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ANDREW'S SPORTING GOODS, INC.
dba TURNER'S OUTDOORSMAN
and S.G. DISTRIBUTING, INC.

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

Judicial Council Coordination Proceeding
Special Title (Rule 1550(b))

FIREARM CASES

Coordinated actions:

THE PEOPLE OF THE STATE OF
CALIFORNIA, ex rel. the County of Los
Angeles, et. al.,

v.

ARCADIA MACHINE & TOOL, et. al.,

THE PEOPLE OF THE STATE OF
CALIFORNIA, by and through JAMES K.
HAHN, City Attorney of the City of Los
Angeles, et. al.,

v.

ARCADIA MACHINE & TOOL, et. al.,

THE PEOPLE OF THE STATE OF
CALIFORNIA, by and through San
Francisco City Attorney Louise H. Renne,
v.

ARCADIA MACHINE & TOOL, et. al.

JUDICIAL COUNCIL COORDINATION
PROCEEDINGS NO. 4095

Superior Court of California City & County of
San Francisco No. 303753

Superior Court of California County of Los
Angeles No. BC210894

Superior Court of California County of Los
Angeles No. BC214794

**DEFENDANT ANDREWS SPORTING
GOODS' MOTION IN LIMINE NUMBER
ONE TO EXCLUDE ANTICIPATED
TRIAL TESTIMONY OF PLAINTIFFS'
GUN TRACE WITNESSES GERALD A.
NUNZIATO AND JOSEPH J. VINCE, JR.
AND REQUEST FOR KELLY HEARING**

Date:
Time:
Dept. 65
Hon. Vincent. P. DiFiglia

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. THE EXPERT TESTIMONY AT ISSUE	1
II. THE NUNZIATO/VINCE OPINIONS ARE INADMISSIBLE PROFILES	3
III. THE NUNZIATO AND VINCE OPINIONS ARE INADMISSIBLE UNDER KELLY	4
A. The Nunziato/Vince Technique Is Not Generally Accepted in the Scientific Community.	5
1. <u>The Nunziato/Vince Technique is Not Generally Accepted Within the Relevant Law Enforcement Communities</u>	6
a. The Nunziato/Vince Technique is Not Generally Accepted within the National Law Enforcement Community	6
b. The Relevant Local Law Enforcement Communities Reject the Nunziato/Vince Technique	10
c. Mr. Vince and Mr. Nunziato admit that their Method is Not Generally Accepted Within the Law Enforcement Community as Proof of Wrongdoing by a Retailer	12
2. <u>The Nunziato/Vince Technique Is Not Generally Accepted Within the Survey Methodology and Statistics Communities</u>	13
a. The Nunziato/Vince Technique Does Not Follow Generally Accepted Survey Methodology	13
b. The Nunziato/Vince Technique Does Not Follow Generally Accepted Statistical Analysis Methodology	16
B. Mr. Nunziato and Mr. Vince are Not Qualified to Testify as to the Reliability of their Technique	17
1. <u>Mr. Nunziato and Mr. Vince Are Not Professionally Qualified to Opine as to Whether Their Technique Is Generally Accepted Within the Scientific Community</u>	18
2. <u>Mr. Nunziato and Mr. Vince Are Biased and Therefore Unqualified to Opine as to Whether Their Technique Is Generally Accepted Within the Scientific Community</u>	18
C. Even If Their Technique Were Reliable, Mr. Nunziato and Mr. Vince Have Failed to Follow Proper Scientific Procedures with Respect to Andrews	19

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

TABLE OF CONTENTS, *Cont.*

1.	<u>Mr. Nunziato's Trace Database Entries Do Not Show That Andrews</u> <u>Illegally or Improper Sold Handguns</u>	20
IV.	CONCLUSION	23

TABLE OF AUTHORITIES

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

Pages

FEDERAL CASES

California v. Brown (1987) 479 U.S. 538, 107 S. Ct. 837, 93 L.Ed.2d 934	17
N.A.A.C.P. vs. Acusport, Inc., 210 F.R.D. 268, 273-76 (EDNY. 2002)	2

STATE CASES

People v. Ashmus, 54 Cal.3rd 932, 972 (1991)	18
People v. Barney, 8 Cal.App.4th 798, 817 (1992)	19
People v. Brown, 40 Cal.3rd 512, 533 (1985)	17
People v. Coleman, 46 Cal.3rd 749, 775 (1988)	17
People v. Kaurish, 52 Cal.3d 648, 688 (1990)	5
People v. Kelly, 17 Cal.3d 24, 30 (1976)	5, 17
People v. Pizarro, 10 Cal.App.4th 57, 83-84 (1992)	5-7, 9, 10, 14-17
People v. Robbie, 92 Cal.App.4th 1075, 1084 (2001)	3
People v. Venegas, 18 Cal.4th 47, 78 (1998)	5

STATUTES

Business and Professions Code	
§17200	4
Evidence Code:	
§ 352	1
§ 801	1
§ 801(b)	4
§ 802	1
§ 803	1

1 **INTRODUCTION**

2 Defendant Andrews Sporting Goods objects to the anticipated gun trace trial opinion
3 testimony of Gerald A. Nunziato and Joseph J. Vince, Jr. and requests a Kelly hearing with
4 respect thereto. Mr. Nunziato and Mr. Vince, ex Bureau of Alcohol, Tobacco and Firearm agents
5 and now partners in the consulting firm "Crime Gun Solutions," are expected to testify that they
6 have created a survey and statistical technique to profile California retail firearm dealers who may
7 illegally or improperly sell handguns used in violent crime, that Andrews Sporting Goods falls
8 within that profile and therefore there is a greater than 50% probability that the company illegally
9 or improperly sold firearms used in violent crime. As shown below, the Nunziato/Vince
10 testimony fails to meet the requirements of Evidence Code Sections 801, 802 and 803¹ as well as
11 the Kelly standards of reliability/general acceptance. Their testimony is irrelevant, speculative
12 and based on unreliable information – matter which is not of the type reasonably relied upon by
13 experts forming an opinion upon this subject matter. It must, therefore, be excluded.

14 **I.**

15 **THE EXPERT TESTIMONY AT ISSUE**

16 When law enforcement officers want to identify the owner (or previous owners) of a
17 firearm, they can request a trace by contacting the federal Bureau of Alcohol, Tobacco and
18 Firearms (the "BATF" or "ATF"). The requesting law enforcement agent makes a telephone call,
19 sends a fax or computer request to the BATF describing the firearm (make, model, serial number,
20 etc.). The BATF in turn traces the ownership of the firearm from the manufacturer to distributor to
21 retail dealer to the first purchaser of the firearm who is not licensed by the BATF to sell firearms.
22 The BATF keeps a record of the trace request, including, if one is provided, the crime code the
23 requesting officer listed at the time of the trace request. The BATF does not, however, verify the
24
25

26 ¹ Andrews maintains all objections previously stated to the Nunziato/Vince testimony as well as
27 an Evidence Code Section 352 objection in that the probative value of the proposed testimony (if any
28 could be found to exist) would be substantially outweighed by the probability its admission
would necessitate undue consumption of time and create substantial danger of undue prejudice.

