconduct, but for ***their own deliberate actions*** in continuing to supply guns to dealers that were more likely than not either engaged in sales to gun traffickers or in high-risk business practices that facilitated the

diversion of guns into the criminal market in California. *Vince* ¶¶42-53 (26JA7514-7519); *Nunziato* ¶¶54-56(26JA7431-7432).

The lower court recognized misfeasance with respect to the defendant dealers, who it said "facilitate the transfer of guns into the wrong hands through various ***malfeasant*** acts." Op. at 18(61JA17857A) (emphasis added). The court also acknowledged that plaintiffs' evidence shows "there are some bad retail dealers in California whose activities facilitate the transfer of guns into the wrong hands," *id.*(61JA17857A), and that "it is 'more likely than not' that the defendants here sold their guns through Federal Firearms Licensees (FFL) that sell to gun traffickers or whose high-risk practices have facilitated the diversion of guns into the underground market." Op. at 19(61JA17858). Yet the court inexplicably failed to accept that defendant manufacturers' and distributors' continued profitable actions of supplying the "malfeasant" dealers with the guns they wrongly transferred was itself misfeasance that "facilitated the diversion of guns into the underground market." *Id.*[19] On summary judgment, the court cannot draw such inconsistent factual conclusions.[20] Given that the vast majority of dealers are associated with few if any crime gun traces or indicators of gun trafficking, *Nunziato* ¶15(26JA7417); *supra* n.11, defendants certainly could have chosen more responsible business partners and more responsible distribution practices.

To put it another way, if a dealer's business practices are unfair because they facilitate the diversion of guns into the underground market,

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[19] The decision to continue supplying "bad" dealers also ran counter to repeated requests by DOJ and ATF for manufacturers to self-police their distribution chains. *See supra* p.8.

[20] The court must view the evidence in the light most favorable to the opposing party and "may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact." *Aguilar v. Atl. Richfield Co.*, 25 Cal.4th 826, 856 (2001).

then a manufacturer's or distributor's business practice of continually supplying that dealer with the guns it is diverting is also unfair, especially where crime gun trace data available to defendant manufacturers and distributors shows that the dealer is engaged in such "high risk" practices.[21] *See, e.g., Gary v. Smith & Wesson Corp.*, ___N.E.2d___, 2003 WL 23010035 (Ind. 2003) (holding gun manufacturers may be liable for failing to exercise care in deciding through whom they sell guns); *James v. Arms Tech., Inc.*, 820 A.2d 27, 41 (N.J.Super.Ct.App.Div. 2003) (upholding city's claims against gun manufacturers for sales to dealers with high numbers of crime gun traces); *Cincinnati v. Beretta USA Corp.*, 768 N.E.2d 1136 (Ohio 2002) (same); *Chicago v. Beretta USA Corp.*, 785 N.E.2d 16 (Ill.App.Ct. 2002), appeal allowed 788 N.E.2d 727 (Ill. 2003) (same); *Boston v. Smith & Wesson Corp.*, 2000 WL 1473568 (Mass.Super.Ct. 2000), interlocutory appeal denied, 2000-J-0483 (Mass.App.Ct. Sept. 19, 2000) (same). The lower court's irrelevant "misfeasance/nonfeasance" analysis cannot avoid the central inconsistency in its opinion.

C. Although §17200 Claims Do Not Require Plaintiffs To Establish That Defendants Have Violated A Tort-Based "Duty Of Care," Plaintiffs Have Met That Standard

Rather than apply the tests for liability under §17200, the lower court analyzed the case as if it were a negligence claim requiring duty to be established, stating that "discussion of the issue of duty appears inescapable" and holding that "[p]laintiffs have failed to supply the Court with any authority for the proposition that defendants' inaction is violative

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[21] The court denied summary judgment to the dealers based almost entirely on analyses of crime gun trace data linked to those stores, finding that the "'sheer volume' of trace requests [has] put them on notice that their guns have been diverted into the criminal market." Op. at 43(61JA17867.F). The same data was available to defendant manufacturers and distributors and should have similarly "put them on notice...." *Nunziato* ¶¶54-56 (26JA7431-7432).

of any duty imposed by law or public policy thus rendering their nonfeasance unfair within the meaning of section 17200." Op. at 19-20 (61JA17858-17858A). This was clear error.

