No. A103211, consolidated with No. A105309

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

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

BRIEF OF RESPONDENT MANUFACTURERS AND DISTRIBUTORS

(Respondents Jointly Submitting this Brief Are Listed on the Inside Front Cover)

James P. Dorr
James B. Vogts
Sarah L. Olson
Aimee B. Anderson
WILDMAN, HARROLD, ALLEN & DIXON LLP
225 West Wacker Drive
Suite 2800
Chicago, IL 60606-1229
(312) 201-2000

Lawrence J. Kouns (SB #95417)
Richard R. Spirra (SB #106361)
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway
Suite 2600
San Diego, CA 92101
(619) 236-1414

ATTORNEYS FOR RESPONDENT STURM, RUGER & COMPANY, INC.

(Additional Counsel Are Listed on the Inside Front Cover)

Service on Attorney General required by
Business & Professions Code Section 17200

RESPONDENTS SUBMITTING THIS BRIEF AND THEIR COUNSEL

B & B GROUP, INC. and S.G. DISTRIBUTING CO.

C.D. Michel (S.B. #144258)
TRUTANICH-MICHEL LLP
407 North Harbor Boulevard
San Pedro, CA 90731

BROWNING ARMS COMPANY

Denis J. Moriarty (S.B. #106064)
HAIGHT, BROWN & BONESTEEL LLP
6080 Center Drive
Suite 800
Los Angeles, CA 90045

William M. Griffin III
Jonann E. Coniglio
FRIDAY, ELDREDGE & CLARK
2000 Regions Center
400 West Capitol Avenue
Little Rock, AR 72201-3493

CARL WALTHER GmbH

Friedrich W. Seitz (S.B. #51536)
MURCHISON & CUMMING, LLP
801 South Grand Avenue
9th Floor
Los Angeles, CA 90017

COLT'S MANUFACTURING COMPANY, INC.

Robert C. Wright (S.B. #051864)
Laurie E. Barber (S.B. #149160)
WRIGHT & L'ESTRANGE
701 B Street
Suite 1550
San Diego, CA 92101

Thomas E. Fennell
JONES DAY
2727 North Harwood Street
Dallas, TX 75201

ELLETT BROTHERS, INC.

Alan J. Lazarus (S.B. #129767)
DRINKER BIDDLE & REATH LLP
50 Fremont Street
20th Floor
San Francisco, CA 94105-2235

EXCEL INDUSTRIES, INC.

Steven A. Silver (S.B. #143926)
LAW OFFICES OF
STEVEN A. SILVER
83 East Harrison Avenue
Porterville, CA 93257

GLOCK, INC., HI-POINT FIREARMS,
H&R 1871, INC. and KEL-TEC CNC INDUSTRIES, INC.

Denis J. Moriarty (S.B. #106064)
HAIGHT, BROWN &
BONESTEEL LLP
6080 Center Drive
Suite 800
Los Angeles, CA 90045

John F. Renzulli
RENZULLI, PISCIOTTI &
RENZULLI, LLP
300 East 42nd Street
New York, NY 10017

HECKLER & KOCH, INC.

Charles L. Coleman, III
(S.B. #065496)
HOLLAND & KNIGHT LLP
50 California Street
28th Floor
San Francisco, CA 94111-4624

INTERNATIONAL ARMAMENT CORPORATION

Raymond J. Liddy (S.B. #171343)
SELMAN BREITMAN LLP
402 West Broadway
Suite 400
San Diego, CA 92101

NATIONAL GUN SALES

Christopher L. Rudd (S.B. #130713)
Frank Sandelmann (S.B. #186415)
Jon-Jamison Hill (S.B. #203959)
GORRY, MEYER & RUDD LLP
2029 Century Park East
Suite 400
Los Angeles, CA 90067

NORTH AMERICAN ARMS, INC.

John A. Gladych (S.B. #13925)
GLADYCH & ASSOCIATES
4400 MacArthur Boulevard
Suite 230
Newport Beach, CA 92660

PHOENIX ARMS

Denis J. Moriarty (S.B. #106064)
HAIGHT, BROWN & BONESTEEL LLP
6080 Center Drive
Suite 800
Los Angeles, CA 90045

Michael J. Zomcik
TARICS & BRANISA, P.C.
5005 Riverway Drive
Suite 500
Houston, TX 77056-2196

RSR WHOLESALE GUNS, INC.