1 accuracy of the information local law enforcement provides.²

2 In the 1990s, the BATF began analyzing trends in its trace database entries in an effort to
3 profile potential illegal gun traffickers³. As discussed in more detail below, the BATF did not
4 then and does not now sanction the use of such profiling activity as a substitute for evidence of
5 wrongdoing. In fact, the agency specifically cautions against doing so, noting that while these
6 kinds of profiles may be appropriate for identifying persons the BATF or local law enforcement
7 might want to investigate, the entries and profiles are not a proper substitute for proof of illegal
8 sales of firearms or “high risk” business practices.

9 “While a trafficking problem can be suggested by these indicators, further
10 information, which can be gathered through regulatory inspections and criminal
11 investigations, is required to determine whether trafficking has actually occurred,
12 what form it has taken and who is responsible.”

12 Commerce in Firearms in the United States (BATF 2000) at 22, Defendants NOL Ex. 2.

13 Nonetheless, Plaintiffs apparently intend to substitute a similar type of profiling activity
14 for proof of illegal acts here. Mr. Nunziato, now a private consultant, is expected to testify that he
15 obtained copies of the available BATF trace request entries and other BATF records⁴, and created
16

17 ² See e.g. Commerce in Firearms in the United States (BATF 2000), Defendant’s NOL
18 Ex. 2 at pp 19-20 (ATF’s description); See also *N.A.A.C.P. vs. Acusport, Inc.*, 210 F.R.D. 268,
19 273-76 (EDNY. 2002)(confirming the agency does not verify the information provided by local
20 law enforcement:

21 “[The ATF does not verify] the truth of information submitted by local law
22 enforcement agencies. Crime codes, for instance, are recorded as whatever the
23 requesting law enforcement agency submits (as long as the code is a valid one).
24 BATF does not follow up on or maintain records on the progress of any
25 investigations for which local law enforcement agencies request traces. There is
26 no information in the BATF databases as to the suspects involved in such
27 investigations, the outcomes of those investigations, or the role of the traced
28 firearm in those investigations.” Id. at p. 275.

26 ³ Commerce in Firearms in the United States (BATF 2000), Defendant’s NOL Ex.2 at p. 20.

27 ⁴ In addition to gun trace request entries, Mr. Nunziato obtained computer records from the
28 BATF multiple sales database and from extracts from the national database gun trace entries which
California municipalities obtain upon their request from the BATF.

1 his own database to which he applied a statistical analytical approach in order to “profile”
2 Andrews. Plaintiffs’ witness Mr. Vince apparently intends to testify that he created his own
3 statistical probability modeling approach and based upon that analysis and Mr. Nunziato’s
4 “profile,” has concluded that there is a greater than 50 percent chance that Andrews engaged in
5 either illegal sales to gun traffickers or high risk business practices that facilitated the diversion of
6 guns into the underground market in California. See Vince Declaration at p. 17, Paragraph 52, p.
7 22 paragraph 73, Defendants NOL Ex.20. Individually and collectively this testimony is
8 inadmissible and must be excluded.

10 II.

11 THE NUNZIATO/VINCE OPINIONS ARE INADMISSIBLE PROFILES

12 At its most basic, the Nunziato/Vince gun trace opinion testimony amounts to an assertion
13 that Andrews must be doing something wrong because the company fits a “law enforcement”
14 profile of dealers who may unlawfully sell firearms. As a threshold matter, this kind of profiling
15 evidence is inherently suspect and prejudicial. See *People v. Robbie*, 92 Cal.App.4th 1075, 1084
16 (2001).

17 “[P]rofile evidence is inherently prejudicial because it requires the [fact finder] to
18 accept an erroneous starting point. . . . We illustrate the problem by examining the
19 syllogism underlying profile evidence: criminals act in a certain way; the defendant
20 acted that way; therefore, the defendant is a criminal. Guilt flows ineluctably from
21 the major premise through the minor one to the conclusion. The problem is the
22 major premise is faulty. It implies that criminals, and only criminals, act in a given
23 way. In fact, certain behavior may be consistent with both innocent and illegal
24 behavior, as the People's expert conceded here.”

25 *Id.* at 1085.

26 As the *Robbie* Court aptly noted, “[e]very defendant has a right to be tried based on the
27 evidence against him or her, not on the techniques utilized by law enforcement officials in
28 investigating criminal activity.” *Id.*

Mr. Nunziato’s and Mr. Vince’s testimony falls squarely within the four corners of
unreliable, speculative and prejudicial profile testimony. They want to opine that, as former law
enforcement officers, they can manipulate gun trace database entries, create a profile, and based

1 thereon, prove that the retail gun dealer improperly or illegally sold guns.

2 Both gentlemen render these opinions notwithstanding their admissions that the data at
3 issue is also consistent with innocent behavior. See Vince Deposition Tr. at pp. 349 line 12
4 through 341 line 1, Defendant's NOL Exhibit 14 (data reflected on Nunziato's spread sheets may
5 only reflect guns lawfully sold to persons lawfully entitled to purchase the guns); Nunziato
6 Deposition Tr. at p. 98 lines 1-4, Defendant's NOL Exhibit 15 (trace data indicating a specific
7 gun dealer sold a lot of "crime guns" is insufficient to conclude that the gun dealer is acting in an
8 inappropriate or wrongful manner).

9 Granted, this may not be the traditional criminal case in which the impropriety of profiling
10 is typically addressed. It is, however, a Business and Professions Code 17200 case in which
11 Plaintiffs must prove up underlying illegal or wrongful acts. Thus, the Nunziato/Vince testimony
12 presents the same danger of speculation and prejudice the *Robbie* court cautioned against – the
13 substitution of a profile for proof of actual illegal or improper conduct. It is, therefore, based on
14 improper matter, lacks foundation, is speculative and would be unduly time consuming and
15 prejudicial.

16 In addition, Evidence Code 801(b) requires that expert testimony be based upon matter
17 reasonably relied upon by experts in forming opinions on this subject matter. As set forth in detail
18 below, Mr. Nunziato and Mr Vince have created unreliable statistical and probability modeling
19 based on unreliable trace database entries – matter which relevant law enforcement and survey and
20 statistics communities have specifically stated may not be reasonably relied upon by experts in
21 forming opinions on whether a particular retail dealer illegally or improperly sold handguns. As a
22 result, the Vince/Nunziato testimony is inadmissible and must be excluded.

23 III.

24 THE NUNZIATO AND VINCE OPINIONS ARE INADMISSIBLE UNDER KELLY

25 The Nunziato/Vince technique is a novel method which carries the misleading aura of
26 scientific infallibility. (See NOL Exhibit 1 - Vince Deposition Tr. at 54-55 admitting the concept
27 is "new" and "innovative.") As such, the Kelly rule applies and Plaintiffs bear the burden of
28 showing (a) the reliability of the method in general (that the method has gained general

1 acceptance within the relevant scientific community), (b) the evidence is furnished by a properly
2 qualified expert, and (c) the expert used proper scientific procedures in this case. *People v. Kelly*,
3 17 Cal.3d 24, 30 (1976); *People v. Venegas*, 18 Cal.4th 47, 78 (1998); *People v. Kaurish*, 52
4 Cal.3d 648, 688 (1990).

5 As detailed below, Plaintiffs cannot meet the Kelly requirements here because (1) the
6 technique is not reliable; the Nunziato/Vince method is not generally accepted in the relevant
7 scientific communities, (2) Mr. Nunziato and Mr. Vince are not properly qualified to establish the
8 general acceptance of their method, and (3) even if their method were reliable, they did not follow
9 proper scientific procedures in this case.

