

**F I L E D**

Clerk of the Superior Court

**APR 10 2003**

By: R. HENDERSON, Deputy

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN DIEGO**

Coordination Proceeding  
Special Title (Rule 1550(b))

**FIREARM CASES**

Coordinated actions:

PEOPLE, ETC.  
v. ARCADIA MACHINE & TOOL, INC.

PEOPLE, ETC.  
v. ARCADIA MACHINE & TOOL

PEOPLE, ETC.  
v. ARCADIA MACHINE & TOOL

JUDICIAL COUNCIL COORDINATION  
PROCEEDINGS NO. 4095

**RULING ON MOTIONS FOR SUMMARY  
JUDGMENT (7)**

SUPERIOR COURT OF CALIFORNIA  
CITY & COUNTY OF SAN FRANCISCO  
NO. 303 753

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES  
NO. BC 210 894

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES  
NO. BC 214 794

**INTRODUCTION**

This Judicial Counsel Coordinated Proceeding (JCCP) has been summarized by the defendants as follows:

Three years ago plaintiffs . . . brought suit against several firearm manufacturers, distributors, retailers and trade associations, seeking to hold them liable for gun violence in California under theories of public nuisance, unfair competition in violation of Business & Professions Code section 17200, and false advertising in violation of Business & Professions Code section 17500. The gist of plaintiffs' claims is that defendants have engaged in unfair and unlawful business practices under section 17200 and have created a public nuisance in California, by distributing firearms in a manner that enables criminals and other

1 prohibited persons to acquire those firearms through straw purchases,  
2 illegal sales by federally licensed retail dealers, gun show sales, so-  
3 called kitchen table dealer sales, multiple sales, and thefts from retail  
4 dealers. In addition, plaintiffs allege that defendants' firearms are  
defectively designed and that the defendants have falsely advertised the  
benefits of owning guns for self defense and home protection.

5 On March 7, 2003, the Court considered seven separate dispositive motions brought by  
6 various defendants. Each will be addressed separately in this ruling.

7  
8 **I.**

9 **DEFENDANT MANUFACTURERS AND DISTRIBUTORS**  
10 **"OMNIBUS" MOTION FOR SUMMARY JUDGMENT**

11 The moving defendants in this motion summarize their argument as follows:

12 Plaintiffs cannot prove causation, an essential element of their claims.  
13 There is no evidence that any defendant's act or omission caused any  
14 criminal in California to acquire a firearm through any of the methods  
15 alleged in the complaints. There is no evidence that the absence of any  
16 design feature on any specific defendant's firearm caused any shooting  
17 in California, or that any advertisement disseminated by a defendant was  
18 false and misleading or likely to deceive the public. In the final analysis,  
what plaintiffs have to offer in support of their lawsuit are not facts, the  
traditional building blocks of legal claims, but policy arguments as to  
how, in their view, defendants should be required to design distribute,  
and advertise their products. Those arguments ignore the extensive  
array of federal, state, and local laws and regulations already directed to  
the design, sale, and use of firearms, and they are more appropriately  
addressed to the legislative branch of government.

19 More specifically, defendants contend that to prevail on their sales and distribution claims,  
20 the plaintiffs must establish a causal connection between the defendants' alleged business practices  
21 and the acquisition of firearms by criminals and other prohibited persons in California. By virtue of  
22 the fact that some of the cases cited utilize the term proximate cause., i.e., "the without which"  
23 standard, the Court wishes to emphasize that its analysis herein is based solely on the current law in  
24 California as embodied in BAJI 3.76, i.e., the "substantial factor" test.

25 Defendants separate statement lists only ten items. They are the following: (1) there is no  
26 evidence that any thing a manufacturer/distributor did caused a criminal in California to acquire a  
27 specific firearm through a straw purchase; (2) there is no evidence that defendants caused a criminal  
28 in California to acquire a specific firearm through an illegal sale by a federally licensed retail

1 dealer; (3) no evidence that anything defendants did caused a criminal in California to acquire a  
2 specific firearm through a sale at a gun show; (4) no evidence that any defendants caused a criminal  
3 in California to acquire a specific firearm through a sale by a kitchen-table dealer; (5) no evidence  
4 defendants caused a criminal in California to acquire a specific firearm through theft; (6) no  
5 evidence defendants caused a criminal in California to acquire a specific firearm through a multiple  
6 sale; (7) no evidence that defendants caused a criminal in California to acquire a specific firearm  
7 through any other means; (8) no evidence that defendants caused an accidental shooting in  
8 California to occur; (9) no evidence that defendants caused an intentional shooting in California to  
9 occur; and (10) there is no evidence that defendants misled or are likely to mislead a reasonable  
10 consumer.

11 The defendants' points and authorities provide their analysis of each of plaintiffs allegations  
12 and why, as a matter of law, they are entitled to judgment in the absence of a triable issue  
13 concerning causation.

14 **Causation As A Necessary Element Of Plaintiffs' Claim That**  
15 **Defendants Engaged In Unfair Or Unlawful Business Practices In**  
**Violation Of Business & Professions Code Section 17200**

16 Defendants cite general propositions concerning 17200 including its definition that "unfair  
17 competition" includes "any unlawful, unfair or fraudulent business act or practice." [*Cel-Tech*  
18 *Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 180. Because  
19 section 17200 is written in the disjunctive, it "establishes three varieties of unfair competition – acts  
20 or practices which are unlawful, or unfair, or fraudulent." [*Podolsky v. First Healthcare Corp.*  
21 (1996) 50 Cal.App.4th 632, 647.] Defendants cite *Emery v. Visa Int'l Serv. Ass'n* (2002) for the  
22 proposition that whether a business practice is unfair under 17200 requires, at the very least, "an  
23 examination of its impact on its alleged victim, balanced against the reasons, justifications and  
24 motives of the alleged wrongdoer." [Defendants' emphasis.]

25 Although defendants concede that a plaintiff suing under 17200 does not have to prove that  
26 the practice in question caused injury to himself, they assert that he must at least show that the  
27 practice caused harm to the general public or to competition and that this harm was not outweighed  
28 by the benefits of the practice. [*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 841.]

1 As to the "unlawful" prong of 17200, defendants argue that a plaintiff must show a direct  
2 connection between the defendants and any purported unlawful activity.

3 Finally, defendants reject any argument that vicarious liability could apply in a 17200 claim,  
4 citing *People v. Toomey* (1984) 157 Cal.App.3d 1, 14 "A defendant's liability must be based on his  
5 personal 'participation in the unlawful practices' and 'unbridled control' over the practices that are  
6 found to violate Section 17200 or 17500."

7 **Causation as a Necessary Element of Plaintiffs' Public Nuisance Claim**

8 Defendants also contend that causation is a necessary element of plaintiffs' public nuisance  
9 claim: In support of this argument, defendants cite, *inter alia*, *Ileto v. Glock, Inc.*, 194 F.Supp.2d  
10 1040, 1045-49 as a case "factually similar" to this case that was dismissed by a federal district  
11 court. In that case, the court found that the manufacturer's "actual control over its firearms ceased  
12 long before the firearms reached the street, where they allegedly became a public nuisance" and  
13 that the plaintiffs had failed, as a matter of law, to allege facts supporting a finding of proximate  
14 cause. *Id.*, at 1060-61.

15 Defendants contend that to establish causation, plaintiffs must prove that criminals acquired  
16 defendants' firearms through the methods alleged in the charging allegations of their complaint, and  
17 the defendants caused those acquisitions to occur. In this respect, defendants argue that whether the  
18 allegedly unfair or unlawful business practices or the alleged public nuisance is based on actual  
19 injuries or the threat of future injuries or both, plaintiffs must show that it is *defendants' conduct*  
20 *that caused* [defendants' emphasis] the injuries or the threat. Defendants assert that "Because  
21 plaintiffs seek to hold the manufacturers and distributors responsible for the acquisition of firearms  
22 by third-party criminals, they must show that it is the manufacturers' and distributors' conduct that  
23 caused such acquisitions to occur." Therefore, according to defendants, causation cannot exist  
24 without proof of at least two essential points: (1) plaintiffs must prove that the firearms of each  
25 specific defendant have in fact been acquired by criminals in California through one of the means  
26 of acquisition they allege; and (2) "even more important," plaintiffs would have to prove that these  
27 acquisitions were caused by a specific defendant's conduct.

28 ///

1 On March 26, 2001, this Court ordered that plaintiffs produce documents in their possession  
2 which reflect how criminals and others acquired the firearms manufactured and/or sold by  
3 defendants and whether the manner of acquisition had a factual nexus to defendants alleged conduct  
4 (*see* Defendants' Notice of Lodgment [NOL], Ex.1.) As could be expected in a case of this  
5 magnitude, discovery has produced a mountain of data, including, *inter alia*, criminal audit reports,  
6 property room databases and trace data identifying guns manufactured and distributed by the  
7 moving parties which have been utilized in criminal activity. Significantly, however, none of this  
8 data reflects evidence of the type of transactions complained of by plaintiffs, i.e., straw purchases,  
9 illegal sales by federally-licensed dealers, gun show sales or kitchen table transactions, which can  
10 be causally attributed to these moving manufacturers and distributors. See, e.g., Declaration of  
11 James Vogts (NOL, Ex. 7).

12 There is no competent evidence before the Court that any criminal acquisition can be  
13 attributed to conduct by the moving parties. See, e.g., Deposition of Gerald Nunziato (NOL Ex. 16  
14 at p. 81 L15 through p. 82 L18, and p. 97 L10 through p. 98 L9).

15 As defendants note, expert opinions cannot substitute for factual evidence. See, *Noble v.*  
16 *Los Angeles Dodgers, Inc.* (1985) 168 Cal.App.3d 912 (expert's testimony too speculative to  
17 establish causation). Further, as illustrated from the deposition excerpt of Mr. Nunziato cited,  
18 *supra*, "... all that plaintiffs' experts offer is criticism of defendants' business practices and their  
19 own notions of what defendants should do." Defendants assert that they have no legal duty to  
20 investigate and police the sales of third-party retailers, and they cannot be held vicariously liable  
21 under 17200 and 17500 for retailers' conduct. [*Emery v. Visa Int'l Serv. Ass'n, supra*, at 962.]

#### 22 **Plaintiffs' Design Claims**

23 According to defendants, the gist of plaintiffs' design claims is that defendants have  
24 engaged in unfair business practices and created a public nuisance by failing to incorporate certain  
25 design features into their respective firearms – such as magazine disconnect safeties, chamber-  
26 loaded indicators, and "personalized gun" or "unauthorized user" technology, including integral  
27 locks. Defendants submit that causation is also an essential element of these claims. "Plaintiffs  
28 must demonstrate that the absence of the alleged features on particular firearms caused accidental

1 and intentional shootings in California to occur, but they have failed to produce any evidence to  
2 establish that causal link.”

3 Defendants further argue that plaintiffs cannot make out a *prima facie* case of fraudulent  
4 business practices under section 17200 or false advertising under section 17500. Insofar as this  
5 claim is concerned, defendants indicate that plaintiffs allege that defendants have engaged in  
6 fraudulent business practices under section 17200 and false and misleading advertising under  
7 section 17500 in that the defendants’ advertisements of guns for self-defense and home protection  
8 are false and misleading because they do not describe the potential risks of keeping guns in the  
9 home.

10 To succeed on their false advertising claims, defendants contend that the plaintiffs must  
11 show that each defendant’s advertisements are likely to deceive the reasonable consumer. [*South*  
12 *Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 878.] Defendants  
13 argue that plaintiffs cannot make out a *prima facie* case of false advertising as to any defendant, let  
14 alone as to each defendant. Citing the deposition testimony of Teret [382-3384; 390-391; 393-396]  
15 defendants indicate that plaintiffs own expert acknowledged that self-defense and home protection  
16 are legitimate, beneficial uses of firearms. “Whether a gun in the home makes the home’s  
17 occupants more or less safe is, on its face, a matter of opinion based on balancing benefits and risks,  
18 which in turn depend on individual circumstances, including whether the gun is stored safely,  
19 handled responsibly, and used for appropriate purposes.” Moreover, even if defendants’  
20 advertisements conveyed more than non-actionable expressions of opinion, defendants argue that  
21 plaintiffs have failed to come forward with any evidence that the advertisements are likely to  
22 deceive the public.