Wayne A. Wolff (S.B. #161351)
SEDGWICK, DETERT, MORAN & ARNOLD
One Embarcadero Center
16th Floor
San Francisco, CA 94111

SIGARMS, INC.

Robert M. Anderson (S.B. #75698)
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER
1055 West 7th Street
Suite 2700
Los Angeles, CA 90017

Robert L. Joyce
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER
3 Gannett Drive
White Plains, NY 10604

SMITH & WESSON CORP.

George J. Berger (S.B. #056548)
ALLEN MATKINS LECK GAMBLE & MALLORY
501 West Broadway
Suite 900
San Diego, CA 92101

Jeffrey S. Nelson
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108

STURM, RUGER & COMPANY, INC.

Lawrence J. Kouns (S.B. #95417)
Richard R. Spirra (S.B. #106361)
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway
Suite 2600
San Diego, CA 92101

James P. Dorr
James B. Vogts
Sarah L. Olson
Aimee B. Anderson
WILDMAN, HARROLD, ALLEN & DIXON LLP
225 West Wacker Drive
Suite 2800
Chicago, IL 60606-1229

TAURUS INTERNATIONAL MANUFACTURING, INC. and FORJAS TAURUS S.A.

Denis J. Moriarty (S.B. #106064)
HAIGHT, BROWN & BONESTEEL LLP
6080 Center Drive
Suite 800
Los Angeles, CA 90045

Timothy A. Bumann
Bridgette E. Eckerson
BUDD, LARNER P.C.
127 Peachtree Street, NE
Suite 636
Atlanta, GA 30303

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' coordinated complaints seek to hold the defendant manufacturers and wholesale distributors[1] liable for harms associated with criminal firearms use in California without any evidentiary showing that defendants cause those harms or have the legal right or duty to control the third parties who are responsible – those who act criminally to sell, acquire and use firearms for illegal purposes. By claiming that defendants bear legal responsibility, plaintiffs disregard immutable principles of California law that define and limit liability and, in their place, have constructed an abstract theory of culpability designed to achieve purely political ends. Their improper attempt to achieve those ends in a court of law rather than in a legislative forum is at odds with California law and should not be countenanced by this Court.

Plaintiffs' claims are based on a theory of public nuisance and alleged violations of Business & Professions Code § 17200 ("UCL"). They claim that defendants have created a public nuisance which is, they assert,

---

[1] Defendants submitting this Response Brief are firearm manufacturers and importers Browning Arms Company, Glock, Inc., Hi-Point Firearms, H&R 1871, Inc., Kel-Tec CNC Industries, Inc., Carl Walther, Colt's Manufacturing Co., Inc., Excel Industries, Inc., Taurus International Manufacturing, Inc., Forjas Taurus, S.A., North American Arms, Inc., Phoenix Arms, Heckler & Koch, Inc., International Armament Corp., Sigarms, Smith & Wesson Corp., and Sturm, Ruger & Company, Inc. Also joining in this response are wholesale distributors, B & B Group, Inc., S.G. Distributing Co., National Gun Sales, RSR Wholesale Guns, Inc. and Ellett Brothers, Inc.

an "unlawful" act under the UCL. They also assert that defendants' commercial distribution practices are "unfair" under the UCL. They do not claim that defendants are liable for violation of any of the extensive laws and regulations which govern firearm manufacture, distribution and sale, but that they are directly liable for alleged violations of law committed by non-defendants – federally licensed, independent retail dealers of firearms, as well as for the illegal acts of "straw purchasers," thieves and other unidentified individuals who acquire firearms outside the regulated channels of firearm distribution and sale.[2]

In the trial court, plaintiffs conceded that they did not have factual support for their claim that defendants caused unlawful acquisitions. They admitted that they had "not sought to obtain" specific factual evidence that firearms manufactured or distributed by defendants were acquired from retail dealers in the ways claimed and, rather than provide evidentiary support for their claim that a causal nexus exists between any defendant's commercial conduct and a criminal's subsequent acquisition of a firearm, plaintiffs responded that they "are not required to prove causation or harm."