10 **A. The Nunziato/Vince Technique Is Not Generally Accepted in the Scientific**
11 **Community.**

12 Plaintiffs bear the burden of showing that the Nunziato/Vince technique has gained
13 “general acceptance in the scientific community.” *People v. Kelly*, 17 Cal.3d 24, 30; *People v.*
14 *Venegas*, 18 Cal.4th 47, 78. In addition, if the technique relies on a database, the use of the
15 database for the statistical analysis at issue must also meet the *Kelly* test. See, e.g. *People v.*
16 *Pizarro*, 10 Cal.App.4th 57, 83-84 (1992) (In order for a database to be reliable, the theory upon
17 which it is predicated “must be an established scientific principal which the court assesses by its
18 having gained general acceptance in the particular field to which it belongs.”) Thus, here,
19 Plaintiffs bear the burden of showing that the theory upon which Mr. Nunziato’s database is
20 predicated is an established scientific principal which has gained general acceptance within the
21 particular field to which it belongs.

22 In other words, Plaintiffs bear the burden of showing general acceptance of the
23 Vince/Nunziato assumptions that the gun trace database entries are accurate and reliable, that all
24 entries reflect guns used in crime, and that the presence of multiple trace request entries or other
25 statistical points are proof that a retail dealer acted illegally or improperly in selling the guns being
26 traced. This they cannot do. In fact, the relevant scientific communities explicitly reject this
27 approach.
28

1 **1. The Nunziato/Vince Technique is Not Generally Accepted Within the Relevant**
2 **Law Enforcement Communities**

3 Both the BATF (the entity which collects the trace information) and local law enforcement
4 (the people who provide the information to initiate the trace) reject the notion that gun trace
5 database entries are proof that a retail dealer illegally or improperly sold handguns used in crime.

6 **a. The Nunziato/Vince Technique is Not Generally Accepted within the**
7 **National Law Enforcement Community**

8 BATF's own publications warn against the use of gun trace data as proof of illegal or
9 improper conduct. In February 1999, the BATF publicly stated:

10 "ATF emphasizes that the appearance of a Federal firearm licensee (FFL) or a first
11 unlicensed purchaser of record in association with a crime gun or in association
12 with multiple crime guns in no way suggests that either the FFL or the first
 purchaser has committed criminal acts. Rather, such information may provide a
 starting point for further and more detailed investigation."

13 See Youth Crime Gun Interdiction Initiative, Crime Gun Trace Analysis Report; The Illegal Youth
14 Firearms Market in Los Angeles, Bureau of Alcohol Tobacco and Firearms at p. 17 (Feb. 1999)
15 Defendants NOL Ex. 1. Notably, Mr. Vince and Mr. Nunziato were involved with preparing this
16 report. See *Id.* at p. A-4.

17 In February 2000, again the BATF noted that trace information does not equal misconduct.

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

23 Commerce in Firearms in the United States, February 2002, Department of the Treasury, Bureau
24 of Tobacco, Alcohol and Firearms at pp. 21-22, attached to Defendants NOL as Exhibit 2.

25 In July 2002, the ATF again stated that "[a] crime gun trace alone does not mean that an
26 FFL or firearm purchaser has committed an unlawful act." Youth Crime Gun Interdiction
27 Initiative, Gun Trace Reports (2000) Los Angeles, Department of the Treasury, Bureau of
28 Alcohol, Tobacco and Firearms, July 2002, at p. 4, paragraph 1, attached to Defendant's NOL

1 Exhibit 3.

2 In fact, the BATF's own "Guide to Investigating Illegal Firearms Trafficking," while
3 listing frequent involvement in a crime related firearms trace as one of some 20 different
4 indicators that "may indicate that certain events have taken place which may involve illegal
5 activity," also clearly cautions that the presence of one or more of the indicators alone does not
6 prove that illegal firearms trafficking is taking place. See U.S. Department of the Treasury,
7 Bureau of Tobacco, Alcohol and Firearms Guide to Illegal Firearms Trafficking (1997) at p. 76,
8 attached to Defendant's NOL Exhibit 4.

9 Forest Webb, former special agent in charge of the BATF tracing program, confirmed that
10 the agency does not consider the trace of a firearm equal to the trace of a crime gun or the number
11 of traces of firearms sold to indicate a bad retail dealer:

12 "A trace of a firearm does not automatically equal a crime. . . . Law enforcement
13 agencies trace over 200,000 firearms each year. When a trace is submitted the
14 submitting agency selects a crime code that represents the type of alleged crime
15 being investigated. The information entered into the database to initiate a trace is
16 provided by the requesting agency. ATF does not confirm the validity of the
17 information furnished. . . . ATF performs a trace of the firearm and the results are
18 sent to the requesting agency. In order for ATF to determine whether the firearm
19 had been used in a crime, ATF would have to require additional information from
20 the investigating agency. ATF does not receive this information as part of the
21 tracing process. ATF provides the trace as a service to the requesting law
22 enforcement agency and rarely has any other involvement in the investigation."

23 Webb Declaration at p. 3 paragraph 6 line 1, p. 5 paragraph 13 lines 1 through 5, paragraph 14
24 lines 6 to 10.

25 "Many firearms are traced because they simply come into the possession of the police
26 department," including firearms which are (1) found, (2) turned over to the police for safe keeping
27 or disposal, (3) purchased as part of a buy back program, (4) not involved in crime which are
28 traced to provide leads or to identify suspects, (5) found at a crime scene that are not part of the
violation or used as an instrument in the crime, and (6) found during the execution of a search
warrant for other than firearms violations." *Id.* at p. 3 paragraph 6 lines 9-22.

26 In fact, the trace of a firearm can help to establish that no crime has been committed. *Id.*
27 "In many instances firearms are taken into custody but returned to the owner after investigation
28 determines them not to be part of any crime." *Id.* at p. 3 paragraph 6 lines 22 -23.

1 Thus, the Nunziato/Vince's technique of assuming any dealer with more than two trace
2 requests has acted illegally or improperly is not generally accepted within the national law
3 enforcement community. Similarly, the Nunziato/Vince technique also improperly assumes the
4 crime codes noted in database entries accurately reflect the circumstances surrounding the trace
5 request. As former special agent in charge Webb explains, the system often uses codes unrelated
6 to the underlying circumstances of the request.

7 "In order for a firearm to be entered into the ATF Tracing System, a crime code
8 must be listed. During my tenure as the Special Agent in Charge, those traces
9 submitted without a crime code defaulted to a firearms offense. It is also logical
that when submitting a trace, if the requester cannot determine an appropriate
crime code they would use the firearms possession or firearms offense code."

10 *Id.* at p.4 paragraph 9 lines 9-14. Thus, the vast majority of firearms traced are coded as firearms
11 violations when, in Mr. Webb's opinion, most of these firearms might not be involved in a crime.

12 *Id.* at p. 5 paragraph 17 lines 24-26.

13 ATF's own publications confirm this practice;

14 "The general term "Firearms Offenses" . . . is also commonly used by local law
15 enforcement agencies and the National Tracing Center when more detailed crime
16 information is not available at the time the trace request is submitted to the National
Tracing Center."