The California Supreme Court has repeatedly held that duty is not an element of §17200 claims. In *Quelimane*, for example, a §17200 claim was allowed to proceed against title insurance company defendants for their coordinated refusal to issue title insurance on certain properties while a parallel negligence claim was dismissed because, the Court held, an insurer "does not have a ***duty*** to do business with or issue a policy of insurance to any applicant for insurance." 19 Cal.4th at 43 (emphasis added). The issue of duty never entered the Court's analysis of the viable §17200 claim. *Id.* at 42-43. Other cases have similarly allowed §17200 claims to proceed even where negligence-based claims have failed for lack of a duty of care. *See, e.g., Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal.3d 197 (1983) (allowing §§17200 and 17500 claims, but affirming dismissal of breach of fiduciary duty because of lack of duty of care); *Day v. AT&T Corp.*, 63 Cal.App.4th 325, 332 (1998) (distinguishing elements needed to prove §17200 claims from those needed to establish common law claims).

The only "duty" required under §17200 is that inherent in the statute – *i.e.*, the duty not to engage in unfair business practices. *See Bank of the W.*, 2 Cal.4th at 1266-67 ("In drafting the [unfair business practices] act, the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity."). Unlike a negligence action, no additional duty owed by these defendants to these plaintiffs – who have brought this case on behalf of the people – need be shown.

Moreover, even if, *arguendo*, duty of care were a required element of §17200 claims, the court undertook no analysis of plaintiffs' evidence to

determine whether the duty element is met. Had it done so, plaintiffs would have easily satisfied its requirements that:

> [e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person.

Cal. Civil Code §1714. This statutory duty codifies a corresponding common law duty of care long embraced by California courts. Thus, "[a]s a general rule, each person has a duty to use ordinary care and 'is liable for injuries caused by his failure to exercise reasonable care in the circumstances.'" *Parsons v. Crown Disposal Co.*, 15 Cal.4th 456, 472 (1997), quoting *Rowland v. Christian,* 69 Cal.2d 108, 112 (1968), and citing §1714. Indeed, ***no exceptions*** to the duty contained in §1714 are permitted "unless clearly supported by public policy." *Rowland*, 69 Cal.2d at 112 (citations omitted).

No public policy considerations support exempting these defendants from a duty of care. If there were ever any doubts, they were put to rest by the Legislature's recent repeal of California Civil Code §1714.4. That provision had provided that firearms could not be found defective in ***products liability actions*** solely "on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged." While §1714.4 did not impact this case (which concerns business practices and public nuisance law, not product liability law),[22] its repeal illuminates California policy, as the Legislature reaffirmed the state's longstanding policy that "[t]he design, ***distribution***, or marketing of firearms and ammunition is not exempt from the ***duty*** to use ordinary care and skill that is required by this section." Cal. Civ. Code §1714(a) (emphasis added).

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[22] In denying demurrer, the lower court so held. (11JA326.)

The other elements of "duty" as originally set out in *Rowland v. Christian* and affirmed in *Parsons* also do not support exempting defendants.[23] The most important factor – foreseeability of harm – is overwhelmingly established not only by the thousands of crime gun traces that alert defendant manufacturers and distributors to the steady diversion of their guns and allow them to identify the sources of that diversion, *Nunziato* ¶¶54-56(26JA7431-7432), but also by the sworn testimony of industry insiders who exposed defendants' internal deliberations to continue supplying high-risk dealers in the face of mounting evidence that they fueled the crime gun market, including the trade associations' role in that decision. SOF §II, *supra*. This is more than sufficient to establish the generalized foreseeability necessary for duty. *See Ileto v. Glock, Inc.*, 349 F.3d 1191, 1204 (9th Cir. 2003) ("a court's task – in determining duty – is...to evaluate more generally whether the...conduct at issue is sufficiently likely to result in the kind of harm experienced"), quoting *Ballard v. Uribe*, 41 Cal.3d 564, 572 n.6 (1986). Defendants' practices, which circumvent the Legislature's clear policy and help arm criminals, also satisfy the moral blame aspects of the *Rowland/Parsons* test.