---

[2] Plaintiffs assert that criminals and other prohibited persons acquire firearms through illegal sales by federally licensed retailers, illegal gun show sales, illegal straw purchases from licensed retailers, illegal sales by licensed retailers conducting business from non-storefront locations, thefts from retailers and lawful sales of multiple firearms by retailers to the same customer who has a criminal intent to resell those firearms on the street to prohibited purchasers. Plaintiffs' Opening Brief ("Pltfs' Opening") at 7; 1JA00145-47.

26JA07296-7308. The trial court properly found that there was "no evidence . . . establishing a triable issue that any act or omission on the part of these moving defendants constitutes a substantial factor contributing to gun violence in California." 61JA17858-858A. The trial court also correctly found no "authority for the proposition that defendants' inaction [in preventing firearm violence in California] is violative of any duty imposed by law or public policy . . . ." 61JA17858A.

The trial court was correct in its assessment of the factual record and its application of California law. Where a plaintiff cannot produce evidence of an essential element of its cause of action, no triable issue of fact exists. *See* Code Civ. Proc. § 437c(p)(2). Here, defendants demonstrated that plaintiffs could not establish an essential element of their claim that defendants are directly liable for the harms resulting when third parties criminally acquire, sell or use firearms: causation. Plaintiffs could not present factual evidence establishing a causal connection between the conduct of any of these defendants and the criminal sale, acquisition or use of any firearm by a retailer or criminal in California.

In the absence of this evidence, plaintiffs are effectively left with a claim for vicarious liability against the defendants. However, manufacturers and distributors of lawfully manufactured, non-defective products do not have a legal duty to prevent criminal acts of independent third parties who may possess or use those products, in the absence of a recognized special

relationship which confers control by the manufacturer or distributor over the criminal actor. The absence of control is fatal to any claim of legal responsibility. *Todd v. Dow* (1993) 19 Cal.App.4th 253, 259. Plaintiffs could not present this essential proof as a predicate to imposition of a vicarious duty to prevent third parties from acting criminally. In the absence of this evidence, plaintiffs' public nuisance and UCL claims fail as a matter of law.[3]

The trial court's ruling should be affirmed for additional reasons: First, plaintiffs produced no evidence in support of their UCL claim that any defendant's business practices were "unfair" or "unlawful." Second, plaintiffs' claims do not fall within the parameters of California public nuisance law, which does not recognize a cause of action for the lawful manufacture and sale of non-defective products. Nor does their evidence support an essential element of a public nuisance claim – that defendants controlled the alleged nuisance, characterized by plaintiffs as the "crime gun problem." Finally, under the doctrine of judicial abstention, a court of equity is within its authority to withhold its aid and refuse to revise and disrupt the extensive legislative and regulatory schemes already governing

---

[3] Plaintiffs abandoned their UCL claims of alleged deceptive advertising and unfair business practices based on alleged defects in firearm design. Pltfs' Opening at 5, n.1.

firearm manufacture, distribution and sale both in California and beyond its borders.

STATEMENT OF FACTS

A. Discovery of the Factual Basis for Plaintiffs' Claims That Each Defendant Caused the Criminal Acquisition of Firearms.

Nearly two years before the trial court granted summary judgment in defendants' favor, it granted defendants' motion to compel plaintiffs' production of factual evidence reflecting the manner in which each defendant's firearms had been acquired and used by criminals in California. 12JA03421-29. The motion to compel production of this evidence sought to discover (1) the factual basis on which plaintiffs had alleged that each defendant's firearms had been acquired in specific ways by criminals and (2) the factual basis on which plaintiffs claimed the defendants were legally responsible for the alleged criminal acquisitions. *Id.* Defendants' motion was granted and plaintiffs were each ordered to "*disclose documents in their possession . . . which reflect how criminals and others acquired firearms manufactured and/or sold by defendants and previously identified by plaintiffs, and whether the manner of acquisition has a factual nexus to defendants' alleged conduct*" ("Order"). 13JA03568-69.