17 Webb Decl. at p. 5 paragraph 17 lines 21-28, p. 6 lines 1-2, quoting ATF Crime Gun Trace
18 Reports (2000).

19 Thus it should come as no surprise that the BATF does not consider the number of traces
20 of firearms sold by a dealer as proof that the dealer is "bad," (Webb Decl. at p. 4, paragraph 10)
21 that the Agency acknowledges that dealers that do a larger volume of business are more likely to
22 have more firearms traced to them,⁵ (Webb Decl. at p. 4, paragraph 12 lines 27-28) and that in
23 order to establish a dealer is involved in criminal activity, more information and evidence than
24 tracing records is needed.⁶ (Webb Decl. at p. 4 paragraph 10 lines 15-18).

25
26 ⁵ This is particularly relevant here where Andrews Sporting Goods has some 19 FFLs that
collectively sold more than 750,000 firearms during the thirty years it has been in business.

27 ⁶ The ATF tested the hypothetical relationship between the number of traces and criminal
28 activity by conducting focused compliance inspections of dealers based on the number of firearm traces
and on random selection. These inspections took approximately 60 to 100 hours to complete and found
no significant difference between the results for inspections done randomly and those based on the

1 The bipartisan Congressional Research Service (the “CRS”) reported the same issues,
2 noting that the “the ATF tracing system is an operational system designed to help law enforcement
3 agencies identify the ownership path of individual firearms,” that it “was not designed to collect
4 statistics.” CRS Report for Congress; “Assault Weapons”: Military Style Semiautomatic Firearms
5 Facts and Issues, 1992, Appendix B at p. CRS-65, attached to Defendants NOL as Exhibit 5.⁷

6 The CRS confirmed that one cannot properly assume that every gun listed in the trace database is
7 involved with a crime:

8 “... [A] law enforcement officer may initiate a trace request for any reason. No
9 crime need be involved. No screening policy ensures or requires that only guns
10 known or suspected to have been used in crimes are traced. . . . the extent to which
11 trace requests focus on guns not involved in crimes cannot be determined.
12 ...”

13 *Id.* at CRS-66

14 “Trace requests are not accurate indicators of specified crimes because some
15 requests do not contain a reference to the type of crime in which the firearm is
16 suspected of being involved and the requesting officers do not follow criteria or
17 definitions in identifying the crime associated with the firearm. While the
18 omission of the crime classification on the trace request form may result from
19 negligence or the press of time, it is also possible that the officer did not list an
20 offense because interest in the firearm was not linked to criminal offenses . . .”

21 *Id.* at CRS-70.⁸

22 The CRS went on the note that traces may be requested for a variety of reasons not
23 necessarily related to criminal incidents.

24 “For example, a trace may be conducted on a firearm found at the residence of a
25 suspect though the firearm itself is not associated with a criminal act. Traces may
26 also be requested with respect to abandoned firearms, those found by chance, those

27 _____
28 number of traces. In each case the inspections resulted in very few license revocation proceedings. Webb
Decl. at p.4 paragraph 11 lines 19-23.

29 ⁷ While the CRS rendered this report in 1992 and the agency has made improvements in
30 computerizing its database since that time, the same issues regarding the accuracy and reliability of the
31 information provided continue to exist. See e.g. the ATF publications spanning the period 1999 to 2002
32 cited above.

33 ⁸ The CRS also concluded that given the objective of the tracing service, these systemic
34 issues arguably need not be changed. “[B]ecause the system is designed to expedite requests
35 from law enforcement agencies on the history of firearm ownership, there would likely be little
36 benefit in placing additional restrictions or requirements on officers submitting trace requests.”
37 *Id.* at CRS 65-66 note 182. The more important accomplishment of the system design is to
38 “minimize paperwork and administrative burdens on the requesting agency.”

1 seen by officers for sale at guns shows or pawn shops, or those used by suicide
2 victims. In addition, traces may be requested with respect to firearms seized
3 pursuant to an investigation not directly related with a violent criminal offense,
4 such as tax evasion or a technical violation of the Gun Control Act provisions. It
5 is not possible to identify how frequently firearms traces are requested for reasons
6 other than those associated with violent crimes.”

7 *Id.* at CRS-70.⁹

8 Thus, the national law enforcement community does not generally accept the
9 Nunziato/Vince method of assuming the accuracy and reliability of the database entries, assuming
10 that all traces indicate guns used in crime and that profiles derived from those entries can be used
11 to conclude that a retail dealer has acted improperly.

12 **b. The Relevant Local Law Enforcement Communities Reject the**
13 **Nunziato/Vince Technique**

14 Similarly, local law enforcement rejects the Nunziato/Vince method of assuming a dealer
15 acted illegally or improperly based on profiles derived from gun trace database entries. For
16 example, Plaintiff City of Oakland’s own Police Department, in discussing retail dealers listed
17 among those having the highest number of firearms traced in California for 1997-1998 stated:

18 “[t]hese are legitimate and licensed gun dealers. It is neither implied nor inferred
19 that the crime guns traced back to these dealers was due to any impropriety on the
20 part of the seller.”

21 City of Oakland Agenda Report dated November 30, 1999 from “Police Department” to the Office
22 of the City Manager, at p. 3, Defendant’s NOL, Exhibit 7.

23 Local law enforcement in Los Angeles takes the same position; Los Angeles County
24 Sheriff’s Deputy Keith LeBrun testified that “[a] crime gun trace alone does not mean that an
25 F.F.L. or firearm purchaser has committed an unlawful act.” (LeBraun Deposition Tr. at pp. 33
26 line 25 through 34 lines 1-4, attached to Defendant’s Notice of Lodgment as Exhibit 8).

27 Los Angeles County Sheriff’s Department Captain John Bauer testified that gun tracing
28 information is an academic exercise if not followed up by a law enforcement investigation, and

⁹ The CRS also noted that standardized procedures do not exist to ensure that officers use
consistent definitions or terms in the reports of circumstances that lead to each trace request finding that
“[i]t is not possible independently to verify the authenticity or accuracy of the circumstances surrounding
trace requests,” and that, according to the BATF, it “is not possible to determine if traced firearms
are related to criminal activity.” *Id.* at CRS-65-66.

1 that without such an investigation, the data would be worthless. (Bauer Deposition Tr. at p. 59
2 lines 1-14, attached to Defendant's NOL Exhibit 9).¹⁰

3 Lieutenant Bauer explained that one cannot use a trace request, standing alone, as proof of
4 an illegal act;

5 "My experience has been that there's too many good explanations for why a
6 firearm would fall into the hands of somebody other than the original purchaser."

7 See *Id.* at p. 31 lines 12-14, Defendant's NOL Exhibit 9 (noting examples such as the original
8 owner losing the gun via burglary or theft, misplacing the gun, or making a legitimate sale of the
9 gun to a third party). Lieutenant Bauer also agreed that the mere fact that a retail dealer may show
10 up in response to a trace request in no way suggests any illegal activity by the retail purchaser. *Id.*
11 at p. 31 lines 22-25 through 32 line 25, Defendant's NOL Exhibit 9.

12 That local law enforcement does expect the information they supply for a trace to be used
13 as evidence in court is further confirmed by comparing actual police reports with the
14 corresponding trace request data base entries. The police reports clearly reflect that the firearms
15 were not used to commit crimes. Mr. Nunziato's database, however, shows they were all violent
16 "crime guns." See Defendant's NOL Exhibits 11-13.