23 Finally, defendants suggest that the Court should decline plaintiffs’ invitation to engage in  
24 the legislative task of imposing new requirements on the design, distribution, and advertising of  
25 defendants’ products. According to defendants “The issues raised in this litigation are public policy  
26 issues and thus are properly the domain of the legislature. The federal, state, and local statutory  
27 scheme presently in place reflects the view of the pertinent legislative bodies as to the appropriate  
28 regulation of the manufacture, sale, purchase, and use of firearms. It is not the function of either

1 these plaintiffs or the judicial system to second-guess those policies.” As support, at footnote 22,  
2 defendants cite to courts from other jurisdictions “called upon to consider whether regulation of  
3 firearm manufacturers and distributors through the imposition of civil penalties is the appropriate  
4 means by which to address violent crime in this country, and many have judiciously declined to  
5 accept this legislative function arising under the guise of private litigation.”

6 **Plaintiffs’ Arguments In Opposition To Defendants,**  
7 **Manufacturers, And Distributors’ Motion For Summary**  
8 **Judgment**

9 As previously noted, defendants separate statement consists of only ten items which traverse  
10 the charging allegations of plaintiffs’ complaint. In opposition, plaintiffs submit as to each of  
11 defendants first nine statements the following: “Disputed. While plaintiffs dispute this fact, it is  
12 not material to any of plaintiffs claims. Plaintiffs are not required to prove causation or harm on an  
13 incident-by-incident basis.” Plaintiffs thereupon proceed to submit a separate statement consisting  
14 of 478 items in 104 pages.

15 Fortunately, given the realistic limitations placed on the trial court, defendants have not  
16 requested specific evidentiary rulings on plaintiffs contentions, nor on the 120 pounds of paper  
17 plaintiffs have submitted in opposition. Suffice it to say, plaintiffs’ opposition evidence consists of  
18 instances of misconduct by retailers at the very end of the distribution chain (*see, e.g.*, plaintiffs’  
19 response to defendants’ separate statement items 1, 2, 3 and 6).

20 In addition to such instances of retail dealer misconduct, plaintiffs claim to,

21 . . . present sound proof here that defendants have engaged in  
22 unfair practices and created a public nuisance. The evidence  
23 shows that each defendant has continually sold its guns in a  
24 manner that creates a serious risk that criminals and juveniles will  
25 obtain them through the underground gun market they supply. The  
26 evidence shows that each defendant has continually sold its guns in  
27 a manner that creates a serious risk that criminals and juveniles  
28 will obtain them through the underground gun market they supply.  
The evidence includes confessions from industry ‘insiders’ such as  
Robert Ricker, the former head of defendant American Shooting  
Sports council (ASSC), who reveals what the defendants knew,  
what went on at key industry meetings, and why the defendants  
carried on business as usual and silenced anyone who dared to  
propose changes. See Declaration of Robert A. Ricker in Support  
of Plaintiffs’ Opposition to Defendant Manufacturers’ Motion for  
Summary Judgment (“Ricker Decl.”). Another declaration, from  
Carole Bridgewater, the former secretary/treasurer of the National  
Alliance of Stocking Gun Dealers (NASGD), describes how

1 responsible dealers have strongly urged the industry to stop  
2 feeding dealers that supply the black market, but manufacturers  
3 have disregarded those pleas. See Declaration of Carole  
Bridgewater Filed with Plaintiffs' Opposition to Defendants'  
Motion for Summary Judgment ("Bridgewater Decl.").

4 The evidence also includes detailed proof about how each  
5 defendant operates its distribution system, testimony from former  
6 top ATF officials regarding how defendants' practices supply the  
7 criminal gun market, and extensive analysis of trace data  
8 establishing that each defendant has sold its guns through high-risk  
dealers associated with large quantities of guns used in crimes in  
California and traced by law enforcement authorities. Despite how  
defendants try to portray them, the opinions of plaintiffs' experts  
are based on solid evidentiary foundations.

9 In looking at B&P 17200, plaintiffs submit that a practice may be found to be "unfair" if it  
10 fails either of two tests.

11 First, a practice may be unfair if it 'offends an established public policy or . . . is immoral,  
12 unethical, oppressive, unscrupulous or substantially injurious to consumers.' [*Cnty. Assisting*  
13 *Recovery, Inc. v. Aegis Sec. Ins. Co.* (2002) 92 Cal.App4.th 886, 894; *Podolsky v. FirstHealthcare*  
14 *Corp.* (1996) 50 Cal.Ap.4<sup>th</sup> 632, 647.] They assert that, in certain cases, this determination can be  
15 made without any inquiry into causation of harm to the public. For example, a business practice  
16 can be unfair, 'without necessarily having been previously considered unlawful' if it 'offends  
17 public policy as it has been established by statutes, the common laws, or otherwise . . . in order  
18 words, it is within at least the penumbra of some common-law, statutory, or other established  
19 concept of unfairness." *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d  
20 509, 530.

21 Second, plaintiffs indicate that courts have also held a practice is "unfair" if its harm  
22 outweighs its benefits, based on the practice's 'impact on its alleged victim, balanced against the  
23 reasons, justifications and motives of the alleged wrongdoer." [*Motors, Inc. v. Times Mirror Co.*  
24 (1980) 102 Cal.App.3d 735, 740; *Day v. AT&T Corp.* (1998) 63 Cal.App.4<sup>th</sup> 325, 332; *Californians*  
25 *for Population Stabilization v. Hewlett-Packard Co.* (1997) Cal.App.4<sup>th</sup> 273, 286; *Saunders v.*  
26 *Super. Ct.* (1994) 27 Cal.App.4<sup>th</sup> 832, 839.]

27 Plaintiffs attempt to distinguish authority cited by defendants, including *Emery v. Visa*  
28 *International Service Association* (2002) 95 Cal.App.4<sup>th</sup> 952 where the plaintiffs claimed that

1 solicitations to enter foreign lotteries were illegally sent to California residents and that these letters  
2 said payment could be made using VISA and other credit cards. Plaintiffs in that case did not sue  
3 those who operated the lotteries, those who sent the letters, or any bank that issued a VISA credit  
4 card. Rather, plaintiff sued an international organization that was not involved in any way in the  
5 preparation or distribution of the letters and that merely served as a clearinghouse for the exchange  
6 of funds among financial institutions that issue VISA credit cards. *Id.* at 956-57. In that case, the  
7 court concluded that 17200 claims failed because the risks of a few merchants misusing the VISA  
8 payment system were outweighed by the tremendous utility of this system, which handled  
9 thousands of transactions every second for thousands of banks and millions of merchants around  
10 the world. *Id.*, at 959. According to plaintiffs, this decision “merely confirms that Section 17200  
11 requires proof of risk, not incident-by-incident proof of causation and injury.” They also note that  
12 the Emery court had emphasized that its ruling was based on the fact that the VISA clearinghouse  
13 did not have any relationship with the merchants who prepared and distributed the lottery  
14 solicitations. In this case, however, plaintiffs submit that the evidence is “dramatically different.”  
15 The evidence, plaintiffs contend, shows that the defendant manufacturers do have relationships and  
16 regular dealings with the distributors and dealers that sell their products. The evidence also  
17 establishes that many of the defendant manufacturers, such as Beretta and Heckler & Koch, also  
18 sell guns directly to dealers. Plaintiffs argue that “In relying on Emery, defendants overlook the  
19 simple fact that the relationship of a gun manufacturer and the distributors and dealers within the  
20 manufacturer’s very own distribution system is not like the relationship the VISA clearinghouse  
21 had to the millions of merchants accepting credit cards around the world.”

22 Plaintiffs in opposing the motion indicate that they have evidence that three of the  
23 defendants distributors have engaged in unlawful business practices by advertising, selling and  
24 distributing firearms in violation of California law:

25 Defendant distributors Ellett Brothers Inc.,\* MKS Supply, Inc.\*  
26 and Southern Ohio Gun Distributors\* have engaged in unlawful

27  
28 <sup>\*1</sup> These parties are the subject of a separate motion for summary judgment *supra*, which the  
court has denied.

1  
2 business practices by selling guns to dealers in California without  
3 obtaining proof of the dealers' state licensure as required by  
4 California Penal Code § 12072(f)(1). See Fact Statement  
5 ¶¶ 444-46.

6 Defendant distributors Ellett Brothers, Inc. and Southern Ohio Gun  
7 Distributors have engaged in unlawful business practices by  
8 advertising assault weapons whose possession is banned by  
9 California law in catalogs that defendants distribute in California,  
10 in violation of California Penal Code § 12020.5. See Fact  
11 Statement ¶¶ 447-48.

12 Defendant distributor Southern Ohio Gun Distributors has engaged  
13 in unlawful business practices by selling banned assault weapons  
14 to California purchasers in violation of Penal Code § 12280. See  
15 Fact Statement ¶ 449.

16 Plaintiffs acknowledge that they are not bringing unlawful practices claims against the  
17 defendant manufacturers or distributors based on third parties' violations of laws. However, they  
18 indicate that they may nevertheless premise claims of unfair business practices upon the defendant  
19 manufacturers' use of distributors who distribute their firearms to California in violation of  
20 California law. In this regard, they note that all of the defendant manufacturers use the services of  
21 Ellett Brothers MKS Supply or Southern Ohio to distribute their products.

22 Plaintiffs assert that their evidence makes out a prima facie case of fraudulent business  
23 practices under 17200 and false advertising under 17500: As support for this argument, plaintiffs  
24 submit that the evidence establishes that defendants have engaged in fraudulent business practices  
25 in violation of 17200 and misleading advertising in violation of 17500 by promoting the purchase  
26 of guns for self-defense without disclosing the risks posed by keeping guns in the home, by  
27 marketing firearms through advertisements containing misleading representations of the proper way  
28 to store firearms, by marketing and promoting firearms to children, and by advertising banned  
assault weapons in a manner likely to mislead consumers to believe they are legal in California,  
citing to Facts 453-58. Plaintiffs assert that these statutes merely require proof that members of the  
public were 'likely to be deceived,' not proof of actual deception or reliance.

Plaintiffs next argue that their evidence establishes a causal connection between defendants'  
business practices and the acquisition of firearms by criminals and other prohibited persons in

1 California: plaintiffs summarize their arguments in this regard to be that the defendants' dangerous  
2 conduct has at least three major components: (1) selling guns without taking reasonable steps to  
3 ensure that they are sold to the public through responsible sales policies and practices; (2) selling  
4 guns without making any efforts to identify corrupt and irresponsible dealers or to limit or terminate  
5 sales to such dealers; selling guns without feasible safety features to prevent unauthorized use and  
6 enabling criminals to use stolen guns.

7 Specific to this argument, plaintiffs cite to the following evidence as support.

8 Federal reports have repeatedly told defendants they engage in high risk practices: Plaintiffs  
9 cite to a "major public report" entitled Gun Violence Reduction: National Integrated Firearms  
10 Violence Reduction Strategy where the United States Department of Justice called on gun  
11 manufacturers to 'self-police' their distribution chain, stating they "could substantially reduce the  
12 illegal supply of guns" by instituting controls on downstream sellers. [Fact 38.] The Justice  
13 Department stated as follows:

14 The firearms industry can make a significant contribution to public  
15 safety by adopting measures to police its own distribution chain. In  
16 many industries, such as the fertilizer and explosives industries,  
17 manufacturers impose extensive controls on their dealers and  
18 distributors. Gun manufacturers and importers could substantially  
19 reduce the illegal supply of guns by taking similar steps to control  
20 the chain of distribution fore firearms. To properly control the  
21 distribution of firearms, gun manufacturers and importers should:  
22 identify and refuse to supply dealers and distributors that have a  
23 pattern of selling guns to criminals and straw purchasers; develop a  
24 continual training program for dealers and distributors covering  
25 compliance with firearms laws, identifying straw purchase scenarios  
26 and securing inventory; and develop a code of conduct for dealers  
27 and distributors, requiring them to implement inventory, store  
28 security, policy and record keeping measures to keep guns out of the  
wrong hands, including policies to postpone all gun transfers until  
NICS [National Instant Criminal Background Check System] checks  
are completed.