After entry of the Order, plaintiffs were given ample opportunity to provide their evidence and promised that production of a "large volume of [law enforcement] incident reports at issue in this case will supply

additional facts" supporting their assertion that specific firearms had been criminally acquired in the ways alleged.[4] 14JA03979. Defendants returned to the trial court on subsequent motions to enforce the Order, and extensions of time were given for plaintiffs to comply. *See* summary of discovery motion practice at 14JA03900-03. Ultimately, defendants presented their Motion for an Order Precluding Evidence That Defendants' Alleged Conduct Has Caused Acquisition of Firearms by Criminals and Other Prohibited Persons, because plaintiffs had failed to comply with the Order by producing factual evidence supporting the causation element of their claims. 14JA03896-3980. Defendants' motion was supported by declarations attesting to the absence of evidence in the documents produced by plaintiffs pursuant to the Order providing factual support for the claim that each defendant had caused criminal acquisition of firearms. JA2106002-6152. In opposition, plaintiffs did not dispute that they had not come forward with this factual evidence, but instead argued that they planned to prove causation, not through the factual evidence the trial court had ordered produced, but through expert testimony. Reporter's Transcript ("R.T."), pp. 617-18. The trial court observed:

---

[4] Although plaintiffs identified a small number of instances in which licensed retailers had acted criminally – and were convicted for their crimes – there was no evidence that any defendant knew of a retailer's intent to commit a criminal act or was otherwise complicit in the criminal conduct.

> Now, with any expert witness, or with any witness they are subject to an evidentiary foundational requirement for their opinions. At this point, I haven't a clue what that is . . . [H]ow can I direct this litigation . . . until I know whether or not there is an appropriate empirical foundation for those opinions or if they are, as you say, 'Judge, they are nothing more than policy arguments.'

R.T., p. 614. The trial court denied defendants' motion "without prejudice to the issues being renewed in the form of a motion for summary judgment." 22JA06154.

Plaintiffs' reliance on their experts to provide factual evidence that each defendant had directly caused criminal acquisition of firearms proved to be misplaced. Plaintiffs' experts did not present factual evidence of illegal sales, acquisitions or uses of firearms that were causally connected to any defendant's affirmative conduct. Moreover, plaintiffs' experts conceded that they did not have or even look for a factual predicate to support an opinion that any defendant had engaged in wrongdoing and that they did not hold such opinions. *See* 21JA05990-5994; 22JA06183-6278. In addition, those experts conceded that Bureau of Alcohol, Tobacco and Firearms ("BATF") trace data, which plaintiffs contend provides evidence of defendants' liability, did not demonstrate wrongdoing on the part of any defendant.[5] 22JA06189; 22JA06197-203; 22JA06262.

---

[5] A firearm trace is the process of tracking a recovered firearm's history from its source (manufacturer/importer) through the chain of distribution

Plaintiffs' own witnesses also admitted that the information provided to law enforcement through firearms tracing is not probative evidence of whether a retail firearm sale was illegally conducted: the identification of a retailer in a firearms trace "in no way, shape or form" indicates a criminal act has been committed by the dealer. 22JA06281-82. The Chief of the Oakland Police Department admitted that "[i]t is neither implied nor inferred that the fact that these crime guns were traced back to these dealers, was due to any impropriety on the part of the seller." 57JA16784; *see also* 22JA06284-98.[6]

B. Defendants' Motion for Summary Judgment and the Trial Court's Ruling.

Defendants renewed their argument that plaintiffs lacked factual evidence that any defendant directly caused the criminal acquisition of firearms in their summary judgment motion, and submitted ten statements of undisputed material fact, each of which struck at the heart of plaintiffs' claim that each defendant had caused criminals to acquire firearms in each

---

(wholesaler/retailer) to the individual who first purchased the firearm. 21JA05861. The BATF has repeatedly "emphasize[d] that the appearance of a Federal firearms licensee (FFL) or a first unlicensed purchaser of record in association with a crime gun or in association with multiple crime guns in no way suggests that either the FFL or the first purchaser has committed criminal acts." *Youth Crime Gun Interdiction Initiative* at 17 (21JA05874).

[6] Courts have also rejected efforts to draw such evidentiary inferences from trace data. *See infra* section I.B.2., p. 31.

of the ways alleged by plaintiffs. 21JA05989-96. Each statement of undisputed material fact established that plaintiffs did not have factual evidence to support their claim.[7] Plaintiffs did not truly dispute defendants' statements of fact but instead offered a view of law and evidence without any basis in recognized legal principles, in which experts may create legal duties and assume facts and defendants can be directly liable for a third party's criminal acts without any evidence of a causal connection between those acts and any defendant's affirmative conduct. 25JA07239-94.