17 For example, according to Mr. Nunziato's database, when the police department requested
18 a trace of the handgun with serial number CBU0854, they listed the crime code "Burglary."
19 According to the Nunziato/Vince technique, this request is treated as proof that the firearm in
20 question was used in the commission of a burglary. The actual police report for the incident,
21 however, stated the handgun had actually been taken from its owner when her home was
22 burglarized. See Police Report attached to Defendants NOL Ex. 11. The gun was not used to
23 commit a crime, yet Mr. Nunziato's database assumes it to be a "crime gun."

24 Mr. Nunziato's trace database similarly identifies handguns with serial numbers
25 AP151950 and Q150685 as "crime guns" used in robberies. Again, the police report notes that the
26 owner of the firearms was the victim of the attempted robbery, not the robber. Defendants NOL
27

28 ¹⁰ Los Angeles County Sheriff's Department Lieutenant Robert Costa agreed. (Costa
Deposition Tr. at p. 30 line 23-25 through p. 35 line 14, Defendant's NOL Exhibit 10).

1 Ex. 12.

2 Mr. Nunziato's database also lists handguns with serial numbers 310698 and 305394 as
3 "Assault-Family-Gun" or "Assault." Once again, the actual police reports show that the handguns
4 at issue were not used in the assaults. Defendant's NOL Ex. 13. Both cases involved domestic
5 violence which did not involve the handguns (husbands struck wives with hands). The reports
6 indicate the police confiscated the guns pursuant to laws which required removal of all firearms
7 for 48 to 72 hours after the owner is arrested on a domestic violence charge.

8 None of these handguns was used in a crime. Nonetheless, the Nunziato/Vince technique
9 counts them as "crime guns" and uses the trace requests as proof that the dealers who originally
10 sold the firearms acted illegally or improperly. In fact, Mr. Vince testified that even one trace
11 request to a dealer qualifies that dealer as "high risk." Vince Deposition Tr. at 413 line 22 through
12 414 line 4, see Defendant's NOL Exhibit 14.

13 Given the statements of the BATF, the CRS and local law enforcement, along with the
14 concrete examples of the lack of accuracy and reliability of the information provided, it is quite
15 apparent that the Nunziato/Vince method of using profiles derived from these database entries as
16 proof of illegal or improper misconduct is not generally accepted by the relevant local law
17 enforcement communities.

18 **c. Mr. Vince and Mr. Nunziato admit that their Method is Not Generally**
19 **Accepted Within the Law Enforcement Community as Proof of**
Wrongdoing by a Retailer.

20 At deposition, prior to the summary judgment motion in this case, Mr. Vince admitted that
21 no conclusions concerning misconduct as to any specific defendant retailer can be drawn from
22 reviewing trace data and the data generated by Mr. Nunziato. See Vince Deposition Tr. at p. 340
23 lines 12 through page 341 line 1, Defendant's NOL Exhibit 14.

24 "Q. The data, itself, does not tell you what, if any, wrongful or improper practices may
25 have occurred; is that correct?

26 A. No, sir, it does not. They are indicators and its different than criminal investigative
27 information. These are indicators that can be used to monitor.

28 .Q. But the data, itself, does not tell you what, if anything, improper or wrongful

1 occurred?

2 A. They are only indicators.”

3 Vince Deposition Transcript at p. 343 line 9 through p. 344 line 7 (objections omitted), attached to
4 Defendant’s NOL Exhibit 14. Mr. Vince also testified that the data reflected on Mr. Nunziato’s
5 spreadsheets may reflect only guns lawfully sold to persons lawfully entitled to purchase the guns.
6 Vince Deposition Tr. at p. 411 lines 6-7. Defendant’s NOL Exhibit 14.

7 Similarly, prior to the summary judgment motion, Mr. Nunziato admitted at deposition
8 that one can not make a conclusion that a particular federal firearm licensee has done anything
9 wrong by just looking at trace data. Nunziato Deposition Tr. at p. 143 lines 8-11, Defendants
10 NOL Exhibit 15. Now that the manufacturers and distributors are out of the case and Plaintiffs
11 have no evidence that Andrews illegally or improperly sold handguns, this is apparently what Mr.
12 Nunziato and Mr. Vince plan to try here.

13 Suffice to say that Mr. Nunziato understated the situation when he recently admitted in an
14 expert report for another case that “other law enforcement ‘industry insiders’ do not share [his]
15 views on the usefulness of this data..” See Nunziato NAACP Report at p.3, paragraph 4,
16 Defendant’s NOL Exhibit 16.

17 **2. The Nunziato/Vince Technique Is Not Generally Accepted Within the Survey**
18 **Methodology and Statistics Communities**

19 The Nunziato/Vince technique of drawing conclusions based on statistical profiles derived
20 from gun trace data base entries is also not generally accepted within the survey methodology and
21 statistics communities.

22 **a. The Nunziato/Vince Technique Does Not Follow Generally Accepted**
23 **Survey Methodology**

24 Dr. Nancy A. Mathiowetz, professor and a recognized expert in the area of survey
25 methodology,¹¹ studied the BATF data as well as Mr. Nunziato’s technique and found that Mr.
26 Nunziato failed to follow generally accepted practice.

27

28

¹¹ Dr. Mathiowetz is Associate Professor, Joint Program in Survey Methodology, University of Maryland and Adjunct Professor and Adjunct Research Scientist, University of Michigan.

1 “Prior to drawing any inferences from a data set, it is generally accepted practice
2 that the analyst; (1) take into account the original purpose for which the data were
3 collected, (2) understand the process by which the data were collected and
4 compiled, the quality control procedures used or not used, and the resulting effects
5 on data validity and quality, (3) evaluate the overall validity and quality of the data
6 set for the purposes for which the data are to be used (e.g. the amount and effect of
7 data errors, missing data, and duplicative data, the representativeness of the data
8 and any anomalies in the data); and (4) determine the appropriate uses of the data
9 set given the above factors.”

10 Mathiowetz Declaration at p. 2 paragraph 3 lines 10-18.

11 Mr. Nunziato failed to follow these generally accepted procedures and as a result failed to
12 uncover serious problems, weaknesses and anomalies in the data which prohibit them from being
13 used as he attempts to use them here – as proof of illegal or improper sales of handguns used in
14 crime. See *Id.* at p. 2 paragraph 4 lines 19-21, 22-27.

15 Dr. Mathiowetz noted that the BATF gun trace data collection process is missing quality
16 control procedures necessary to insure the collection of accurate and reliable information,
17 especially among critical data elements. *Id.* at paragraph 5 lines 7-15, paragraph 6 lines 17-26. For
18 example, the BATF program does not include consistent training of personnel associated with all
19 levels of data capture, quality control for all levels of data collection and data entry, assessment of
20 the reliability of coding systems, and the documentation of the extent of missing data within the
21 data system.¹² *Id.* In addition, the data suffers from other problems, both at the point of data
22 capture (the original request for tracing) and with the processing of the data at the National
23 Tracing Center, including, but not limited to, missing data and inconsistent implementation of

24 ¹² For example, the form used to request a trace submission (ATF F 3312.1) requires the
25 assignment of a crime code. This field is noted on the form as a required field. The back of the form
26 includes a partial list of the possible crime codes that could be assigned; this list does not include the
27 code for “weapons offense”— code 5299. Among all trace requests between 1990 and 2000, 42.0% are
28 associated with code 5299, a rate three and a half times that of the next most frequently assigned code
29 (“weapons possession,” code 5212 ,which accounts for 11.8% of the trace requests). However, the code
30 5299 has been used as a default code for missing crime codes; unlike statistical data files in which
31 imputed data are flagged for the data analyst, there is no flag in the FTS data file to distinguish between
32 those traces for which code 5299 represents the actual circumstances associated with the recovered
33 weapon and those cases for which 5299 was assigned due to missing data. Any analyst using the data
34 would therefore be unable to separate those traces classified as weapons offenses from those trace
35 requests for which the crime code was missing and the default value of 5299 assigned. Mathiowetz Decl.
36 at p. 3 paragraph 6 lines 16-26.