The closeness of the connection between defendants' conduct and the injuries suffered by plaintiffs further weighs in plaintiffs' favor. The diversion of firearms to criminals occurs within the manufacturers' and distributors' own distribution systems, which they have created and which they control. *Gundlach* ¶¶68-84(26JA7454-7459), ¶¶97-99(26JA7463-

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[23] Those elements are: "foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for

7464); *Higgins* ¶13(26JA7492), ¶15(26JA7493), ¶¶19-20(26JA7494). Once those guns are diverted they cause immediate harm, as cities incur "the governmental cost of ***deterring*** illegal use of firearms." *James*, 820 A.2d at 41-42 (upholding Newark's suit against gun manufacturers), *citing Cincinnati*, 768 N.E.2d 1136 (city's claims closely connected to gun manufacturers' conduct). Moreover, the "[e]xpenditure of public funds to police public schools and the City's streets in accordance with a deterrence policy is hardly an 'indirect' injury." *Id.*

The burden on defendants to act responsibly is also minimal, as defendants could easily choose to distribute their guns in a manner that does not rely on sales through high-risk dealers. *Gundlach* ¶¶68-88 (26JA7454-7460), ¶¶97-99(26JA7463-7464); *supra* n.16 (citing defendants' testimony regarding their distribution capabilities). Further, the consequences to the community of imposing a duty on defendants would be substantially positive by helping eliminate a critical source of firearms for criminals and preventing thousands of firearm injuries and deaths, without restricting the distribution of firearms to law-abiding citizens. Thus, if the lower court had applied the *Rowland/Parsons* standards to determine whether defendants should be exempt from a duty of care it would have found a clear duty – even though no such threshold is required to prove a §17200 claim.

In *Ileto* – a gun distribution case applying California negligence principles – the Ninth Circuit recently held that gun manufacturer Glock owed a duty to use reasonable care in choosing the dealers and distributors through which it sold firearms. The *Ileto* court added:

> The social value of manufacturing and distributing guns without taking basic steps to prevent these guns from

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breach, and the availability, cost, and prevalence of insurance for the risk involved." *Rowland*, 69 Cal.2d at 113 (citations omitted).

> reaching illegal purchasers and possessors cannot outweigh the public interest in keeping guns out of the hands of illegal purchasers and possessors who in turn use them in crimes like the one that prompted plaintiffs' action here.

349 F.3d at 1205 (footnotes omitted). This balancing mirrors the kind of balancing the lower court should have undertaken to evaluate whether defendants' sales practices are unfair under §17200. *See Motors*, 102 Cal.App.3d at 740. Clearly the *Ileto* decision underscores the lower court's legal errors regarding §17200 and duty.

D. Tort-Based Causation Analysis Is Not Applicable To Plaintiffs' §17200 Claims

The lower court also improperly engaged in a negligence-type causation analysis that is inappropriate in a §17200 case. Although plaintiffs presented substantial evidence showing that defendants' business practices were unfair and posed great risk to the public, the court required plaintiffs to go further in showing "some causal connection between the harm and some conduct by the defendants," evidenced by specific acts of "wrongdoing." Op. at 19(61JA17858); Op. at 29-30(61JA17863-17863A). To the extent that the court required plaintiffs to show that specific incidents of violence were causally connected to defendants' unfair practices, it committed legal error.