The trial court granted defendants' motion and found that plaintiffs had "failed to supply . . . any authority for the proposition that defendants' inaction [in not preventing illegal conduct by third parties] is violative of any duty imposed by law or public policy." 61JA17858.A. The trial court also found that under the UCL, "there must be some causal connection between the harm and some conduct of the defendants." 61JA17858. The trial court determined that there was "no evidence . . . establishing a triable

---

[7] For example, one of the defendants' undisputed material facts was: "There is no evidence of any incident in which the act or omission of a specific manufacturer or distributor defendant caused a criminal in California to acquire a specific firearm through an illegal sale by a federally licensed retail dealer." 21JA05990. The other undisputed material facts followed this form and addressed the absence of evidence reflecting the other methods of criminal acquisition alleged by plaintiffs: illegal straw sales, illegal gun show sales, thefts from retailers, and lawful sales of multiple firearms to the same purchaser. *See* 21JA05989-96. In response to defendants' statements, plaintiffs merely offered rhetoric and anecdote, not factual evidence on which liability can be based under California law.

issue that any act or omission on the part of these moving defendants constitutes a substantial factor contributing to gun violence in California." 61JA17859.

C. The Statutory and Regulatory Framework in Which Defendants Conduct Their Commercial Activities.

Plaintiffs' arguments in the trial court were not based on the law and evidence, but on their view of a preferable public policy in California regarding firearms in which manufacturers and distributors of firearms can be directly liable for criminal firearms violence regardless of fault and in the absence of essential elements of recognized causes of action. Their policy arguments ignore the legislative and regulatory framework that already governs defendants' business practices and informs the analysis of whether any defendant's practices were "unfair" under the UCL. The existence of this legislative and regulatory framework also provides the basis for this Court to abstain from involvement in the debate over the appropriate level of regulation of defendants' commercial activities.

Federal, state and local legislatures have established – and the BATF, the Federal Bureau of Investigation ("FBI"), the California Department of Justice ("California DOJ") and local law enforcement agencies regulate and oversee – the "distribution systems" of which the plaintiffs complain. *See* 18 U.S.C. § 921 *et seq.*; 27 C.F.R. § 478 *et seq.* and Cal. Penal Code § 12000 *et seq.*; *see also* Appendix A to Memorandum

of Points and Authorities in Support of Defendant Manufacturers' and Distributors' Motion for Summary Judgment ("Appendix A") (21JA05946) and Office of the Attorney General, State of California, Department of Justice, Firearms Division, at http://caag.state.ca.us/firearms. This existing legislative and regulatory framework dictates the kinds of firearms that may be manufactured and sold;[8] establishes the identifying information they must bear;[9] controls by whom they may be sold;[10] restricts to whom they may be sold by manufacturers, distributors and retailers,[11] or by "any person";[12] sets limits on where[13] and under what circumstances they may be sold;[14] defines the investigation, documentation and reporting that must accompany their manufacture and sale;[15] and much more.

Of specific significance to this appeal, firearm manufacturers, distributors and retailers are investigated, approved and licensed by the

---

[8] 18 U.S.C. § 922(v); Appendix A, 21JA05947-58.

[9] 18 U.S.C. § 922(k); 27 C.F.R. §§ 478.34, 478.92.

[10] 18 U.S.C. § 922(a); 27 C.F.R. §§ 478.41-.42; Appendix A, 21JA05967-75.

[11] 18 U.S.C. § 922(a)-(c).

[12] 18 U.S.C. § 922(d).

[13] 18 U.S.C. § 923(d)(1)(E); 27 C.F.R. §§ 478.11, 478.47(b)(5); Appendix A, 21JA05967-75.

[14] 18 U.S.C. §§ 922(a)-(d); 27 C.F.R. §§ 478.11, 478.47(b)(5), 478.100-.102; Appendix A, 21JA05977-80.

[15] 18 U.S.C. § 923(g); 27 C.F.R. §§ 478.121-.131.

federal government before they may produce, ship or sell firearms to anyone in interstate commerce. 18 U.S.C. § 922(a)(1). Manufacturers and distributors may only sell to licensed importers, licensed dealers or licensed collectors and may not sell firearms across state lines to any non-licensed entity or person. 18 U.S.C. § 922(a)(2). Retail licensees must certify under federal law that the business on the licensed premises is not prohibited by state or local law.[16] 18 U.S.C. § 923(d)(1)(F).