1 coding schemes. *Id.*¹³

2 Dr. Mathiowetz's also found Mr. Nunziato's underlying assumptions to be outside
3 generally accepted survey methodology. For example, Mr. Nunziato treats all trace requests as
4 guns used in crime even though the data itself clearly contradicts such an assumption. *Id.* at p.4,
5 paragraph 8 lines 10-13. The various elements of the trace data file (specifically the trace,
6 weapon, individual, recovery, and dealer tables) reveal that a trace request (even one with a unique
7 serial number) cannot be relied upon to show that a particular gun was used in a crime or even in
8 the possession of the requesting law enforcement agency. *Id.* at p. 4 paragraph 8 lines 10-28, p. 5
9 lines 1-10.

10 For example, the database contains "fictitious traces," – entries which suggest that police
11 in possession of a firearm with one serial number missing would submit trace requests for every
12 potential serial number configuration (i.e. if the last number was missing, the officer would
13 request 10 different traces, each with a different last number from 0 to 9).

14 "If one looks at weapons for which the serial number has been obliterated, it is not
15 uncommon to find a series of trace requests in which the serial number for the
16 weapon varies by one digit. In these cases, the date of the trace request, the crime
17 code associated with the weapon, the birth date of the possessor of the weapon, and
18 other information pertaining to the recovery and submission of the trace request are
19 all identical. The nature of the requests suggest that for weapons for which the
20 serial number is obliterated, not all trace requests are associated with a recovered
21 weapon. In the illustrative case provided in Table 1, ten traces are all associated
22 with weapons for which the serial numbers are obliterated; the serial numbers range
23 from 311-96186 through 311-06186, all of the same model and caliber, all
24 associated with the same crime code (0999, homicide), all recovered on the same
25 date, same city, all in the possession of the same individual. The fact that all ten
26 trace requests are associated with weapons for which the serial numbers are
27 obliterated and that the serial numbers only vary by the 4th digit (from 0 to 9)
28 indicates a series of trace requests looking for any individual in whose hands to
place the gun."

23 *Id.* at p. 4, paragraph 9 lines 13-28, p. 5 lines 1-2 . Given Mr. Nunziato's profile technique, all ten
24 of these traces would be counted as sales of crime guns by the retail dealer(s) who sold the

26 ¹³ For example, among those traces submitted between 1990 and 2000, at least 10 percent
27 indicate one or more missing data elements for data elements listed as required on the trace request form.
28 In addition, examination of the data file reveals inconsistencies in the assignment of trace result status
codes. For example, among those trace requests assigned a status code of B8 indicative of a missing or
invalid manufacturer name, 17.7% have a legitimate manufacturer code associated with the trace request.
Use of the FTS for statistical estimation can result in erroneous conclusions.

1 firearms.

2 As Dr. Mathiowetz noted, from the perspective of a law enforcement tool, this kind of a
3 broad sweeping attempt to locate the purchaser of the weapon serves the very purpose for which
4 the BATF system was created; finding the owner or previous owners of the handgun. From the
5 perspective of statistical estimation, however, the result is a number of “fictitious” traces and the
6 false inflation of “crime guns.” *Id.* at p. 5 paragraph 8 lines 2-7.

7 **b. The Nunziato/Vince Technique Does Not Follow Generally Accepted**
8 **Statistical Analysis Methodology.**

9 Dr. William E. Wecker, former professor of mathematics and statistics at the University of
10 Chicago and University of California at Davis, also analyzed Mr. Nunziato’s approach and found
11 it outside accepted practice. Dr. Wecker testified to flaws in the reliability of the database and
12 noted his “great concern about the reliability of the whole process.” See, e.g. Wecker Deposition
13 Tr. at 143 at Defendant’s NOL Exhibit 17. In describing the lack of reliability of the database, Dr.
14 Wecker testified:

15 “I think it’s a serious problem and makes problematic any work that one would do
16 with a database of this kind, but I don’t think you can rule out that somehow you
17 could get lucky and somehow the mistakes don’t matter to something. So I don’t
18 think I can be categorical, that there’s absolutely nothing ever that could be done
19 with this database. But I’ve seen nothing that plaintiffs are trying to do that fits
20 into that category that gets a free pass. Everything they are trying to do would be
21 seriously undermined by the kinds of problems I’m seeing.

19 *Id.* at 130.

20 Plaintiffs’ own criminal statistics witness, Dr. James Fox, similarly admitted in his
21 deposition that he could not determine wrongdoing from the trace data,¹⁴ that even a high number
22 of traces would not prove it¹⁵, and that the differences in trace counts among dealers may be due to
23 sales volume¹⁶ or chance.¹⁷

24 “Q. I take it, Professor, you agree with the notion that a high number of traces does not
25

26 ¹⁴ Fox Deposition Tr. at 393-394, attached as Defendants NOL Exhibit 18.

27 ¹⁵ *Id.* at 77-78.

28 ¹⁶ *Id.* at 115-116 .

¹⁷ *Id.* at 390-392.

1 necessary mean that there has been any illegal or improper conduct by that FFL
2 [Federal Firearm Licensee] correct?

3 A. Yes, that's what I said."

4

5 "Q. Theoretically, all of the differences could be explained by sales volume, correct? . .

6 A. In theory they could all."

7 Fox Deposition Tr. at pp. 77-78, 115-116, 390-392, attached to Defendants NOL as Exhibit 18.

8 Despite the wealth of opinions against the general acceptance of the Nunziato/Vince
9 technique, Plaintiffs apparently still intend to offer their "opinions" that profiles derived from
10 trace database entries are accurate and reliable, that all database entries involve guns used in
11 crimes, that they can count up the number of entries "associated" with Andrews, run a profile of
12 statistical "indicators" from that data and then conclude that the company must have illegally or
13 improperly sold guns or diverted guns to criminals. Their novel technique is not generally
14 accepted within any of the relevant scientific communities and must not, therefore, be admitted.

15
16 **B. Mr. Nunziato and Mr. Vince are Not Qualified to Testify as to the Reliability of their**
17 **Technique**

18 The reliability of a novel scientific technique must be established by properly qualified
19 expert testimony. Only a scientist or other professional who regularly communicates with other
20 scientists or professionals in his or her field may assess the view held by the scientific community.
21 *People v. Coleman*, 46 Cal.3rd 749, 775 (1988); *People v. Kelly*, 17 Cal.3d 24, 31 (1976).