The case law interpreting §17200 articulates two clear tests for unfair business practices, neither of which requires a causal connection between the defendants' conduct and actual harm to identifiable victims. Indeed, the law is clear in stating that plaintiffs "need not plead and prove the elements of a tort" to recover under §17200 because one purpose of the statute is "to deter future violations." *Bank of the W.*, 2 Cal.4th at 1266-67 (citations omitted). Thus, a court can grant relief to plaintiffs under §17200 "without individualized proof of deception, reliance, and injury if it determines that such a remedy is necessary to prevent the use or

employment of the unfair practice." *Children's Television*, 35 Cal.3d at 211 (quotations omitted). Conspicuously absent from these cases is any discussion of tort-based causation analysis, as that is simply not part of the test for §17200 violations. Section 17200 violations occur if defendants' unfair practices create a heightened risk of harm. Selling guns through high-risk dealers who fuel crime gun diversion certainly poses grave risks to the people of California.

The California Supreme Court's decision in *American Philatelic Society v. Claibourne*, 3 Cal.2d 689 (1935), further illustrates how §17200 analysis focuses on the creation of a risk or danger. In that case, brought under §17200's predecessor (Cal. Civ. Code §3369), postage stamp collectors sought to enjoin the defendant from selling inexpensive stamps altered to look like rare, valuable stamps. The defendant was not defrauding or misleading anyone; it sold these stamps only to dealers and made clear that they were merely simulations. The plaintiffs in *Claibourne* alleged that the defendant should have expected that unscrupulous dealers would palm off the simulations as originals to unsuspecting consumers. Although this had not yet occurred, plaintiffs argued that defendants' business practices created a risk of harm. In analyzing plaintiffs' claims, the Court did not require plaintiffs to offer evidence that dealers had passed off any stamps as genuine or that defendant's conduct caused that to happen. Instead, it was sufficient for plaintiffs to show that defendant's conduct created a risk or danger that fraud would occur. Plaintiffs were entitled to relief upon a showing of the danger created by defendant's "placing of tools of fraud into the hands of dealers or vendors," and it was no defense "that the threatened fraud can only be consummated with the co-operation of an unscrupulous dealer." *Id.* at 692, 699. As in unfair business practice cases since then, defendants' practices were held to be unfair because they increased the risk of harm to California citizens. *See,*

e.g., *Prata v. Super. Ct.*, 91 Cal.App.4th 1128, 1143-46 (2001) (citations omitted) (requiring proof "that members of the public are likely to be deceived by the [unfair] practice" rather than proof of particular injuries to specific consumers); *Children's Television*, 35 Cal.3d at 214 (allowing §17200 *et seq.* claims to proceed based on risk to children to be explained at trial through expert testimony).

The lower court here, on the other hand, held that plaintiffs must show negligence-type causation, relying almost exclusively on the case of *Camden County v. Beretta USA Corp.*, 123 F.Supp.2d 245 (D.N.J. 2000), *aff'd*, 273 F.3d 536 (3d Cir. 2001), the only gun-related case cited anywhere in the court's discussion. Op. at 18(61JA17857A). Not only was this case *not* based on California law, but more than three weeks prior to the lower court's decision here, *Camden*'s analysis – by a federal court exercising diversity jurisdiction – was rejected by a New Jersey appellate court. The New Jersey Appellate Division explicitly repudiated the federal court's ruling in *Camden* as a flawed reading of state tort law, and upheld Newark's suit against gun industry defendants alleging negligent distribution of firearms and creation of a public nuisance. *James*, 820 A.2d at 38.

The court's reliance on the repudiated *Camden* decision instead of *James* also illustrates how the court erred as a matter of ***California*** law. The *James* court rejected the conclusion in *Camden* – cited by the lower court here – that the "causal chain [is] too attenuated to make out a claim against ... [gun] manufacturer[s]." Op. at 18(61JA17857A). Instead, *James* held:

> [B]ased on the City's pleadings, the multiple "links" that form defendants' remoteness argument in fact fold into a single link....[I]ts allegations...charge that defendants individually and collectively failed to develop and in fact discourage the development of reasonable safeguards over the

> distribution scheme, and that defendants refuse to oversee or supervise the control of handgun distribution in order to prevent the foreseeable channeling of guns to such an illegal market. This conduct, the City asserts, is a natural and proximate cause of its injury.