24 Additionally, the Justice Department went on to explain that the federal ATF, the Treasury  
25 Department and the Justice Department would encourage and assist the gun industry in preventing  
26 criminal acquisition of guns:

27 To assist industry efforts to keep guns from falling into the wrong  
28 hands, ATF will supply manufacturers and importers that request it  
with information about crime gun traces of the manufacturer's or  
importer's firearms. The Department of Treasury and the

1 Department of Justice are continuing to work with responsible  
2 members of the firearms industry to encourage voluntary measures,  
3 such as a code of conduct and comprehensive training for dealers,  
4 to ensure that guns are not stolen or sold to criminals or straw  
5 purchasers. [See Fact Statements 38-39.]

6 According to plaintiffs, the industry has been warned about the risk posted by its  
7 distribution practices many times over the past thirty years by reports and studies issued by ATF,  
8 Congress and other government agencies. [Fact Statement 27, 66.] And, if defendants were to take  
9 better steps to oversee their distribution systems, plaintiffs submit that the ATF would welcome it.  
10 [FS 32.]

11 Plaintiffs contend that gun industry insiders have acknowledged that defendants engage in  
12 high risk practices. As support, plaintiffs begin by citing to the Ricker declaration. As they note  
13 Ricker worked for nearly twenty years representing the interests of gun manufacturers, distributors  
14 and dealers in California and elsewhere, including working for the National Rifle Association, the  
15 California Rifle and Pistol Association, Gun Owners of California, the Citizens Committee for the  
16 Right to Keep and Bear Arms, and the National Alliance of Stocking Gun Dealers. They credit  
17 Ricker with playing a key role in the enactment of legislation [codified at Civ. Code section 1714.4,  
18 recently repealed] to protect the gun industry from lawsuits. From his declaration, plaintiffs cite the  
19 statement that “[t]he firearms industry, including the defendants in this action, has long known that  
20 the diversion of firearms from legal channels of commerce to the illegal black market in California  
21 and elsewhere occurs principally at the distributor/dealer level” as “firearms pass quickly from  
22 licensed dealers to juveniles and criminals through such avenues as straw sales, large-volume sales  
23 to gun traffickers and various other channels by corrupt dealers or distributors who go to great  
24 lengths to avoid detection by law enforcement authorities.” He accuses the gun manufacturers and  
25 distributors of adopting a “see-no-evil, hear-no-evil, speak-no-evil” approach and “encourages a  
26 culture of evasion of firearms laws and regulations.”

27 Plaintiffs also cite to a memo authored by National Shooting Sports Foundation (NSSF)  
28 head Robert Delfay where he told industry executives “someone in a position of authority at ASSC  
needs to direct Mr. Ricker to become silent.”

///  
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1 Plaintiffs also cite to the deposition testimony of Robert Hass, Smith & Wesson's former  
2 senior vice-president of marketing and sales who stated:

3 [Smith and Wesson] and the industry . . . are . . . aware . . . that the  
4 black market in firearms is not simply the result of stolen guns but is  
5 due to the seepage of guns into the illicit market from multiple  
6 thousands of unsupervised federal firearms licensees. In spite of their  
7 knowledge, however, the industry's position has consistently been to  
8 take no independent action to insure responsible distribution practices .  
9 . .

10 [None] of the principal U.S. firearms manufacturers and whole sale  
11 distributors . . . to my knowledge, take additional steps, beyond  
12 determining the possession of a federal firearms license, to investigate,  
13 screen or supervise the wholesale distributors and retail outlets and sell  
14 their products to insure that their products are distributed responsibly.  
15 [FS 46.]

16 Next, plaintiffs cite to the declaration of Carole Bridgewater. She served as  
17 secretary/treasurer of the National Alliance of Stocking Gun Dealers (NASGD) for approximately  
18 twelve years and her husband, Bill Bridgewater, was its executive director. She states that "[t]he  
19 gun industry has known for a long time that there are serious problems in the way it distributes its  
20 products" because "[m]anufacturers and distributors are willing to sell guns to any 'dealer' with a  
21 Federal Firearms License." According to her, the majority of those with licenses are not real,  
22 legitimate, responsible businesses, but manufacturers and distributors continue to actively feed guns  
23 to them anyway. She also contends that the practice of selling to anyone with a federal firearms  
24 license "feeds the black market for guns" and "makes it extremely difficult for legitimate dealers  
25 who obey the rules to compete and survive." She states that NASGD repeatedly and forcefully  
26 warned the industry about all these problems.

27 Citing Fact Statements 388-400, plaintiffs indicate that in response to a Sturm Ruger survey  
28 inquiring how it could increase its sales, dealers wrote saying they 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. According to plaintiffs, Sturm Ruger's marketing manager informed William Ruger Sr.  
about what the dealers had said and was told to drop "the whole thing" and not pursue any part of it  
further. [FS 398-99.]

1 Plaintiffs cite to dealers and representatives of the gun industry who have spoken about the  
2 industry's responsibility to distribute its products safely. [FS 52, 56, 62.]

3 Plaintiffs argue that each defendant has engaged in high-risk practices likely to increase the  
4 extent to which guns are illegally acquired and used in California:

5 High risk dealers: First, plaintiffs assert that defendants have been aware for years that  
6 many of the gun dealers through which they sell their guns engage in unscrupulous or irresponsible  
7 practices that supply the gun market. "ATF reports have indicated that gun dealers sell guns to  
8 traffickers on a massive scale, that a high percentage of dealers have violated firearms laws or  
9 regulations, and that even a small number of corrupt dealers can funnel huge numbers of guns into  
10 the underground market." [FS 73.] Plaintiffs argue that numerous federal reports have indicated  
11 that a significant volume of the diversions of guns to crime are concentrated in a small percentage  
12 of dealers who account for the majority of firearms successfully traced in the United States. For  
13 example, just 1.2% of retail dealers accounted for 57% of crime guns traced to dealers in 1998. [FS  
14 125.]

15 Plaintiffs cite various examples of California gun dealers who "provide particularly  
16 egregious examples of how corrupt dealers supply the illegal market" [FS 76-79; 82-87.]

17 Straw purchase: According to plaintiffs, straw purchases are another significant method by  
18 which guns are diverted from defendants' distribution systems to the criminal market. Plaintiffs  
19 contend the problem with straw purchases has been common knowledge in the industry for many  
20 years and the subject of many ATF reports and newsletters and congressional hearings. [FS 165-  
21 184.] Plaintiffs assert that Sturm Ruger even had an employee making straw purchases for  
22 members of his motorcycle club who could not legally buy guns. [FS 171.] Plaintiffs contend that  
23 rather than doing anything themselves, the defendant manufacturers and distributors rely entirely on  
24 the existence of "Don't Lie for the Other Guy," a program in which NSSF became involved in  
25 2000. [FS 183.]

26 Large-volume sales: Plaintiffs explain that large volume sales occur when a customer  
27 purchase a large quantity of guns from a dealer, either on one occasion or on multiple occasions  
28 over time. plaintiffs indicate that Congress and ATF for years have warned that making large

1 volume sales is a high-risk practice and a means by which gun traffickers obtain guns to sell in the  
2 illegal market. [FS 187-188.] California banned multiple sales effective 1-1-00. "However, most  
3 states place no limits on the number of handguns that can be purchased, and defendants have been  
4 all too eager to take advantage of these high-risk sales." [FS 199.] They cite to the deposition of  
5 Robert Lockett, former NASGD "dealer of the year" who acknowledged that manufacturers and  
6 distributors can and should prohibit dealers from making large-volume sales. [FS 203.]

7 Gun shows: Plaintiffs argue that ATF and the Department of Justice have also advised the  
8 gun industry that gun shows are an important source of guns for criminals as there have been many  
9 instances in which licensed dealers selling at gun shows have violated firearms laws and  
10 regulations. [FS 230-246.]

11 Gun thefts: plaintiffs additionally contend that the gun industry has also increased the risk  
12 of criminals obtaining guns from thefts by failing to require stricter security standards for dealers  
13 and common carriers. ATF and congressional reports, they indicate, have repeatedly warned the  
14 industry that thefts from manufacturers, distributors, dealers and shipping companies are a source of  
15 supply for criminals. [FS 2447-262.]

16 Gun designs: Plaintiffs also accuse the defendants of failing to implement design changes  
17 that would reduce the risk posed by their distribution systems. In this regard, they suggest that  
18 safety features to prevent unauthorized use of guns, such as "built-in" locks could be implemented  
19 to prevent unauthorized use of guns. [See FS 402.] They note one defendant Taurus has been  
20 selling handguns with integral locks since 1997. Since being used some other manufacturers  
21 (including Beretta, Glock and Smith & Wesson) have begun to equip guns with internal locks. [FS  
22 425.] Plaintiffs contend that this technology has existed for many years. [FS 401-15.]

23 Plaintiffs indicate that their experts will testify about their analysis of data showing that  
24 each defendant has distributed guns through high-risk dealers selling a substantial quantity of crime  
25 guns in California: Plaintiffs suggest that the ATF tracing process provides each defendant with  
26 continual notice of the diversion of particular guns into the criminal market. [FS 108-25.]  
27 According to plaintiffs, each defendant could easily gather and use information from tracing to  
28 identify the dealers within its distribution system responsible for the most sales and to take special

1 precautions or to limit or terminate sales to those dealers. [FS 108-165.] Plaintiffs indicate that the  
2 ATF has specifically encouraged defendants to utilize trace data in exactly that way to monitor and  
3 control their distribution networks. Plaintiffs state that their experts have performed the type of  
4 analysis of the trace data that ATF has recommended by defendants have refused to do. [FS  
5 459-78.]

6 Gerald Nunziato: Nunziato is the former head of ATF's National Tracing Center. For the  
7 plaintiffs, Nunziato prepared reports and profiles by doing the same kind of analyses that  
8 defendants could conduct of the FFLs through which they sell firearms in order to curb gun  
9 trafficking and the diversion of new guns into the underground market. He generated six types of  
10 profiles: (1) Defendant manufacturer profile [includes information about the number of the  
11 manufacturer's traced guns recovered nationwide and in California as well as the extent to which  
12 those guns have a short "time to crime" or an obliterated serial number]; (2) Defendant distributor  
13 and dealer profile [also provides a "snapshot" of crime gun tracing totals and examines the extent to  
14 which each of these defendants made "multiple sales" of handguns or sold guns traced with a short  
15 "time to crime"; (3) California Dealer Profile [this analysis was performed to determine whether  
16 there are gun trafficking indicators associated with these dealers]; (4) California Dealer Final Sale  
17 Profile [provides information about each of the more than 6,000 dealers that showed crime guns  
18 recovered in California; (5) Defendant Manufacturer-to-Dealer Profile [connects distributor to  
19 dealers that sold guns later recovered and traced in California.]

20 Plaintiffs argue that based on Nunziato's extensive experience doing the same kind of  
21 analysis at ATF, his analysis led him to conclude that each of the defendant sold significant  
22 numbers of firearms recovered in crimes in California and traced. According to Nunziato, had  
23 defendants cared to gather and analyze this data as ATF and the Department of Justice asked them  
24 to do, they could have utilized it to oversee their distribution systems and establish a simple  
25 standard: "If you want to be a seller of our handguns, you cannot be linked to significant indicators  
26 of gun trafficking or diversion." [Nunziato's decl., Para. 56.]