22 In addition, the expert who is to vouch for the acceptance of the new technique or method
23 must be impartial. For example, testimony of the creator of the test may be insufficient to
24 establish general acceptance within the scientific community. *People v. Brown*, 40 Cal.3rd 512,
25 533 (1985) reversed on unrelated grounds in *California v. Brown* (1987) 479 U.S. 538, 107 S. Ct.
26 837, 93 L.Ed.2d 934; *See also People v. Pizarro*, 10 Cal.App.4th 57, 79-80 (1992)(noting factors
27 such as career interest in acceptance of the tests and lack of formal training and background in the
28 applicable scientific disciplines as rendering witnesses unqualified to state the view of the relevant

1 scientific community of impartial scientists.) Impartiality turns on whether the expert is so
2 personally invested in establishing the technique's acceptance that he or she may not be objective
3 about disagreements within the relevant scientific community. *People v. Ashmus*, 54 Cal.3rd 932,
4 972 (1991).

5 In the present case, Mr. Nunziato and Mr. Vince are both unqualified and biased. Neither
6 Mr. Nunziato nor Mr. Vince are experts in survey sampling or statistics and both are professional
7 proponents of this new theory and principals in a consulting firm which stands to gain financially
8 should their technique gain acceptance here.

9 1. **Mr. Nunziato and Mr. Vince Are Not Professionally Qualified to Opine as to**
10 **Whether Their Technique Is Generally Accepted Within the Scientific**
Community

11 Mr. Nunziato admits he is not a statistician, computer expert, or expert in survey sampling
12 or quality control procedures with respect to sampling and statistical matters. Nunziato Deposition
13 Tr. at p. 102 line 22 through p. 103 line13, p. 507 line13 through p. 508 line 2, Defendant's NOL
14 Ex. 14. Similarly, Mr. Vince apparently does not claim any formal training in statistics or survey
15 methodology. As a result, they are not competent to testify as to whether their technique is
16 generally accepted within the statistics or survey communities.

17 2. **Mr. Nunziato and Mr. Vince Are Biased and Therefore Unqualified to Opine**
18 **as to Whether Their Technique Is Generally Accepted Within the Scientific**
Community

19 Mr. Nunziato and Mr. Vince are also so personally invested in establishing their technique
20 that they cannot be objective about disagreements within the relevant communities regarding it.
21 As a result, they are unqualified to opine on whether their method has achieved general
22 acceptance.

23 Mr. Nunziato admits that he was involved in creating the approach of using trace database
24 information to analyze national crime gun trafficking patterns. Nunziato Declaration at p. 2 lines
25 9-16, attached to Defendant's NOL as Exhibit 19. He and Mr. Vince are also principals in the
26 consulting firm Crime Gun Solutions, a company they describe as "devoted to the collection,
27 access, management, analysis and dissemination of crime-gun information." Nunziato NAACP
28 Report at p.2, paragraph 2, Defendant's NOL Exhibit 16.

1 For the past several years, Mr. Vince and Mr. Nunziato have attempted to create a cottage
2 industry in gun trace database analysis. Crime Gun Solutions initially offered its services to the
3 firearm industry. When that marketing approach did not pan out, they shifted their focus to
4 supporting plaintiffs efforts to force these same manufacturers and distributors to perform the
5 types of analyses Crime Gun Solutions provides. For example, in a case currently pending in New
6 York federal court, Mr. Vince testified:

7 “In the past, my firm has offered services to members of the industry to assist them
8 in analyzing the crime gun trace information they receive on a daily basis . . . We
9 have the expertise to provide various services to the members of the industry
10 should they care to take advantage of it. The services Crime Gun Solutions offered
11 to members of the industry in the past and which we could provide now include . . .
12 ‘Interpreting ATF’s gun-trace data involving their products. . . .’”

13 Vince NAACP Report at p. 6, paragraph 4, Defendants NOL Exhibit 19. Thus, Mr. Nunziato, Mr.
14 Vince and their consulting firm are not unbiased analysts of the proposed new technique. In fact,
15 they are “so personally invested in establishing the technique that they cannot be objective about
16 disagreements within the relevant scientific community regarding it.” Neither is therefore
17 qualified to testify to the general acceptance of their technique.

18 **C. Even If Their Technique Were Reliable, Mr. Nunziato and Mr. Vince Have Failed to**
19 **Follow Proper Scientific Procedures with Respect to Andrews**

20 Even if the Nunziato/Vince technique of using gun trace database profiles to assume illegal
21 or improper conduct were reliable, Mr. Vince and Mr. Nunziato have failed to follow proper
22 scientific procedures in this case. Thus, they fail on the third prong of Kelly as well.

23 The failure to perform proper statistical analysis can render expert opinions inadmissible,
24 even if the overall method would have satisfied Kelly. See, e.g. *People v. Barney*, 8 Cal.App.4th
25 798, 817 (1992)(statistical analysis must also be properly performed). Here, the method itself,
26 using unreliable statistical profiles created from unreliable trace entries as proof of illegal conduct,
27 is improper. But even if it were not, the unreliable data upon which Mr. Nunziato and Mr. Vince
28 base their attempts to perform statistical analysis and probability estimation with respect to
Andrews Sporting Goods does not show that Andrews illegally sold guns used in crime or

1 engaged in high risk business practices.

2 Mr. Vince apparently intends to assert that the Nunziato profile indicates Andrews
3 received a “high” number of trace requests, made a “high” number of multiple sales, a high
4 number of traces requests reflecting handguns with what he considers a short time to crime (less
5 than 3.5 and 1.5 years) as well as a number of completion codes (notations placed in the file at the
6 completion of a trace by the BATF) that he and Mr. Nunziato deemed “suspect.” All of this, Mr.
7 Vince says, should have put the company on notice that its guns were being illegally sold or
8 diverted into the illegal handgun market. While Andrews steadfastly maintains that the Nunziato
9 database is not reliable for the type of analysis he and his partner attempt here, when one takes a
10 careful look at the entries, they actually contradict the Nunziato/Vince theory that Andrews
11 illegally or improperly sold firearms.

12 1. **Mr. Nunziato’s Trace Database Entries Do Not Show That Andrews Illegally**
13 **or Improper Sold Handguns**

14 The most stunning revelation provided by Mr. Nunziato’s own database entries is that
15 *none* of the 1,267 traces Mr. Nunziato attributes to Andrews involved a purchaser who had
16 already been the subject of a trace. Wecker Decl. at p.2, paragraph 2. Since none of the purchasers
17 had previously been the subject of a trace, Andrews could not possibly have analyzed its trace data
18 and been “on notice” that these purchasers were somehow at risk for criminal behavior prior to
19 selling them the firearms.

20 The Nunziato/Vince multiple sales profile also dissipates when one shines a light on the
21 actual data. In a recent declaration, Mr. Vince claimed that Andrews must be doing something
22 wrong because the company had 1,037 multiple sale transactions (representing the sale of more
23 than 2,000 firearms) during the four year time period he claims at issue in this case. What Mr.
24 Vince didn’t tell the Court was (1) all of the firearms were part of legal multiple sales,¹⁸ (2) Mr.
25 Nunziato’s database listed only eight of those more than 2000 firearms as the subject of a trace
26 request with a violent crime code, and (3) of those eight, none were purchased by the same
27

28 ¹⁸ Multiple sale transactions were in legal in California at the time Andrews made all of the
multiple sales reflected in the multiple sale database entries.

1 original purchaser (i.e. the data does not support Mr. Vince's implication that multiple sale
2 purchases are actually multiple sale straw purchases).¹⁹ See Wecker Decl. at p.2 paragraph 4.