820 A.2d at 39, 43-44 (holding that City's allegations support proximate cause). Even the tort causation principles articulated by *James* – which Newark satisfied – are overly strict compared to the elements of a §17200 claim in California. *See Saunders v. Super. Ct.,* 27 Cal.App.4th 832, 839 (1994) ("A plaintiff suing under [§]17200 does not have to prove he or she was directly harmed by the defendant's business practices.").

Nevertheless, plaintiffs presented substantial material evidence showing a strong causal link between defendants' conduct and harm to plaintiffs. SOF §§I, IV, *supra* (identifying links between each defendant and numerous high-risk dealers and expert testimony establishing that reformed distribution practices would dramatically reduce crime gun diversion). The court ignored this evidence, erroneously holding that "no expert could opine that any specific manufacturer or distributor had engaged in wrongdoing based on their analysis of the data." Op. at 19(61JA17858). In fact, plaintiffs' experts Vince and Nunziato, both former ATF agents, opined that *every* defendant manufacturer and distributor was engaged in the high-risk practice of selling through dealers associated with significant indicators of gun trafficking or diversion activity. *Nunziato* ¶¶54-56(26JA7431-7432); *Vince* ¶¶47-73 (26JA7516-7523). Plaintiffs also presented declarations by industry insiders that defendant manufacturers knew they were supplying high-risk dealers and specific admissions by defendants that they do nothing to ensure that the dealers they continue to supply are not diverting those same guns into the illegal market. *Bridgewater* ¶¶5-14(26JA7543-7548), *Ricker* ¶¶8-14 (26JA7554-7559). Moreover, plaintiffs presented evidence showing that

defendants could, and even defendant admissions that they should, take steps to use more responsible intermediaries to sell their firearms, but that defendant trade associations actively stifled and prevented such actions. SOF §§III-IV, *supra*.

By drawing conclusions adverse to plaintiffs' overwhelming evidence, the court violated the most basic tenets of summary judgment where the court must view evidence in the light most favorable to the opposing party and may not act as the trier of fact at this stage. *See Binder v. Aetna Life Ins. Co.*, 75 Cal.App.4th 832, 839 (1999) ("Only when the inferences are indisputable may the court decide the issues as a matter of law."). Citing only to defendants' exhibits, as the lower court did, Op. at 19(61JA17858), further illustrates the court's improper application of summary judgment's strictures. *See Branco v. Kearny Moto Park, Inc.*, 37 Cal.App.4th 184, 189 (1995). The court's conclusions regarding causation are thus erroneous and contrary to the standards for reviewing summary judgment motions.

II. THE LOWER COURT ERRED BY COMPLETELY IGNORING PLAINTIFFS' PUBLIC NUISANCE CLAIM

In granting summary judgment, the court below not only ignored plaintiffs' evidence that established triable issues regarding how defendants' firearm distribution practices put the health and safety of California communities at risk, creating a public nuisance, ***but its discussion said not a single word about plaintiffs' public nuisance claim.*** *See* Op. at 18-21(61JA17857A-17859), 29-30(61JA17863-17863A). Clearly, this was legal error.

A public nuisance includes "[a]nything which is injurious to health,...or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Cal. Civ. Code §3479. Public nuisances affect "an entire

community or neighborhood, or any considerable number of persons." Cal. Civ. Code §3480. Creation and maintenance of a public nuisance is an "unlawful" act for purposes of §17200 claims. *Farmers Ins. Exch. v. Super. Ct.*, 2 Cal.4th 377, 383 (1992). As with §17200 "unfair" business practice claims, the focus of public nuisance is on the risk or danger of defendants' practices. That is especially true here, where plaintiffs only seek injunctive relief on their public nuisance claims. *Restatement (Second) of Torts* §821B cmt. i ("harm need only be threatened and need not actually have been sustained at all" in public nuisance cases seeking injunction).