27 Joseph Vince, Jr.: This expert did further analysis of the data assembled by Nunziato. By  
28 background, during his thirty years at ATF, Vince served as Chief of the Firearms Enforcement

1 Division at ATF headquarters and created and managed the ATF's Crime Gun Analysis Branch.  
2 From analyzing the profiles, Vince concluded that the guns sold by each defendant manufacturer,  
3 distributor and dealer have contributed significantly to the crime gun problem in California  
4 communities. [Vince Decl., Paras. 37-41, 46-53.] In addition, by examining the profiles that show  
5 whether particular dealers are associated with significant indicators of trafficking or diversion,  
6 Vince concluded it is more likely than not that many of the dealers that sold guns recovered in  
7 California were either engaged in sales to gun traffickers or utilized high risk business practices that  
8 facilitated the diversion of guns into the criminal market in California. Specific examples cited  
9 include defendant Trader Sports Inc. which has, according to Vince, overwhelming gun trafficking  
10 indicators associated with it, noting that Traders averaged more than 100 crime gun traces per year  
11 in California alone.

12 James Fox: Fox is a "nationally-acclaimed" criminologist at Northeastern University who  
13 also analyzed data about defendants' crime guns. Professor Fox examined whether each  
14 defendant's traced guns were heavily concentrated among a small number of dealers or distributed  
15 widely across many dealers. He found a significant amount of concentration and concluded that  
16 defendant manufacturers could focus their efforts on particular dealers and that this likely would  
17 prevent a significant number of handguns from entering the underground market in California.

18 Plaintiffs' final argument is that each defendant could take steps to reduce the risk of its guns  
19 being illegally acquired and used in California: Plaintiffs submit that "[t]he evidence in this case,  
20 from fact witnesses and expert witnesses alike, also demonstrates that defendants could take  
21 reasonable and responsible steps to reduce the risk of their guns being illegally acquired and used in  
22 California. Defendant dealers interact directly with gun purchasers at the retail level and can follow  
23 responsible sales practices to reduce the risk of supplying the criminal market." Plaintiffs argue  
24 that the defendant manufacturers have the ability to:

- 25 • Sell only through authorized and approved dealers;
- 26 • Issue strict written guidelines on how the manufacturer's products will be sold;
- 27 • Screen and investigate distributors and dealers and how they do business before permitting  
28 guns to be sold to them;

- 1 • Require distributors and dealers to provide information about store management and all
- 2 sales personnel;
- 3 • Provide training to their own sales representatives;
- 4 • Require dealers and their employees to pass strict comprehensive professional
- 5 examinations;
- 6 • Prohibit dealers from selling guns at locations other than their legitimate business premises;
- 7 • Limit the number of guns that dealers throughout the country sell to a customer at one time
- 8 or on multiple occasions;
- 9 • Monitor and enforce compliance with their distribution agreements;
- 10 • Collect and use crime gun tracing and multiple sale data to identify high-risk dealers;
- 11 • Impose strong sanctions for distributors or dealers who fail to comply.

#### 12 Discussion

13 In opposing this motion, plaintiffs have submitted a mountain of argument and “evidence,”  
14 most of which consists of inadmissible hearsay studies, monographs and reports. The declaration  
15 of Gerald A. Nunziato, who served as a law enforcement agent for the ATF from 1970 to January  
16 1999, indicates at paragraph 15 that he “observed a trend in the results of tracing queries showing  
17 that a small group of federal firearms licenses appeared to be associated with most of the crime gun  
18 traces.” That opinion appears supported by the evidence. In reviewing plaintiffs 104-page, 478-  
19 item separate statement, what does appear is that there are some bad retail dealers in California  
20 whose activities facilitate the transfer of guns into the wrong hands through various malfeasant acts.  
21 In contrast, plaintiffs’ case against these moving parties is predicated on a theory of nonfeasance,  
22 namely the manufacturers and distributors’ failure to prevent independent third-party retailers from  
23 selling guns to criminals. In the case of *Camden County v. Beretta USA Corp.*, 123 F.Supp.2d 245  
24 (D.N.J. 2000), aff’d, 273 F.3d 536 (3d Cir. 2001), the court held that the relationship between  
25 manufacturer and retailer constituted “a causal chain too attenuated to make out a claim against the  
26 manufacturer.” Defendants note that plaintiffs’ theory of nonfeasance begs the question of whether  
27 the moving parties have a duty to police the distribution and ultimate sale of firearms, but contend  
28 the court need not reach the issue of duty since the matter can be determined on causation above.

1 Defendants submit that "if plaintiffs cannot prove that a single manufacturer or distributor  
2 defendant caused a single criminal in California to acquire even one of their guns through one of  
3 the avenues alleged, then they cannot possibly succeed in proving that defendants have caused a  
4 multitude of criminals to acquire firearms in California through such methods to justify the  
5 sweeping injunctive relief and civil penalties they request." While the Court appreciates any  
6 suggestion that would narrow the scope of its analysis in this case, a discussion of the issue of duty  
7 appears inescapable.

8 As noted *supra* section 17200 is written in the disjunctive and establishes three practices of  
9 unfair competition, i.e., acts or practices which are "unlawful," "unfair" or "fraudulent." As to  
10 these moving defendants, there is no evidence that they are engaged in any activity which is  
11 unlawful or fraudulent, consequently the analysis must turn on whether this case falls within the  
12 ambit of the "unfair" prong of section 17200. Plaintiffs have correctly cited the tests which have  
13 evolved. In *South Bay Chevrolet v. General Motors* (1999) 72 Cal.App.4<sup>th</sup> 861, the test of whether  
14 a business practice was unfair was whether the gravity of the harm to the public outweighed the  
15 utility of the conduct to the defendant. In *People v. Casa Blanca Convalescent Homes, Inc.* (1984)  
16 159 Cal.App.3d 509, 530, the court found an unfair business practice to occur "when it offends an  
17 established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or  
18 substantially injurious to consumers." Under either test, the Court feels there must be some causal  
19 connection between the harm and some conduct by the defendants. If plaintiffs cannot demonstrate  
20 that any harm has occurred as a result of defendants' nonfeasance in policing the industry, how can  
21 defendants inaction be deemed unfair? While some of plaintiffs' evidence (*see, e.g.,* Vince Decl. at  
22 paragraph 55) suggest it is "more likely than not" that the defendants here sold their guns through  
23 Federal Firearms Licensees (FFL) that sell to gun traffickers or whose high-risk business practices  
24 have facilitated the diversion of guns into the underground market, no expert could opine that any  
25 specific manufacturer or distributor had engaged in wrongdoing based on their analysis of the data.  
26 (*See* Defense Exhibits 16, 98; 43-559-563; Ex. 19 184:21-185:18; 343-345.) Based on this

27 ///

28 ///

1 evidence, there is no evidence before the Court establishing a triable issue that any act or omission  
2 on the part of these moving defendants constitutes a substantial factor contributing to gun violence  
3 in California.

4 Taken in their entirety, plaintiffs' much-publicized declarations in opposition to defendants'  
5 motion discuss what the defendants "ought to do" in the light of generalized industry knowledge.  
6 This brings us to the issue of duty. Plaintiffs have failed to supply the Court with any authority for  
7 the proposition that defendants' inaction is violative of any duty imposed by law or public policy  
8 thus rendering their nonfeasance unfair within the meaning of section 17200. Indeed, the cases  
9 suggest that liability will be imposed only when a party voluntarily adopts standards which later are  
10 found to be inadequate. *See, FNS Mortgage Service Corp. v. Pacific General Group, Inc.* (1994)  
11 24 Cal.App.4<sup>th</sup> 1564 and *King v. National Spa & Pool Ins., Inc.* 570 So.2d 612 (1990).

12 With respect to plaintiffs' claims that the moving defendants' failure to implement known  
13 design changes in their products is a contributory factor to gun violence, they cite to the example of  
14 the tragic, unintentional shooting of 15-year-old Griffin Dix in Berkeley in 1994. Plaintiffs claim  
15 that this incident could have been prevented if Beretta had equipped the gun with an effective  
16 loaded chamber indicator or an integral lock. The evidence in support of this contention (Plaintiffs  
17 Ex. 112) consists of articles, police reports and correspondence, but nothing to competently raise a  
18 triable issue that this incident could have been prevented as plaintiffs suggest.

19 Concerning the false advertising claims, plaintiffs' arguments that advertisements of guns as  
20 "homeowners insurance" and "tip the odds in your favor" (*see* Plaintiffs Ex. 112 and 114) are  
21 misleading, is unpersuasive. As pointed out *infra* plaintiffs' own expert acknowledges that home  
22 protection and self defense are legitimate, beneficial uses of firearms. Moreover, plaintiffs have  
23 failed to present any evidence to suggest that any reasonable consumer would fail to appreciate the  
24 inherent damages presented by firearms.

25 For the foregoing reasons, the motion for summary judgment of moving and joining  
26 defendants Sturm, Ruger & Company, Inc., Beretta U.S.A. Corp., Fabbrica d'Armi Pietro Beretta  
27 SpA, Kel-Tec CNC Industries, Inc., Hi-Point Firearms, H&R 1871, Inc., Glock, Inc., Sigarms, Inc.,  
28 Taurus International Manufacturing, Inc., Forjas Taurus S.A., Phoenix Arms, Browning Arms

1 Company, Excel Industries Inc., North American Arms, Inc., Heckler & Koch, Inc., Smith &  
2 Wesson Corp., Colt's Manufacturing Company, RSR Wholesale Guns, Inc., B&B Group, Inc., S.G.  
3 Distributing Co., Hawthorne Distributors, Carl Walther GmbH, and National Gun Sales is  
4 GRANTED.

5 The motion of joining defendant Trade Associations is treated separately at II *infra*. The  
6 motion of joining defendants Elliott Brothers, MKS Supplies and Southern Ohio Gun Distributors  
7 is DENIED and treated separately at III *infra*. The motion of joining defendant Andrews Sports  
8 Guns, Inc., dba Turners Outdoorsman is similarly treated separately at VI *infra*.

9 **II.**

10 **DEFENDANT TRADE ASSOCIATIONS' MOTION FOR**  
11 **SUMMARY JUDGMENT, OR ALTERNATIVELY,**  
12 **SUMMARY ADJUDICATION**

13 **Defendants' Argument**

14 This motion is brought collectively by the three defendant trade associations, National  
15 Shooting Sports Foundation (NSSF), Sporting Arms and Ammunition Manufacturers' Institute  
16 (SAAMI) and American Shooting Sports Counsel (ASSC). In reply, these defendants indicate that  
17 the plaintiffs have voluntarily dismissed ASSC with prejudice.

18 The trade association defendants seek summary judgment, and alternatively, summary  
19 adjudication of the following issues:

- 20 1. A cause of action for nuisance cannot be sustained.
- 21 2. A cause of action for unfair competition under Business and Professions Code section  
22 17200 cannot be sustained.
- 23 3. A cause of action for deceptive advertising pursuant to Business and Professions Code  
24 section 17500 cannot be sustained.
- 25 4. The lobbying activities by the Associations do not constitute a nuisance.
- 26 5. The lobbying activities by the Associations do not constitute a violation of Business and  
27 Professions Code section 17200.
- 28 6. The lobby activities of the Associations do not constitute false advertising pursuant to  
Business and Professions Code section 17500.

1 By way of background, defendants explain that NSSF, founded in 1961, is a tax-exempt  
2 trade association whose primary mission is to promote a better public understanding of, and a more  
3 active participation in, the shooting sports. SAAMI was founded in 1926 and is an accredited  
4 standards developer for the American National Standards Institute (ANSI). As an accredited  
5 standards developer, SAAMI has developed, submitted for ANSI review, published and distributed  
6 four voluntary recommended practices for the commercial manufacturing of sporting ammunition  
7 and one for sporting firearms. However, SAAMI indicates it has never considered establishing  
8 recommended practices for those design features at issue in plaintiffs' complaints, i.e. chamber  
9 loaded indicators, magazine disconnects and internal locks.