In California, retailers are also licensed by the state and city or county licensing authorities. Cal. Penal Code § 12071(a). Retailers who are appropriately licensed are designated "Certified Firearms Dealers" by the California DOJ and placed on a centralized list of all persons licensed to make retail sales. Cal. Penal Code § 12071(e)(1). Licensed retailers in California may not sell a firearm unless that specific sale to a specific purchaser has been directly approved by the California DOJ. Cal. Penal Code § 12072(c)(1).[17] In California, a ten-day waiting period requirement

---

[16] Commencing January 1, 2005, any manufacturer or distributor who intends to sell a firearm to a federally licensed retailer in California must first seek and obtain verification from the California DOJ that the retailer is properly licensed under federal, state and applicable local laws to make retail firearm sales. Cal. Penal Code § 12072(f)(1)(B) and § 12071(i).

[17] Before transferring a firearm to a purchaser, the licensed dealer must receive from the prospective buyer a "firearms transaction record" – Federal Form 4473 – which contains identifying information about the buyer and the firearm. 27 C.F.R. § 478.124. In completing Form 4473, the prospective buyer is required to certify that he does not possess any disqualifying characteristics. *Id.* A person who knowingly makes a false

is imposed, and if the California Department of Justice cannot determine the purchaser's eligibility to possess the firearm, the transaction will not be completed. Cal. Penal Code § 12072(c)(1). California additionally imposes a limitation on the number of handguns a person may purchase to "one gun a month." Cal. Penal Code § 12072(a)(9)(A). By statute, anybody transacting business at a gun show in California, whether a licensed seller or a private citizen, must comply with all federal, state and local laws governing firearm sales on licensed business premises, including the law enforcement background check, the ten-day waiting period and all paperwork requirements. Cal. Penal Code § 12071(b)(1)(B). A Dealer Record of Sale ("DROS") reflecting detailed information on the purchaser of firearms and the transaction must be electronically submitted by the retailer to the California DOJ. Cal. Penal Code § 12076. All licensed retail sellers of firearms in California are subject to the inspection authority of the BATF, the California DOJ and local law enforcement agencies. 18 U.S.C. § 923(g)(1)(A); Cal. Penal Code § 12071(f); Appendix A, 21JA05980-82. Comprehensive and detailed state and local statutes, codes and regulations

---

statement on Form 4473 commits a felony and may be imprisoned for up to five years. 27 C.F.R. § 478.128(a). It is also a federal crime for a licensed dealer to make a false statement or representation in connection with any record required under the Gun Control Act – including Form 4473. 27 C.F.R. §478.128(c).

in California also mandate training of retail purchasers,[18] criminalize straw purchases,[19] regulate secondary market transfers between private citizens,[20] require retailer liability insurance[21] and prohibit retail sales in residential areas.[22]

Plaintiffs could not present a factual basis to expand the existing statutory and regulatory duties imposed on the defendants or to conclude that any defendant had committed an "unfair" act that proximately caused criminals to acquire firearms. This failure of evidence justified summary judgment in defendants' favor.

STATEMENT OF ISSUES

1. Was summary judgment proper on plaintiffs' direct liability claims where plaintiffs did not present evidence of a causal connection between a defendant's affirmative acts and any third party's criminal acquisition, sale or use of a firearm?

2. Was summary judgment proper on plaintiffs' claims where the evidence failed to establish the existence of a special relationship,

---

18 Cal. Penal Code § 12800, *et seq.*

19 Cal. Penal Code § 12072(a)(4).

20 Cal. Penal Code § 12072(a)(4) and (g)(3).

21 21JA05975-77.

22 21JA05967-75.

conferring a right to control, between any defendant and any person who criminally sold, acquired or used a firearm?

3. Was summary judgment proper on plaintiffs' UCL claim where plaintiffs did not present evidence that any defendant committed an "unfair" or an "unlawful" act in its manufacture or distribution of firearms?

4. Was summary judgment proper on plaintiffs' public nuisance claim where the defendants lawfully manufactured and sold non-defective firearms in full compliance with all existing statutory and regulatory requirements?

5. Was summary judgment proper on plaintiffs' public nuisance claim where the evidence failed to demonstrate any defendant's control over the criminal use of firearms by third parties?