As with plaintiffs' §17200 claim, plaintiffs presented substantial evidence that defendants' reckless distribution practices created a public nuisance more than sufficient to overcome defendants' motion for summary judgment. In California, a dangerous condition is a public nuisance and therefore proof of a threat or risk is sufficient for a public nuisance claim.[24] For example, the storage of explosives or "harboring a vicious dog" can be a public nuisance, whether or not an explosion or bite has occurred. *Prosser and Keeton on the Law of Torts* §90, at 644 (5th ed. 1984). *See also, Selma Pressure Treating Co. v. Osmose Wood Preserving Co. of Am. Inc.*, 221 Cal.App.3d 1601, 1620 (1990) (defendant "created or assisted in the creation of a public nuisance" where defendants' recommended disposal practices for chemical waste "might threaten the safety of the underlying water supply" because of "the dangerous propensities of the chemicals"); *Bakersfield v. Miller*, 64 Cal.2d 93, 99-102 (1966) (building is public nuisance if it poses sufficient danger to public); *San Diego County v. Carlstrom*, 196 Cal.App.2d 485, 491 (1961) ("[n]o one has the right to

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[24] California courts have expressly noted that the weighing of risk and utility under §17200 is very similar to the weighing process under nuisance law. *See Motors*, 102 Cal.App.3d at 740.

inflict unnecessary and extreme danger to the life, property and happiness of others" and "[t]he greater the number of people threatened, the greater becomes the need for abatement correction").

Numerous courts have upheld similar public nuisance claims brought by cities against gun manufacturers and distributors. In *Cincinnati*, the Ohio Supreme Court upheld Cincinnati's public nuisance claim against gun makers and sellers alleging that the defendant gun companies created a public nuisance by "marketing, distributing and selling" their guns through systems deliberately designed by defendants to funnel guns to criminals. 768 N.E.2d at 1143. The New Jersey Appellate Division likewise held that Newark stated a valid public nuisance claim against gun manufacturer and distributor defendants where the gun companies' alleged "conduct was of a 'continuing nature' and had a 'long-lasting effect,'" causing substantial harm to Newark. *James*, 820 A.2d at 51. Most significantly, in December 2003, the Indiana Supreme Court ruled unanimously that its public nuisance statute – ***which is identical to California's public nuisance law***[25] – supported a claim brought by Gary against gun manufacturers' reckless distribution practices. *Gary*, __N.E.2d__, 2003 WL 23010035, at *7 ("[T]he City claims that manufacturers are on notice of the concentration of illegal handgun sales in a small percentage of dealers, and the ability to control distribution through these dealers, but continue to facilitate unlawful sales by failing to curtail supply....These allegations state a [public nuisance] claim.") *See also Chicago*, 785 N.E.2d 16 (allowing City's public nuisance case against manufacturers); *Boston*, 2000 WL 1473568 (same).

Public nuisance suits by individual victims of gun violence alleging dangerous distribution practices have also been upheld. In *Ileto*, the Ninth

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[25] *Compare* Cal. Civ. Code §3479 *with* Ind. Code §32-30-6-6.

Circuit allowed California shooting victims to pursue "a classic...nuisance case," 349 F.3d at 1202, under California law against firearm manufacturers whose alleged "distribution and marketing practices" "[f]acilitat[ed] the purchase of guns by individuals declared unfit to buy guns by the state and federal legislatures," causing injury to "the health, safety, and welfare of the California public." *Id.* at 1211. The court noted that "[t]he California Supreme Court has never limited public nuisance suits in a manner that would prevent the claim alleged here." *Id.* at 1211 n.26. *See also Young v. Bryco Arms*, 765 N.E.2d 1 (Ill.App.Ct. 2001), appeal allowed, 786 N.E.2d 202 (Ill. 2002) (upholding claim that firearm manufacturers created public nuisance by distributing firearms through high-risk dealers).