10 The Trade Associations cite to plaintiffs' allegation that they "failed to adopt adequate  
11 guidelines on standards relating to the development and inclusion of [safety] features in handguns"  
12 and "failed to adopt adequate guidelines or standards for development and inclusion of personalized  
13 safety features in handguns"; "discouraged development of safety features"; and further, "had not  
14 taken reasonable steps" to keep handguns away from minors.

15 Defendants explain that membership in their organizations is voluntary. They write and  
16 speak about firearms issues. They sponsor educational activities, engage in governmental relations,  
17 maintain public relations and otherwise promote the shooting sports. They do not design,  
18 manufacture, distribute or sell firearms. Nor do they exercise control over those who do design,  
19 manufacture, distribute or sell firearms.

20 Defendant Trade Associations summarize their arguments as follows:

21 First, plaintiffs' claims based upon executive and legislative  
22 activity by the Associations and their statements on public policy are  
barred by the First Amendment to the Constitution.

23 Second, plaintiffs' public nuisance claims are defective because  
24 none of the Associations owe a duty to plaintiffs, they have no control  
25 over the alleged nuisance, and there is no causal connection between any  
26 conduct of the Associations and any incident of illegal acquisition of  
27 firearms or criminal/accidental injury with a firearm. Further, there is not  
a shred of evidence to support the plaintiffs' allegations of collusion  
against any of the Associations on their assertion that NSSF's support of  
lawful youth participation in the shooting sports creates nuisance.

28 Third, plaintiffs' claims under Business and Professions Code §  
17200 (the 'Unfair Competition Law' or 'UCL') and § 17500 (the 'False  
Advertising Law') are improperly premised on the Associations' failure

1 to do more to control third-party conduct. There is no legal basis for  
2 imposing vicarious liability on the Associations under these statutes.

3 Fourth, plaintiffs have not met their threshold evidentiary burden  
4 to support their allegations that the Trade Associations disseminated  
5 deceptive communications. There is no evidence that any California

6 resident received and relied on safety information disseminated by an  
7 Association to his or her detriment, or that NSSF's and SAAMI's  
8 statements on firearms in the home are deceptive.

9 Fifth, as the injunctive relief sought by the plaintiffs in these  
10 coordinated proceedings would require an excessive and improper use of  
11 the Court's equitable powers, their causes of action must be dismissed.

12 Ultimately, plaintiffs' claims are that the defendant firearm  
13 manufacturers did not design their firearms with all the features plaintiffs  
14 desire and did not adopt the firearms distribution practices plaintiffs  
15 advocate, and that the Associations did not do anything to make the  
16 manufacturers do so. This 'double not do' theory is legally insufficient  
17 fore nuisance liability or liability for an unfair business practice.

### 18 **Plaintiffs' Argument**

19 Plaintiffs begin by contending that the Trade Associations have influenced and controlled  
20 the conduct and direction of the firearms industry, including the member defendants in these  
21 actions. They assert that the majority of defendants are members of one or more of the Trade  
22 Associations; NSSF and SAAMI have always been interconnected entities; ASSC, a parallel and  
23 interconnected trade association, was recently merged into NSSF and dissolved; and the firearms  
24 industry, through the meeting ground of the Trade Associations, is a "Family" that influences and  
25 controls the conduct of its members.

26 Plaintiffs describe the Trade Associations as operating "less as independent entities and  
27 more as an interconnected network." They indicate that between 1992 and 1997, relying on former  
28 ASSC Director of Government Affairs Ricker, lawyers and key executives for the gun industry and  
Trade Associations, including inside and outside counsel, held "informal" meetings during the  
annual NSSF SHOT show to discuss various legal, legislative and policy issues facing the industry.  
While Ricker and Richard Feldman, Executive Director of ASSC, suggested at these meetings that  
the industry would be better served taking a proactive stance to deal with the problems of firearm  
diversion and safety, Plaintiffs contend the prevailing view was if the industry took voluntary action

1 it would be an admission of responsibility for those problems. Ultimately, the meetings were  
2 considered "dangerous" and after 1997 were stopped. [FS 20.]

3 Plaintiffs continue by suggesting that as a result of Feldman and Ricker's continued efforts  
4 to keep guns out of the hands of criminals, NSSF and SAAMI – under the leadership of Delfay,  
5 engineered the firing of Feldman and ultimately the takeover of ASSC by NSSF and the dissolution  
6 of ASSC. [FS 22.]

7 They also accuse the Trade Associations of putting pressure on Smith & Wesson when it  
8 agreed to certain reforms in the way it distributed and designed its handguns.

9 Plaintiffs explain why they have sued the Trade Associations:

10 Plaintiffs have sued the Trade Associations for their critical role in the  
11 firearm industry's continuing unreasonable firearm distribution  
12 practices, which directly contributes to and supports the underground  
13 market, as well as their role in manufacturers' continued marketing of  
14 unreasonably unsafe guns. In addition, the Trade Associations have  
15 paired with firearm manufacturers to unreasonably market guns to  
16 children. Plaintiffs will present concrete proof that the Trade  
17 Associations have engaged in unfair practices and created a public  
18 nuisance.

19 As they did in opposing the Manufacturer/Distributor motion for summary judgment,<sup>2</sup>  
20 plaintiffs point out that this "is not a negligence case." Rather, under B&P section 17200 and  
21 nuisance law, the "core issue" is the extent to which defendants have created an unreasonable and  
22 unnecessary risk. Plaintiffs contend that the defendants' dangerous conduct has at least three  
23 dangerous components: selling guns without taking reasonable steps to ensure that they are sold to  
24 the public through responsible sales policies and practices; selling guns without making any efforts  
25 to identify corrupt and irresponsible dealers or to limit or terminate sales to such dealers; and  
26 selling guns without feasible safety features to prevent unauthorized use, enabling criminals to use  
27 stolen guns.

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28 <sup>2</sup> Plaintiffs in opposing these various motions indicate that pursuant to CCP § 437c(b), they  
"hereby incorporate by reference the facts, law, arguments, and expert declarations contained within  
plaintiffs' oppositions to the motions for summary judgment filed by the other defendants in this action."  
Presumably, Plaintiffs are referring to the last sentence of subdivision (b) which states: "Any incorporation  
by reference of matter in the court's file shall set forth with specificity the exact matter to which reference is  
being made and shall not incorporate the entire file." The Court is not convinced that the intent of this  
language was to permit a party to base its opposition on arguments raised in opposition to other motions  
simply by "incorporating it by reference."

1       Plaintiffs assert that the Trade Associations have long known that firearms are being  
2       diverted from within their members' distribution systems to criminals and other prohibited  
3       persons and their actions have ensured perpetuation of the diversion:

4       Federal reports have informed the Trade Associations of the industry's high risk practices  
5       that contribute to diversion: In support of this argument, plaintiffs appear to basically cite the  
6 Court to their opposition to the Manufacturers/Distributors' opposition.

7       Gun industry insiders have acknowledged that trade associations member companies  
8       engage in high risk practices that contribute to diversion: Plaintiffs cite to the  
9 testimony/declarations of those cited above in opposition to the Mfr/Dist motion. Included is  
10 Robert Hass, formerly of Smith & Wesson, who stated members of the gun industry "[s]hould have,  
11 could have, would have" known that manufacturers sold through high-risk dealers and that the  
12 industry could be more active in "analyzing the tracing of its guns" and "pinpointing those dealers  
13 who are involved in a significantly higher percentage of traces than the average." [FS 50.]

14       Plaintiffs also cite to Ricker's declaration, where he indicates that there was a split between  
15 the industry's "hardliners" (who were closely allied with the NRA) and the advocates of voluntary  
16 reform (including Ricker) that eventually resulted in the industry shutting down ASSC. Plaintiffs  
17 again cite to NSSF/SAAMI head's Robert Delfay's memo where he directed that "[s]omeone in a  
18 position of authority at ASSC needs to direct Mr. Ricker to become silent." [Plaintiff's NOL,  
19 Ex. 98.]

20       The Trade Associations have recognized the firearms diversion problem, but have acted to  
21       ensure that it was never addressed: Plaintiffs contend that SAAMI, as early as 1976, debated the  
22 implication of a comprehensive report issued by the U.S. House of Representatives concerning the  
23 diversion of guns to criminals with its response being to oppose federal efforts to address these  
24 problems. In 1989, ATF's concern about the problem of straw purchasing and gun trafficking  
25 through retail establishments was discussed at an ASSC board meeting. ASSC remained aware of  
26 these problems throughout the 1990s, but did not address them. [FS 56.]

27       Plaintiffs next cite to a memo written in 1993 by Doug Painter, NSSF Marketing Director,  
28 to Robert Delfay, NSSF Executive Director, discussing an ATF Report entitled "Operation

1 Snapshot." According to plaintiffs, the memo offered a "scathing critique" of gun manufacturers'  
2 distribution systems and strongly called for a "*proactive industry strategy*" [plaintiffs' emphasis] to  
3 (1) address the serious 'potential for illegal firearms transactions through ostensibly 'legal' FFL  
4 holders." [FS 57.] Painter also warned that "[t]here are literally tens of thousands of FFL holders  
5 throughout the country whose firearms transactions are not subject to regular inspection or proper  
6 oversight" because ATF lacks the resources to oversee them. [FS 57.] Painter noted that 34% of  
7 FFLs who were inspected by ATF had Gun Control Act violations.

8 Delfay's response to the memo was a handwritten note signed "10/1/93, Doug - You may  
9 want to file for future reference. Arlen [Chaney, then Chairman of the Board of Governors of  
10 NSSF] not keen on doing anything right now." [FS 76.]

11 Plaintiffs note that in approximately 1994 or 1995, SAAMI published a brochure entitled "A  
12 Responsible Approach to Public Firearms Ownership and Use," which discussed "straw man"  
13 transaction. [FS 64.]The document stated "SAAMI members pledge to sell our products to only  
14 legitimate retail firearms dealers," and adds "we feel such action would result in fewer of our  
15 products ending up in the hands of unethical dealers." Plaintiffs contend this pledge was never  
16 implemented and Robert Delfay, its author, said in his deposition that the phrase "unethical dealers"  
17 was a poor choice of words. In subsequent editions of the public brochure, the pledge was dropped.  
18 [FS 81.]

19 Plaintiffs continue that in August of 1995, Robert Delfay stated to Chief Neil Behan of the  
20 Major Cities Chiefs, a major national law enforcement organization, "that it was pretty much  
21 SAAMI's opinion that, while the crime problem is largely created by criminals and not by guns,  
22 guns are involved, and it is the responsibility of the manufacturers, distributors and retailers of  
23 firearms to attempt to keep them out of the hands of criminals." [FS 65] Plaintiffs assert that there  
24 is no evidence that SAAMI or NSSF were serious about this commitment.

25 Plaintiffs further note that at a meeting between NSSF and ATF officials in August of 1999,  
26 NSSF pledged to "look for ways to help identify problem dealers." [FS 69.] However, NSSF never  
27 followed through on that commitment. [FS 86.]

28 ///

1       The Trade Associations' failure to set standards for firearm safety design has forestalled  
2 development of safer guns: Next, plaintiffs argue that "SAAMI is also directly responsible for  
3 creating an unreasonable and unnecessary risk of harm in California by its utter failure to develop  
4 standards for firearm safety design." In this regard, plaintiffs contend that certain safety features –  
5 such as internal locks – would help prevent widespread unauthorized firearm use and resulting  
6 harm if they were incorporated into handguns and other firearms. They accuse SAAMI of opposing  
7 advancements in this area. [FS 95.]