6. Was summary judgment proper under the doctrine of judicial abstention under which the court may abstain from revising, through injunctive relief, the extensive legislative and regulatory framework in which each defendant conducts its commercial activities?

STANDARD OF REVIEW

A defendant has met its "burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action . . . cannot be established." Code Civ. Proc. § 437c(p)(2). A defendant may do so through "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must

or may be taken or by showing that the plaintiff does not possess and cannot reasonably obtain needed evidence. *Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826, 853. The burden then shifts to the plaintiff to show the existence of a triable issue of one or more material facts with respect to each element of the cause of action. Code Civ. Proc. § 437c(p)(2). Where, as here, the parties had sufficient opportunity to develop their factual cases through discovery, and the defendants have made a sufficient showing that the plaintiffs' claims have no merit, the plaintiffs must produce substantial responsive evidence sufficient to establish a triable issue of material fact. *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1376.

On appeal after a summary judgment motion has been granted, the court reviews the record *de novo*, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334. A trial court's ruling on summary judgment must be affirmed if it is correct on any legal ground. *Barkley v. City of Blue Lake* (1996) 47 Cal.App.4th 309, 313 ("even if summary judgment was granted on an incorrect basis, we must affirm if it would have been proper on another ground").

ARGUMENT

Defendants presented ten straightforward undisputed material facts supported by evidence, in the form of admissions, declarations, and

documents, much of it from plaintiffs themselves and their experts, demonstrating that plaintiffs could not establish essential elements of their claims. 21JA05989-96. Plaintiffs' voluminous submission of documents notwithstanding, the trial court properly found that they could not "prove one or more of the elements of [their] cause[s] of action." Code Civ. Proc. § 437c(p)(2). The trial court's order granting summary judgment should therefore be affirmed.

I. PLAINTIFFS DID NOT PRESENT EVIDENCE OF A CAUSAL CONNECTION BETWEEN THE CONDUCT OF ANY DEFENDANT IN ITS LAWFUL MANUFACTURE AND SALE OF FIREARMS AND THE HARM ALLEGED BY PLAINTIFFS.

Plaintiffs assert that each defendant is directly liable under the UCL and public nuisance law for the criminal acquisition and use of firearms by third parties. There is no evidence supporting an essential element of those claims – the existence of a causal nexus between any defendant's conduct and the harm alleged.

A. An Essential Element of Plaintiffs' Theories of Liability Is Proof of a Causal Connection between Defendants' Conduct and the Illegal Acquisition and Use of Firearms.

Proof of a causal connection between a defendant's acts and a redressable harm is clearly required in both public nuisance and UCL cases. It is well settled in California that proximate cause is an element of public nuisance:

> Whether liability is based upon negligence or nuisance, the scope of that liability has been similarly measured: It extends to damage which is proximately or legally caused by the defendant's conduct, not to damage suffered as a proximate result of the independent intervening acts of others. As early as 1905, the principle had been established in California that liability in nuisance is limited by Civil Code section 3333 to "the amount which will compensate for all the detriment proximately caused thereby."

Martinez v. Pacific Bell (1990) 225 Cal.App.3d 1557, 1565 (citing *Coats v. Atchison Ry. Co.* (1905) 1 Cal.App. 441, 444). *See also Vasquez v. Alameda* (1958) 49 Cal.2d 674, 676; RESTATEMENT (SECOND) OF TORTS § 822 (1979) (for private nuisance, defendant's conduct must be legal cause of invasion of plaintiff's protected interests) and *id.* at § 822, cmt. a (subject to certain inapplicable exceptions, "the tort law of public nuisance is consistent with this Section") and cmt. e (concept of "legal cause" in this section is the same as for negligent and intentional torts). *Accord, People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1104-05 & n.3.