In addition, in *NAACP*, 271 F.Supp.2d 435, a federal court found, ***after a trial***, that many of the same gun manufacturers and distributors who are defendants here created a public nuisance by distributing their guns through high-risk dealers. Although ultimately dismissing plaintiff's claim for lack of standing under New York law because it was not brought by a governmental entity, *id.* at 455, the court held that plaintiffs established that the gun industry's distribution practices amount to a public nuisance, finding:

> The evidence at trial demonstrated that the manufacturers and distributors–marketing tiers one and two–can, through the use of handgun traces and other sources of information, substantially reduce the number of firearms leaking into the illegal secondary market and ultimately into the hands of criminals in New York. A responsible and consistent program of monitoring their own sales practices, enforcing good practices by contract, and the entirely practicable supervision of sales of their products by the companies to which they sell could keep thousands of handguns from diversion into criminal use in New York.

Id. at 449-50.

Accordingly, the lower court's summary judgment ruling against plaintiffs' public nuisance claim should be reversed. Moreover, reversal of the lower court's public nuisance holding is an independent ground for reinstating plaintiffs' §17200 claims, as creation of a public nuisance is an "unlawful" act for purposes of §17200 claims. *See Farmers Ins.*, 2 Cal.4th at 383.

III. THE LOWER COURT ERRED BY IGNORING THE TRADE ASSOCIATIONS' AFFIRMATIVE MISCONDUCT GIVING RISE TO PLAINTIFFS' §17200 AND PUBLIC NUISANCE CLAIMS

In addition to showing that defendant manufacturers' and distributors' business practices are unfair, unlawful, and have created a public nuisance, plaintiffs also presented material facts supporting these claims against defendant trade associations NSSF and SAAMI. SOF §III, *supra*. Despite plaintiffs' evidence, the lower court granted summary judgment to defendant trade associations, holding that "before they can be liable for a business ***practice*** or ***conduct*** that ***causes harm*** there must be some evidence that ***they*** did something that was either unlawful, unfair or fraudulent....Again, plaintiffs' complaint is premised on non-feasance." Op. at 29-30(61JA1786317863A) (emphasis in original). The lower court's conclusion, however, ignores the active role NSSF and SAAMI played ensuring that gun manufacturers would continue to maintain their unfair and unlawful business practices and that no manufacturer would "desert" the industry's policy to continue selling guns through "high risk" dealers. *See, e.g.*, *Bridgewater* ¶¶2-5(26JA7543-7544), ¶7(26JA7545); *Ricker* ¶17 (26JA7562); *Delfay* 103:10-19(50JA14620A), 162:11-12(50JA14627); (56JA16295-16296).

Plaintiffs presented substantial material evidence regarding affirmative trade association misconduct consisting of expert declarations, internal association documents, and deposition testimony. This evidence

outlined a consistent and active pattern of trade association suppression of initiatives to engage in responsible business practices. *See, e.g.*, *Delfay* 45:20-55:11(50JA14575-14585); (56JA16298-16299); (47JA13555). Plaintiffs' evidence also showed that the trade associations deliberately engaged in intimidation practices against anyone within the industry who suggested reforms. *See, e.g.*, *Pluff* 79:11-80:4(53JA15439-15440); *Ricker* ¶21(26JA7565). For example, NSSF and SAAMI retaliated against ASSC Director Richard Feldman and its lobbyist Robert Ricker for working with manufacturers and the Clinton administration to include safety locks with new guns. *Ricker* ¶18(26JA7562), ¶21(26JA7565); (47JA13656-13657); (47JA13665-13667). Eventually the two associations engineered the firing of Feldman, the dissolution of ASSC itself, and the ouster of Ricker. *Ricker* ¶21(26JA7565); (45JA13184-13190); (47JA13656-13664); (55JA16152-16154). Robert Scott's discussion of the firearms' industry "family" from which Smith & Wesson was ostracized when it broke with the status quo and tried to hold its firearms dealers accountable, but then was allowed to rejoin once it had scuttled its agreement to distribute guns responsibly, is another example of the trade associations' corrupting influence over defendants' business practices. *See supra* pp.21-22.