3 Again, none of the eight purchasers had been the subject of a trace request prior to
4 purchasing the firearms at issue. It is, therefore, extremely unclear how Andrews could have been
5 "on notice" that any of the multiple sale purchasers were somehow at risk for criminal behavior
6 prior to the sale. Especially given that many firearm collectors often make multiple purchases for
7 their own private collections.

8 The trend continues when one looks at the Vince's statements regarding the "high" number
9 of trace requests associated with Andrews Sporting Goods. Once again, the Nunziato data actually
10 contradicts Mr. Vince's conclusion.

11 When one eliminates entries which are (1) duplicates, (2) noted for health and safety code
12 violations, (3) default weapons possession codes²⁰, (4) nonviolent crime codes, and (6) entries
13 reflecting firearms sold prior to 1995, the number of trace requests listing Andrews is 31. Of
14 those 31, only 10 list a time to recovery of less than 1.5 years. See Wecker Decl. at p.2 paragraph
15 3. This is hardly a large number of traces, especially when one considers that Andrews has some
16 17 active locations which have collectively sold more than 175,000 firearms since 1995.

17 Similarly, with respect to Plaintiffs' "suspect completion code" analysis, even if one were
18 to assume the code entries are reliable and that some of them could be interpreted as indicating
19 "suspect" behavior (assumptions to which Andrews objects) Mr. Nunziato and Mr. Vince have,
20 once again, failed to produce data which proves up the conclusions they draw. For example, their
21 suspect completion codes include numerous entries which involve (1) time periods not at issue in
22 this lawsuit, (2) firearms not at issue in the lawsuit, (3) manufacturer rather than dealer conduct,
23 (4) nonviolent crime and/or (5) simply inaccurate data.

24 According to the Nunziato database, more than half of the completion codes he terms
25 suspect are part of trace requests which occurred before 1995 -- prior to the time period at issue in
26

27 ¹⁹ Straw purchases are scenarios in which a buyer who can lawfully purchase a handgun buys
28 for another who is legally prohibited from doing so.

²⁰ Weapons codes 5299 and 5212.

1 this case. Nearly one third do not refer to handguns, the only firearms at issue in this case. And,
2 nearly half relate solely to manufacturers' conduct, despite the fact that Andrews is a retail dealer,
3 not a manufacturer²¹

4 Even entries which arguably apply to Andrews do not support the Nunziato/Vince
5 opinions. For example, a number of the "suspect" completion codes are simply inaccurate. See
6 e.g., trace request T19960083029 which lists completion code D5 – "the dealer has no record of
7 receipt or disposition of the firearm being traced" and compare with Defendants NOL Ex. 22 at
8 pp. 1-2 showing that Andrews did in fact have such a record.

9 Similarly, Mr. Vince and Mr. Nunziato count trace request T19960014852 as suspect
10 because it lists completion code D2; "Dealer claims firearm was lost or stolen." In fact, Andrews
11 reported the firearm stolen from the store during a burglary on September 20, 1992, some four
12 years prior to the trace request at issue and three years prior to the time period at issue in this
13 litigation. See the West Covina Police Report detailing Andrews report of the crime, attached as
14 Defendants NOL Exhibit 22, at pp. 3-4. This is hardly proof of any suspicious conduct by
15 Andrews.

16 And finally, many of Mr. Vince's suspect completion codes are not associated with a trace
17 entry involving a violent crime. For example, trace requests T1996083029, T19960094603, and
18 T19960124590 are listed as involving health and safety code violations.

19 Given the unreliability of the Nunziato database, that none of the trace requests he lists
20 involved a purchaser who had previously been the subject of a trace, that only a small number of
21 multiple sale firearms were listed as the subject of a trace, that only a small number of trace
22 requests involved violence with a short time to crime, and the lack of truly "suspect" completion
23 codes, it is extremely unclear what Plaintiffs intend to claim Andrews did wrong or should have
24
25

26
27 ²¹ For example, the trace request entries T19900031992, T19900032768, T1991002284,
28 T19910025303, T19910025855, T19910028152, T19910028193, T19920009184, T19920014744,
T19920020322, T19920035095, T19930003161, T19930005469 each note that the "manufacturer claims
to have no record of [the] serial number...."

1 done differently.²² Clearly, analyzing Mr. Nunziato's data would not have put Andrews on notice
2 that the company was illegally or improperly selling handguns to criminals. Thus, Mr. Nunziato
3 and Mr. Vince failed to follow proper scientific procedures in their statistical analysis and,
4 pursuant to the third prong of Kelly, their opinions must be excluded.

5 IV.

6 CONCLUSION

7 Mr. Nunziato and Mr. Vince base their testimony on a new technique which does not meet
8 the strict requirements of Kelly or the Evidence Code. Their hunches and uncorroborated theories
9 lack foundation, are speculative, based on matter which is not of the type reasonably relied upon
10 by experts forming an opinion upon this subject matter and an improper attempt to substitute a law
11 enforcement profile for evidence of wrongdoing. At the very least, the probative value of their
12 theories is far outweighed by the probability their admission will necessitate undue consumption
13 of time and create substantial danger of undue prejudice. Andrews therefore, requests the court
14 exclude their testimony.

15 Dated: May 7, 2003

Respectfully submitted,

16 TRUTANICH • MICHEL, LLP:

17
18 /s/ C. D. Michel
C. D. Michel
19 Attorney for Andrews Sporting Goods, Inc., dba
20 Turner's Outdoorsman, and S.G. Distributing, Inc.

21
22 ²² One thing is certain, the BATF does not want Andrews to investigate its customers who have
23 been the subject of a trace after the fact. As late as last month, Terrence P. Austin, chief of the National
Tracing Center Division for the BATF confirmed the agency's position:

24 While important, the role of federally licensed manufacturers and dealers in responding
25 to trace requests is limited. Your understanding is correct that in the context of a trace
26 request, ATF only requests manufacturers and dealers to provide trace information in a
27 timely and accurate manner. ATF does not want licensees or members of the public to
28 interfere with ongoing criminal investigations by undertaking their own criminal
investigations. While the law and regulations enforced by ATF do not prohibit licensees
from undertaking any lawful follow-up action based on firearms trace information,
nonetheless we urge licensees not to undertake their own criminal investigations or take
any other action that might interfere with a specific ATF or other governmental
investigation unless directed to do so by a law enforcement agency.

See Defendants NOL Ex. 21 at p.2.

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA

3 COUNTY OF LOS ANGELES

4 I, Haydee Villegas, declare:

5 That I am employed in the City of San Pedro, Los Angeles County, California. I am over
6 the age eighteen (18) years and am not a party to the within action. My business address is 407
7 North Harbor Boulevard, San Pedro, California 90731.

8 On May 7, 2003, I served the foregoing document(s) described as **DEFENDANT**
9 **ANDREWS SPORTING GOODS' MOTION IN LIMINE NUMBER ONE TO EXCLUDE**
10 **ANTICIPATED TRIAL TESTIMONY OF PLAINTIFFS' GUN TRACE WITNESSES**
11 **GERALD A. NUNZIATO AND JOSEPH J. VINCE, JR. AND REQUEST FOR KELLY**
12 **HEARING** on the interested parties in this action by Justice Link Electronic filing on all persons
13 appearing on the Service List.

14 I declare under penalty that the foregoing is true and correct. Executed this 7th day of May,
15 2003, at San Pedro, California.

16
17 Haydee Villegas

18 Haydee Villegas
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