8       The Trade Associations have targeted their advertisements to kids: Starting in the early  
9 1990s plaintiffs indicate that the gun industry – concerned about its diminishing base of gun owners  
10 – began an aggressive campaign to interest kids in gun ownership and to encourage manufacturers,  
11 distributors and dealers to market firearms to kids. As an example, plaintiffs cite to the trade  
12 publication *Shot Business* where NSSF encouraged members in the firearms industry to market  
13 firearms to children: "[T]here's a way to help ensure that new faces and pocketbooks will  
14 continue to patronize our business: use the schools. . . . schools are an opportunity, grasp it."  
15 [FS 119] [plaintiffs' emphasis.]

16       Plaintiffs argue that the Trade Associations are liable under the UCL for marketing, and  
17 encouraging others to market, firearms to children.

18       Moreover, plaintiffs believe the Trade Associations should be liable under California's  
19 False Advertising Law (B&P §§ 17500, *et seq.*). Plaintiffs argue that for the same reason that it is a  
20 violation under 17200, NSSF's aggressive marketing of firearms to children is a violation of  
21 Section 17500.

22       Unfair/unlawful and fraudulent business practices: Plaintiffs cite again some of the  
23 arguments and authorities submitted in opposing to the Manufacturers/Distributors' motion.

24       Plaintiffs argue that the Trade Associations are liable under the unfair competition law  
25 ("UCL") for their role in continuing the high risk distribution of guns contending that despite  
26 knowing of the problem of diversion and considering changes in business practices that would help  
27 curb diversion, the Trade Associations have acted to suppress such reforms.

28       ///

1 Plaintiffs assert that "the fact that the Trade Associations themselves did not sell firearms is  
2 no defense, since the choice of distribution methods used by Trade Association members who do  
3 sell firearms was dramatically influenced by the Trade Associations' conduct. When defendants  
4 work together to engage in unfair or unlawful behavior, all defendants who participate are liable  
5 under the UCL no matter which parties performed the wrongful act." As support they cite *People v.*  
6 *Toomey* (1984) 157 Cal.App.3d 1, 15 where the court found a defendant can be liable under the  
7 UCL for aiding and abetting other defendants.

8 Plaintiffs argue that contrary to the Trade Associations' assertion, numerous courts have  
9 held trade associations liable for failing to establish adequate standards. As support, plaintiffs cite  
10 *FNS Mortgage Service Corp. v. Pacific General Group, Inc.* (1994) 24 Cal.Ap.4<sup>th</sup> 1564. Plaintiffs  
11 also cite *King v. National Spa & Pool Ins., Inc.* 570 So.2d 612 (1990) where the court held a  
12 swimming pool trade association could be liable for failing to promulgate standards to prevent head  
13 injuries caused by diving.

14 "In our view, the fact that the standards promulgated by a trade association are based on a  
15 voluntary consensus of its members, or the fact that a trade association does not specifically control  
16 the actions of its members, does not, as a matter of law, absolve the trade association of a duty to  
17 exercise reasonable care . . . "

18 *Defendant Trade Associations are Liable for Contributing to a Public Nuisance:* Plaintiffs  
19 assert that their evidence shows that the Trade Associations' actions contributed to a public  
20 nuisance defined under California law as "[a]nything which is injurious to health . . . or is indecent  
21 or offensive to the senses, or an obstruction to the free use of property. So as to interfere with the  
22 comfortable enjoyment of life or property." [Civ. Code section 3479.] Plaintiffs explain that  
23 California allows suits under public nuisance against either those who created the nuisance; those  
24 who contributed to or assisted in the creation or the nuisance; *or* [plaintiffs' emphasis] those who  
25 are maintaining the public nuisance.

26 Plaintiffs argue that there is a triable issue of fact whether the Trade Associations have  
27 control over the alleged nuisance, first asserting that the Trade Associations have not demonstrated  
28 that they have no control over the nuisance alleged within plaintiffs' complaint. Second, plaintiff

1 submits that a party need not wield the exacting measure of control suggested by the Trade  
2 Associations – rather, they argue a party need only to have created or assisted in creating a nuisance  
3 to be liable.

4 Plaintiffs further argue that the Trade Associations’ lobbying is evidence of their awareness  
5 of the diversion problem and their influence over members of the industry.

6 Plaintiffs accuse the Trade Associations of misunderstanding the nature of plaintiffs’  
7 contentions regarding their lobbying activities. “Plaintiffs’ proofs are premised upon the trade  
8 associations’ efforts to ensure that individual members of the firearms industry do not develop safer  
9 distribution practices and products, not upon lobbying activities involving the government . . .  
10 Moreover, the limited evidence of lobbying that plaintiffs do proffer is offered to show Trade  
11 Association knowledge of the diversion problem and their efforts to ensure that nothing was done  
12 about it, not to criticize t he Trade Association’s right to lobby. For example, evidence that the  
13 Trade Associations lobbied against tougher dealer inventory regulations proposed by ATF (*See* Fact  
14 Statement ¶ 83) dovetails with NSSF’s decision not to urge FFLs to conduct more frequent  
15 inventories despite having pledged to ATF it would do so. . . .”

#### 16 Discussion

17 As previously indicated at footnote 2, plaintiffs have incorporated their arguments and  
18 evidence submitted in opposition to defendant manufacture and distribution omnibus motion.  
19 Again, the gist of plaintiffs argument is the failure of these moving defendants to do more.

20 The evidence would support an argument that the Trade Associations were aware of  
21 problems in the distribution of firearms. Plaintiffs cite to a SAAMI meeting agenda, for example,  
22 that had asked “Can or Should we ‘Pro-Act’” with respect to a firearms retailer “Code of Ethics.”  
23 Although SAAMI and NSSF had drafted a “Responsible Firearms Retailer Code of Practice.”  
24 Plaintiffs complain that neither SAAMI nor NSSF implemented this Code of Ethics and that  
25 SAAMI should “*take no action* on a retailer’s code of ethics.” Although, as a matter of policy,  
26 perhaps these defendants should do more, nevertheless, before they can be liable for a business  
27 *practice or conduct that causes harm* there must be some evidence that *they* did something that was  
28 either unlawful, unfair or fraudulent that has some causal connection to some harm suffered by

1 someone in California. Again, plaintiffs' complaint is premised on non-feasance. Again, plaintiffs  
2 have failed to present authority for the proposition that the Trade Associations have a duty to adopt  
3 standards for firearm safety design or that their failure to do so is causally connected to harm to  
4 Californians.

5 As to the advertising claim, this would appear strictly limited to NSSF as plaintiff admits as  
6 "undisputed" that there is no evidence that SAAMI markets firearms to minors. [Plaintiff  
7 opposing statement to SAAMI's separate statement.] Insofar as that claim is concerned the  
8 plaintiffs rely on *Mangini v. R.J.Reynolds Tobacco Co.* (1994) 7 Cal.4<sup>th</sup> 1057 where the California  
9 Supreme Court declared that "the targeting minors theory [is] cognizable under Business and  
10 Professions Code section 17200 . . . . Cigarette advertising targeting minors was 'unfair' within the  
11 meaning of the statute." *Id.*, at 1061. That case is distinguishable. The Court in that case was  
12 dealing with the prevention of minors from obtaining access to, possessing or using *tobacco*  
13 *products*. But, as defendants note, California does not have a public policy (unlike tobacco) with  
14 respect to the sales/possession of firearms by minors. In the absence of some public policy or law  
15 that prevents minors from using firearms, the Court fails to see how the marketing of firearms to  
16 minors can be considered "unfair."

17 Finally, with respect to plaintiffs' theory that defendants could be liable because they have  
18 failed to establish standards of safe gun design, the authorities are distinguishable inasmuch as the  
19 cases cited involve trade organizations that *voluntarily adopted standards that were allegedly*  
20 *inadequate* [see, for example, *FNS Mortgage Service Corp. v. Pacific General Group, Inc.* (1994)  
21 24 Cal.App.4<sup>th</sup> 1564; *King v. National Spa & Pool Inst., Inc.* 570 So.2d 612.] Plaintiffs have not  
22 cited to the Court any authority which would support the proposition that the Trade Associations  
23 have a duty to adopt standards.

24 For the foregoing reasons, defendant Trade Associations' Motion for Summary Judgment is  
25 granted.

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III.

**DISTRIBUTORS ELLETT BROTHERS, INC; MKS SUPPLY,  
INC., AND SOUTHERN OHIO GUN DISTRIBUTORS'  
MOTION FOR SUMMARY ADJUDICATION RE PLAINTIFFS'  
UNFAIR COMPETITION LAW CLAIMS FOR COMMISSION  
OF UNLAWFUL BUSINESS PRACTICES**

By way of background, defendant Southern Ohio indicates that it is a federally licensed firearms distributor located in Ohio. It has produced its sales records in this litigation which lists sales to thousands of firearms distributors and dealers, including many in California. MKS is a licensed firearms distributor also located in Ohio. It sells firearms to approximately 55 Federally licensed firearms dealers and other wholesalers, but none located in California. It has not sold firearms to California customers since approximately 1998. Ellett Brothers is a federally licensed firearms distributor located in South Carolina. It has produced documents listing sales to thousands of firearms distributors and dealers, including many in California.

Based on the opposition, it appears plaintiffs claims against these defendants is predicated on the following alleged unlawful acts: That the defendants transfer and distribute firearms to purchasers in California without receiving any documentation of such purchasers' possession of state and local firearms dealers licenses; that defendants Ellett Brothers and Southern Ohio distribute to potential California purchasers catalogues that advertise banned assault weapons for sale to California; that Southern Ohio has sold banned assault weapons to California purchasers and that Southern Ohio sells, transfers and distributes firearms for sale in California without providing any label containing the language specified by Penal Code section 12088.3. Because the Court feels that defendants have failed to meet their burden concerning the issue of compliance with state and local licensing requirements, the Court will limit its discussion to that issue.

Purported violations of Penal Code section 12072(F)(1) by these defendants: Penal Code section 12072, provides in pertinent part:

(f)(1) No person who is licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code shall deliver, sell, or transfer a firearm to a person who is licensed pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and whose licensed premises are located in this state unless :

1 (A) Prior to January 1, 2005, the intended recipient does one of the  
2 following:

3 (i) Presents proof of licensure pursuant to Section 12071 to that  
4 person.

5 (ii) Presents proof that he or she is exempt from licensure under  
6 Section 12071 to that person, in which case the person also shall  
7 present proof that the transaction is also exempt from the provisions of  
8 subdivision (d).

9 Defendants indicate that plaintiffs contend in this action that each of these defendants  
10 violates the statute with each sale to California because they do not require California dealers to  
11 send copies of their state and local business licenses to defendant in connection with each sale.  
12 Because, according to defendants, MKS no longer transacts business with any California dealers,  
13 this is not a present or future issue as to MKS and applies only to past acts.

14 Defendants contend that the "flaw in Plaintiffs' claim is their misinterpretation of the  
15 statute." Defendants take the position that because they require proof of a *Federal* license this itself  
16 is proof of state and local licensure pursuant to section 12071. Defendants support that proposition  
17 by the argument that this is so because "under Federal law, no Federal firearms license can be  
18 issued without a certification that all state and locally required licenses and permits have been or  
19 will be obtained before any business is conducted under the license." Specifically, defendants cite  
20 to 18 U.S.C. § 923(d)(1)(F) which states:

21 § 923 Licensing

22 (d)(1) Any application submitted under section (a) or (b) of  
23 this section shall be approved if –

24 (D) The applicant has not willfully failed to disclose any  
25 material information required, or has not made any false statement as  
26 to any material fact, in connection with his application.

27 (E) The applicant has in a State (i) premises from which he  
28 conducts business subject to license under this chapter or from which  
he intends to conduct such business within a reasonable period of  
time, . . .

(F) The applicant certifies that –

(i) the business to be conducted under the license is not  
prohibited by State or local law in the place where the licensed  
premise is located;

1 (ii) (I) within 30 days after the application is approved the  
2 business will comply with the requirements of State and local law  
3 applicable to the conduct of the business; and (II) the business will  
4 not be conducted under the license until the requirements of State and  
5 local law applicable to the business have been met; and

6 (ii) the business will not be conducted under the license until  
7 the requirements of State and local law applicable to the business  
8 have been met; and

9 (iii) that the applicant has sent or delivered a form . . . to the  
10 chief law enforcement officer of the locality in which the premises  
11 are located which indicates that the applicant intends to apply for as  
12 Federal firearms license. . . .