The court wrongly characterized all of this as mere evidence of "nonfeasance," ignoring the trade associations' critical role ensuring that no one "desert" from the united front of maintaining distribution systems created by defendants that sell guns through what the lower court recognized were "high risk" dealers. Op. at 43-45(61JA17867.F-17867.H). Plaintiffs' evidence shows not merely that NSSF and SAAMI "should do more," as the lower court put it, Op. at 29(61JA17863), but that they engaged in affirmative conduct to prevent others in the industry from doing more.

Plaintiffs introduced evidence that the trade associations actively coordinated and disciplined the industry to maintain the its unfair and unlawful business practices. California courts have held that where defendants work together to engage in unfair or unlawful behavior, all defendants who participate are liable under §17200 no matter which parties performed the unfair or unlawful act. *See, e.g.*, *People v. Toomey*, 157 Cal.App.3d 1, 15 (1984) (defendant can be liable under UCL for aiding and abetting other defendants); *People v. Bestline Prods., Inc.*, 61 Cal.App.3d 879, 917-20 (1976) (holding that "anyone who knowingly aids and abets fraud or furnishes the means for its accomplishment is liable equally with those who actually make the misrepresentations"); *People v. Witzerman*, 29 Cal.App.3d 169, 184-85 (1972) (where defendants cooperated in advertising of fraudulent contracts, all were liable under §17500); *People v. Arthur Murray, Inc.*, 238 Cal.App.2d 333 (1965) (defendant may be liable for aiding and abetting unlawful acts where defendant's business practice was calculated to aid and abet violations by others).

Similarly, the trade associations violated public nuisance law by contributing to and working to maintain the nuisance. Courts in this state have consistently held that a party who creates or assists in creating a nuisance may be liable. *See Newhall Land & Farming Co. v. Super. Ct.*, 19 Cal.App.4th 334, 343 (1993) ("under California law, both the parties who maintain the nuisance and the parties who create the nuisance are responsible for the ensuing damages"); *Selma Pressure Treating*, 221 Cal.App.3d 1601 (holding defendants liable for creating or assisting in creation of public nuisance); *Shurpin v. Elmhirst*, 148 Cal.App.3d 94, 101 (1983) ("the party or parties who create or assist in [the creation of a nuisance] ... are responsible for the ensuing damages"). *See also Cincinnati*, 768 N.E.2d at 1143 (holding that gun industry trade

associations have sufficient control over the source of the nuisance to allow liability).

Thus, plaintiffs' evidence raises material issues of fact regarding the trade associations' active involvement in defendants' unfair and unlawful acts, as well as their contribution to a public nuisance in California, and should allow plaintiffs to proceed to trial. The lower court's contrary ruling should be overturned.

CONCLUSION

Based on plaintiffs' substantial material evidence, it is clear that the lower court erred in granting summary judgment. Plaintiffs have presented sufficient evidence to proceed to trial on claims that defendants' business practices are unfair and unlawful and have created a public nuisance in California.

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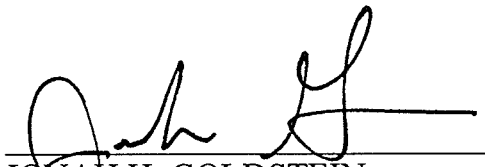
RULE 14 CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that **APPELLANTS' OPENING BRIEF** uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this brief comprises 13,982 words according to the word count provided by Microsoft Word word-processing software.



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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 San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on January 16, 2004, declarant served the **APPELLANTS' OPENING BRIEF** by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of January, 2004, at San Diego, California.

Kathy Scoville

KATHY SCOVILLE

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