13 Based on this statute, defendants assert that "Thus, under federal law, a Federal firearms  
14 license cannot issue unless the applicant has certified to the Secretary of the Treasury that the  
15 applicant will comply with all state and local licensing requirements, that no business will be  
16 conducted under the license until all state and local licenses have been obtained and all other state  
17 and local requirements have been met, and that the local law enforcement authorities have been  
18 formally advised of the applicant's intent to engage in the sale of firearms." Therefore, defendants  
19 contend, that when the purchaser submits proof that it holds a valid Federal firearms license, it is  
20 also presenting "proof" that it has obtained all licensed required by state and local law.

21 Defendants note that plaintiffs' contention appears to be that the proof required must take  
22 the form of an actual copy of the state and local licenses. However, defendants respond that  
23 nothing in the statute imposes this requirement and if the Legislature meant to require that it would  
24 have said so.

25 Moreover, defendants argue, to the extent there is an ambiguity to this criminal statute, it  
26 must be resolved in favor of the person charged. [*United States v. Bass* (1971) 404 U.S. 336, 348;  
27 *People v. Gontiz* (1997) 58 Cal.App.4<sup>th</sup> 1309, 1318.] Defendants also invoke the "rule of lenity"  
28 and submit that it applies "even though this is not a criminal prosecution because the statute we are  
construing imposes criminal penalties." [*Harrott v. County of Kings* (2001) 25 Cal.4<sup>th</sup> 1138, 1154.

Defendants also note their argument that under section 12070(b)(12), (15) and (b)(16),  
(b)(13), sales by out-of-state wholesalers are exempted.

In opposition, plaintiffs make the following arguments:

1 First, that a federal firearms license is not sufficient proof of licensure pursuant to Penal  
2 Code section 12071. As they note, the FFL applicant only indicates that it *will* comply with state  
3 and local licensing requirements. The federal statute does not require proof of the applicant's  
4 actual compliance with state and local licensing requirements as a condition of granting a federal  
5 firearms license. An example of the United States Treasury issuing FFLs to persons who are  
6 patently not in compliance with state and local laws is demonstrated by the BATF's handling of the  
7 FFL application of gun trafficker Sean Twomey. Plaintiffs indicate that the ATF agent who  
8 reviewed Twomey's application and interviewed him noted that Twomey's plans to operate his  
9 firearms business out of his apartment violated the City of Hayward's prohibition against the sale of  
10 firearms from residential buildings. [SSF 31.] Nevertheless, the ATF agent granted Twomey an  
11 FFL, stating in his notes that he had informed Twomey of the Hayward prohibition and obtained  
12 Twomey's oral commitment to move the business to a non-residential building.

13 Plaintiffs indicate that section 12072 requires that firearms sales to federally licensed  
14 firearms dealers be permitted only upon proof of their compliance with the state and local licensing  
15 requirements imposed by Penal Code Sec .12071. Plaintiffs assert that 12071 contains an explicit  
16 statement of the documentary requirements of licensure pursuant to the section, including that a  
17 person "licensed pursuant to Section 12071" must have:

- 18 (A) A valid federal firearms license.
- 19 (B) Any regulatory or business license, or licenses, required by local government.
- 20 (C) A valid seller's permit issued by the State Board of Equalization.
- 21 (D) A certificate of eligibility issued by the Department of Justice pursuant to
- 22 paragraph (4).
- 23 (E) A license issued in the format proscribed by paragraph (6).
- 24 (F) Is among those recorded in the centralized list specified in subdivision (c).

25 Plaintiffs argue that defendant's interpretation of the statute as requiring proof only of a  
26 federal firearms license would render the majority of the language of 12071 meaningless.

27 Next, they assert that the rule of lenity does not require a tortured interpretation of a statute  
28 that is contrary to the plain language of the statute or the expressed legislative intent, noting the rule

1 of strict construction of criminal statutes applies only where the statutory language is ambiguous.  
2 *Harrott v. County of Kings, supra*, at 1154. And, application of the rule “is inappropriate unless,  
3 after consideration of the intent of the statute, the canons of statutory construction, and an analysis  
4 of the legislative history, the statute is still ambiguous.” [*In re Michael D.* (2002) 100 Cal.App.4<sup>th</sup>  
5 115, 125; *People v. Anderson* (2002) 28 Cal.4<sup>th</sup> 767, 780.]

#### 6 Discussion

7 Defendants move for summary adjudication contending they have not violated any law  
8 because they require that each purchaser of a firearm send the defendants a copy of a current federal  
9 firearms license (*see* defendants’ separate statement #7). The Court disagrees with their  
10 interpretation that obtaining proof of a current FFL is the equivalent of obtaining proof of licensure  
11 pursuant to section 12071 as required before selling firearms pursuant to section 12072. Section  
12 12071 specifically requires not only an FFL but licenses required by local government. As  
13 plaintiffs note, and the plain language of 18 U.S.C. 923(d)(1)(F) indicates, all that is required for an  
14 FFL is a representation that the applicant intends to comply with all state and local licensing  
15 requirements. However, proof of same is not required under the federal law as it is under Penal  
16 Code § 12072.

17 Moreover, the “exemption” defendants cite and as found at Penal Code section 12070, only  
18 exempts out-of-state wholesalers from the requirement that they be licensed pursuant to 12071.  
19 There is nothing in the statute that would exempt the moving parties from the requirements of  
20 12072 and what is required from the potential purchaser pursuant to 12071.

21 Finally, the rule of lenity would appear to apply only when there is an ambiguity. The Court  
22 fails to see any ambiguity.

23 Accordingly, the Court finds that the defendants have failed to meet their burden, and the  
24 motion is DENIED.

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1 IV.

2 **DEFENDANT MKS SUPPLY, INC.'S MOTION FOR**  
3 **SUMMARY ADJUDICATION OF PLAINTIFFS' CLAIM FOR**  
4 **INJUNCTIVE RELIEF.**

5 This motion is apparently brought as an alternative to the moving defendants' joint motion  
6 with defendants Ellett Bros. and Southern Ohio *supra*. Defendant asserts that assuming that MKS  
7 has engaged in business products that can be found to be actionable, i.e., selling firearms without  
8 proof of state/local licensure, it is entitled to summary adjudication of the injunctive relief claims  
9 because it no longer sells firearms to California dealers. Since MKS ceased selling firearms in  
10 California in 1998, it claims the request of injunctive relief be moot.

11 Plaintiffs oppose the motion claiming that MKS's own acquisition and disposition records  
12 show firearms sold to California purchasers as recently as July 2000. Plaintiffs further argue that  
13 MKS should be estopped by failure to produce in discovery its post-July 2000 acquisition records.

14 **Discussion**

15 The Court must deny MKS's motion, but for a reason not asserted by plaintiffs. As the  
16 moving party concedes at footnote 1, "This motion seeks summary adjudication rather than  
17 summary judgment because Plaintiffs' also pursue civil penalties under the UCL against MKS,  
18 presumably for past practices. . . ."

19 Since a motion for summary adjudication can be granted "only if it completely disposes of a  
20 cause of action, an affirmative defense, a claim for damages (pursuant to Civil Code §3294) or an  
21 issue of duty," the motion must be denied, since it would not completely dispose of the cause of  
22 action.

23 V.

24 **PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION**  
25 **AS TO DEFENDANTS ELLETT BROTHERS, INC., MKS**  
26 **SUPPLY, INC. AND SOUTHERN OHIO GUN**  
27 **DISTRIBUTORS, INC.**

28 This motion is in essence, a cross-motion to defendants Ellett Brothers, MKS Supply and  
Southern Ohio's motion for summary adjudication (Motion III) *supra*.

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1 Specifically, plaintiffs seek to summarily adjudicate their claims that "each of these  
2 distributors sells and delivers firearms to California firearms dealers without obtaining proof of  
3 state licensure of such dealers, in violation of California Penal Code § 12072(f)(1); that Southern  
4 Ohio Gun Distributors and Ellett Brothers advertise the sale of assault weapons whose possession is  
5 banned by Penal Code § 12280 in catalogs that they distribute and circulate in California, in  
6 violation of Penal Code § 12020.5; that Southern Ohio Gun Distributors and Ellett Brothers also  
7 engage in deceptive advertising in violation of Bus. & Prof. Code § 17500 by advertising banned  
8 assault weapons in a manner that is likely to mislead potential California purchasers to believe that  
9 purchase and possession of such weapons is lawful, thereby creating an illegal market for such  
10 firearms in California. Finally, plaintiffs seek summary adjudication as to their claim that Southern  
11 Ohio Gun Distributors has further engaged in unlawful and unfair business practices by selling  
12 banned assault weapons to California purchasers in violation of Penal Code § 12280."

13 Plaintiffs acknowledge the requirement of CCP § 437c(f)(1) that summary adjudication  
14 should only be granted if "it completely disposes of a cause of action, an affirmative defense, a  
15 claim for damages, or an issue of duty." However, they respond that "because of limitations on  
16 Plaintiffs' discovery of Defendants' finances, Plaintiffs are unable to make a full showing with  
17 respect to the question of appropriate relief, and in particular the question of appropriate levels of  
18 civil money penalties. Nonetheless, resolution of the liability of these three defendants with respect  
19 to Plaintiffs' unfair competition law claims would facilitate the expeditious and efficient resolution  
20 of these claims. Plaintiffs therefore request this Court to make a liability determination with respect  
21 to Plaintiffs' Bus. & Prof. Code §§ 17200 and 17500 claims as to these three defendants pursuant to  
22 the authority granted it pursuant to California Rule of Court 1541(a)(4), which authorizes the Court  
23 in this coordinated proceeding "to provide a method and schedule for the submission of preliminary  
24 legal questions that might serve to expedite the disposition of the coordinated actions."  
25 Determination of the instant motion would serve the interests of the parties and the Court in  
26 facilitating the efficient resolution of Plaintiffs' causes of action against these defendants under  
27 Bus. & Prof. Code §§ 17200 and 17500."

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1 In opposing the motion, defendants raise various arguments, including that the motion  
2 violates CCP 437c(f)(1).

3 Defendants also have filed “objections and motion to strike” regarding the declaration of  
4 plaintiffs’ expert witness Whit Collins. Defendants seek to strike the declaration pursuant to CCP §  
5 2034(f)(2) because plaintiffs offer him to testify on an area outside the scope of their expert witness  
6 disclosure – the identity of weapons advertised and sold by SOG and Ellett which, in his view,  
7 qualify as “assault weapons” within the meaning of California law. Whereas in the expert  
8 disclosure, defendants summarize Collins’ testimony to focus on the safety design issues.

9 The motion is not an appropriate motion for summary adjudication because it will not  
10 completely dispose of a cause of action or any of the other enumerated bases for granting summary  
11 adjudication. Further, the Court declines to exercise its discretionary powers as the coordination  
12 judge, as requested by plaintiffs.

13 Even if the Court had the inherent power to grant summary adjudication on “liability” as  
14 plaintiffs request, no time saving or benefit to the Court or litigants would be achieved since  
15 plaintiffs will still have to put on evidence to establish their right to penalties.

16 Given the Court’s ruling, the “Motion to strike” the Collins Declaration is moot.

17 **VI.**

18 **DEFENDANT ANDREW’S SPORTING GOODS, INC., DBA**  
19 **TURNER’S OUTDOORSMAN AND DEFENDANT SG**  
20 **DISTRIBUTING INC.’S MOTION FOR SUMMARY**  
**JUDGMENT OR ALTERNATIVELY FOR SUMMARY**  
**ADJUDICATION**

21 Defendant SG Distributing, Inc. joined in the omnibus motion (I *supra*) brought by the  
22 manufacturers and distributors. The Court having granted summary judgment to SG therein, the  
23 instant motion will deal with Andrew’s Sporting Goods only.

24 Defendants begin by noting that in this Court’s order overruling defendants’ demurrers  
25 dated 10-4-00, the Court found that “because this is not a products liability action, the bar of Civ.  
26 Code § 1714.4 does not apply.” According to defendants, since that time two California cases have  
27 been decided that cast doubt on the ruling “given the paucity of facts presented by Plaintiffs to  
28 provide a legal and factual basis to support their ‘pleading around’ Section 1714.4.” Those cases

1 are *Merrill v. Navegar, Inc.* (2001) 26 Cal.4<sup>th</sup> 465 and *Ileto v. Glock* (C.D. Cal. 2002) 194  
2 F.Supp.2d 1040. In *Ileto*, the plaintiffs had brought claims in state court for negligence and public  
3 nuisance against the manufacturers of firearms used by Buford Furrow, Jr. to kill U.S. postal  
4 worker Joseph Ileto, and injure three children at the Jewish Community Center in Los Angeles.  
5 Moreover, according to defendants, “cases around the country continue to reject creatively pled  
6 actions against firearms manufacturers, distributors, and retailers.” Although defendants  
7 acknowledge that section 1714.4 was recently repealed, that fact “should not alter this court’s  
8 analysis”, arguing that the repeal is not retroactive.

9 Defendants then list some of the allegations from the *Ileto* case which include some similar  
10 allegations as made in the complaints before this Court – including that the defendants produce,  
11 etc., substantially more firearms than they reasonably expect to be bought by law-abiding  
12 purchasers; engage in sales to straw purchasers, crime guns are sold by kitchen table dealers, etc.  
13 That case was brought on negligence theories and did also include a similar claim as brought in this  
14 case – one for public nuisance. Defendants note that the *Ileto* court stated: “Guided by the decision  
15 in *City of San Diego v. U.S. Gypsum* (1994) 30 Cal.App.4<sup>th</sup> 575] and in light of the policies  
16 expressed by section 1714.4 and by the California Supreme Court in *Merrill*, the Court concludes  
17 that *Plaintiffs may not state a public nuisance claim for the distribution of firearms.*” [*Id.*, at 1059]  
18 [Emphasis added.] Defendants summarize the *Ileto* court’s rejection of the nuisance claim to be  
19 based on two grounds: (1) the inability of the plaintiffs to bring a nuisance claim for distribution of  
20 a non-defective product; and (2) the absence of any causal relationship between Glock’s conduct  
21 and the alleged injury. As to the latter finding, defendants note that the plaintiffs had failed to  
22 allege that Glock had control over the firearm when it was discharged or otherwise demonstrate that  
23 Glock’s conduct was a proximate cause of plaintiffs’ injuries, citing *Martinez v. Pacific Bell* (1990)  
24 225 Cal.App.3d 1557, 1565-66.

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1 Defendants also look to the *Merrill* case where the plaintiffs had alleged the defendant  
2 negligently manufactured, marketed and distributed weapons suited for mass killing to the general  
3 public, including potential criminals, and that the weapons had no legitimate civilian use. In that  
4 case, the California Supreme Court rejected the plaintiffs' argument that this was not a products  
5 liability action and found that 1714.4 barred the action.

6 Defendants next argue that California law does not support a nuisance claim for the  
7 distribution of a non-defective product and that plaintiffs have failed to produce evidence to suggest  
8 otherwise.

9 Defendants additionally assert that plaintiffs' 17500 claim is predicated upon expressions of  
10 opinion in the "public debate over personal security" and therefore violates defendants'  
11 constitutional rights.

12 By way of background, defendants indicate that plaintiffs sue ASG, a firearm retailer, and  
13 SGD, a firearm distributor, for (1) maintaining a public nuisance; (2) unlawful business practices;  
14 and (3) false and misleading advertisements. Defendants contend that despite repeated requests by  
15 them and other defendants, plaintiffs have failed to identify *any* instance of improper conduct  
16 attributed to defendants or any factual nexus between that conduct and the alleged injuries. "The  
17 absence of specific allegations leaves Defendants with an impossible task: to defend its lawful  
18 business practices against unspecified allegations."

19 Defendants summarize plaintiffs discovery responses which appear to contain no specific  
20 facts or evidence to support their claims against defendants. They submit that "The time for  
21 Discovery has passed. . . Plaintiffs have had an ample opportunity to provide competent evidence  
22 to support their allegations against ASG and/or SGD. However, as indicated in Plaintiffs'  
23 discovery responses and as discussed below, they have not. Thus, Plaintiffs cannot meet their  
24 evidentiary burden of production to raise a triable issue of fact."

25 Plaintiffs oppose the motion. They begin by essentially citing the Court to its own order  
26 overruling defendants' demurrer as proof that this Court has already (and apparently should  
27 continue to) rejected the argument that 1714.4 would bar these claims.

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1 Plaintiffs argue that even if this Court were to reverse itself and somehow construe  
2 plaintiffs' nuisance and 17200 actions as claims for negligent distribution, they would not be barred  
3 under *Ileto*. Similarly, unlike in *Merrill*, where the court found that Sec .1714.4 applied because  
4 plaintiffs alleged that defendant distributed to the public a weapon defectively designed and  
5 uniquely suited for mass killing and lacking legitimate uses, here, plaintiffs' nuisance and 17200  
6 actions are not based on the negligent sale of a defectively designed firearm. The only allegation in  
7 plaintiffs' complaints that is remotely related to 1714.4, according to plaintiffs, is the contention  
8 that defendants should design safer guns by incorporating certain design alternatives. Had plaintiffs  
9 proffered this type of products liability cause of action, they submit, such allegations would have  
10 been expressly permitted under 1714.4(c) which allowed product liability actions based on the  
11 improper selection of design alternatives prior to its repeal.

12 Plaintiffs also reject defendants' reliance on *Ileto* to support the argument that the nuisance  
13 claim fails. Again, they cite to this Court's ruling overruling the demurrer. Also, they assert that  
14 the "policies expressed by Section 1714.4 and by the California Supreme Court in *Merrill*" cited by  
15 the *Ileto* court have been repudiated. Plaintiffs argue that the repeal of 1714.4 makes certain the  
16 California **does not** have any public policy excluding courts from adjudicating claims concerning  
17 the distribution of firearms, particularly those that create a public nuisance.

18 Plaintiffs next address the causal connection between their claims and acts by these  
19 defendants. Again, they argue that they are not required to prove their case on a "gun-by-gun"  
20 basis."

21 Plaintiffs argue that they are able to "present sound proof" that ASG and SGD have engaged  
22 in unfair business practices and created a public nuisance. For example, they contend that  
23 testimony from former top ATF officials and extensive analysis of trace data establish that ASG is a  
24 "high risk" dealer associated with large quantities of guns used in crimes in California and traced  
25 by law enforcement authorities and that SG continues to distribute over 90% of its guns to ASG,  
26 despite knowing that SG is engaging in high risk business practices that facilitate the under ground  
27 market.

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1 Plaintiffs cite to the "California Trace Database" which shows that ASG had at least 1,375  
2 guns traced between 1995 and 2001, or almost 200 per year, citing to the declaration of Joseph J.  
3 Vince, Jr., ¶ 52. Plaintiffs assert that based on these traces, ASG was provided with continual  
4 notice of the diversion of particular guns sold by ASG into the criminal market. "Further  
5 significant trafficking indicators show that ASG is engaging in sales to gun traffickers or is  
6 engaged in high-risk business practices that facilitate the diversion of guns into the underground  
7 market, citing Vince's declaration at ¶¶ 49, 5. Plaintiffs cite to the short "time-to-crime" associated  
8 with these guns as indicators of gun traffickers. Plaintiffs accuse ASG of engaging in 1,037 known  
9 multiple sales transactions involving 2,192 handguns between 1995-1999 [Vince Decl., ¶ 52] and  
10 that this is an indicator of gun trafficking as most FFLs do not have multiple sales transactions.  
11 Plaintiffs further contend that "ASG's repeated failure to properly account for the disposition of its  
12 firearms is further evidenced by the undisputed fact that ATF has repeatedly cited ASG for  
13 violating federal law for failing to reflect all required information in their acquisition and  
14 disposition records."

15 Plaintiffs further accuse SGD of selling significant numbers of traced crime guns through  
16 ASG, despite knowing that ASG is associated with serious indicators of gun trafficking or  
17 diversion of guns into the criminal market.

18 Plaintiffs suggest that SGD should have known that ASG was a high risk dealer. SGD's  
19 failure to take even minimal steps to ensure its firearms are not sold to high risk dealers is  
20 "particularly striking" plaintiffs contend given that both ASG And SGD are owned and run by Ms.  
21 Andrews. Plaintiffs suggest that all SGD had to do was in essence "look in its own backyard" for  
22 obvious evidence that ASG was engaged in gun trafficking or high risk business practices. "SGD's  
23 blatant failure to do so constitutes an unfair business practice and helped to create and maintain the  
24 public nuisance in plaintiffs' communities."

25 Plaintiffs also complain that, citing to the declaration of Daren Jasourowski, between 1992  
26 to 2000 ASG consistently had problems accounting for guns when store inventories were taken.

27 Finally, in response to the 17500 claim and that it violates defendants' First Amendment  
28 Rights, plaintiffs cite to The Rutter Group's *Unfair Business Practices and False Advertising Bus &*

1 *Prof. Code § 17200*, by William L. Stern, where the author states “Sections 17200 and 17500 have  
2 withstood every first amendment challenge that has been reported in a published opinion.”

3 **Discussion**

4 In essence, defendants argue that *Merrill v. Navegar* and *Ileto v. Glock, infra*, should cause  
5 the Court to reconsider the wisdom of its earlier ruling on demurrer. The Court is not so inclined.  
6 Although these two cases are certainly more favorable to the firearms industry, they are  
7 distinguishable. First, neither of these cases involved the extremely broad application of section  
8 17200. Second, the repeal of 1714.4, although not retroactive, would support a finding that a 17200  
9 claim falls outside any protection 1714.4 previously afforded the firearms industry in a negligence  
10 or products liability action.

11 Defendant’s motion for summary judgment is DENIED.

12 Defendant’s motion for summary adjudication of the false advertising claim is GRANTED.  
13 See defendants separate statement, Items 70-92, and plaintiffs’ reply thereto.

14 Defendant’s motion for summary adjudication of plaintiffs’ 17200 and public nuisance  
15 claims is DENIED since, at a minimum, plaintiffs’ evidence suggests that triable issues exist  
16 concerning Andrews’ engagement in high risk business practices that facilitate the diversion of  
17 guns into the underground market, to wit:

18 (1) ATF citing ASG for failing to reflect all required information in their  
19 A&D records;

20 (2) the “sheer volume” of trace requests have put them on notice that their  
21 guns have been diverted into the criminal market [Vince decl., ¶¶ 49, 52, 64-65,  
22 70]; defendants do not track the traces they receive; other “significant gun  
23 trafficking indicators” including a short time-to crime associated with defendants’  
24 guns; a large number of multiple sales and suspect completion codes; ASG set up  
25 an entire inventory account in the guise of another store for firearms that were  
26 missing 25-50 per year [Jasourowski decl., ¶ 17.]

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1 national ATF database shows that Traders was linked to 927 national crime gun traces between  
2 1989 and 1996, or more than 115 per year. The high numbers of traces linked to Traders in these  
3 databases are "overwhelming indicators of gun trafficking," given that the majority of FFLs have  
4 no gun traces associated with them and that numerous federal reports indicate that the distribution  
5 of traces is strikingly disproportionate; a small percentage of dealers, including Traders, account for  
6 the majority of traces. *See also*, Vince Declaration at ¶ 46.

7 IT IS SO ORDERED.

8  
9 Dated: April 16, 2003

  
VINCENT P. Di FIGLIA  
Judge of the Superior Court