Likewise, causation is an element of any claim of "unfair" or "unlawful" business practices in violation of the UCL. The requirement that a plaintiff prove causation under the "unfairness" prong is implicit in the very definition of unfairness adopted by California courts. Determining whether a business practice is unfair under the UCL requires, at the very least, "an examination of *its impact on its alleged victim,* balanced against

the reasons, justifications and motives of the alleged wrongdoer." *Emery v. Visa Int'l Serv. Ass'n* (2002) 95 Cal.App.4th 952, 965; *Smith v. State Farm Mut. Auto. Ins. Co.* (2001) 93 Cal.App.4th 700, 718. Inherent in this test is the requirement that, while a plaintiff suing under the UCL need not prove that the challenged practice caused injury to himself, he must at least show that the practice has caused or threatens to cause harm to someone – members of the general public, a specific consumer or a competitor. *See Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 841 ("because plaintiff has sufficiently alleged injury *due to* defendant's conduct as described above, the Court concludes that plaintiff has standing to sue and has stated a claim under [Section 17200 of the UCL]") (emphasis added). *See also Pines v. Tomson* (1984) 160 Cal.App.3d 370, 380-81 (rejecting argument that plaintiffs, who were not competitors of defendants, lacked standing to bring a claim under section 17200 of the UCL, where plaintiffs alleged that "as *a direct and proximate result* of defendants' unfair business practice, members of the general public" had suffered injury) (emphasis added).[23]

---

[23] *Accord, Southwest Marine, Inc. v. Triple A Machine Shop, Inc.* (N.D.Cal. 1989) 720 F.Supp. 805, 808; *Motors v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 740; *People v. Duz-Mor Diagnostic Lab., Inc.* (1998) 68 Cal.App.4th 654, 662 (practice in question not unfair because, *inter alia,* it did not cause injury to consumers).

This Court recently predicted that the California Supreme Court would follow the federal standard for "unfair" in UCL "consumer" cases just as it followed the federal standard for "unfair" in "competitor" cases in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 185-86. *Lavie v. Proctor & Gamble Co.* (2003) 105 Cal.App.4th 496, 512, n.8. That standard rests in part on the Federal Trade Commission's definition of an "unfair" act as one that "causes or is likely to cause substantial injury to consumers." 15 U.S.C. § 45(n). Plaintiffs nevertheless argue that proof that any defendant caused harm is not required under the UCL. Plaintiffs are simply wrong, for multiple reasons.

First, of the four cases upon which plaintiffs rely,[24] three were decided on demurrer and one on a point of law irrelevant to the issue of causation. None of these cases addresses the question presented here: whether the plaintiffs have presented evidence of a causal connection between any defendant's acts and an injury to avoid summary judgment.

Second, the bulk of the cases on which plaintiffs rely involve claims of "fraudulent" advertising, rather than "unfair" or "unlawful" business practices. *See Children's Television*, 35 Cal.3d at 204 (defendants charged "with fraudulent, misleading and deceptive advertising in the marketing of

---

[24] *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197; *American Philatelic Society v. Claibourne* (1935) 3 Cal.2d 689; *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128; and *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254.

sugared breakfast cereals"); *American Philatelic*, 3 Cal.2d at 691 (defendant charged with marking and perforating certain issues of United States postage stamps so as to make them indistinguishable from other, more valuable issues, such that they could be fraudulently palmed off, injuring honest stamp dealers); *Prata*, 91 Cal.App.4th at 1133 (allegedly deceptive loan program advertisements). The test for a fraudulent business practice under the UCL – conduct which is "likely to deceive" members of the public – does not apply to allegations of "unfair" or "unlawful" business practices. *Children's Television*, 35 Cal.3d at 211. Plaintiffs' remaining case, *Bank of the West,* 2 Cal.4th 1254, addresses whether amounts paid in settlement of an "advertising injury" claim were "damages" for the purpose of an insurance provision which covered "unfair competition" and does not reach the relevant issue of whether causation is an element of an "unfair" practices claim.

Third, causation of harm or risk of future harm is evident or implicit in each of plaintiffs' cited cases. *See Children's Television*, 35 Cal.3d at 207, n.4 ("for many children, excessive sugar consumption will have serious and detrimental health consequences"); *American Philatelic*, 3 Cal.2d at 693 ("flooding of the market by said spurious articles [stamps] results, and will continue to result, in depreciating the value of the collections of stamps owned by the plaintiffs"); *Bank of the West*, 2 Cal.4th at 1263 (underlying fraudulent act described as "passing off" or "wrongful

exploitation of trade names and common law trademarks," implicitly assuming that such practice causes confusion, deception and injury). Plaintiffs' reliance on *Prata* is particularly misplaced since that case involved a loan program in which hidden requirements, finance charges and fees were assessed against plaintiff, causing obvious and direct injury to him. *Prata*, 91 Cal.App.4th at 1138.

Causation is unquestionably an essential element of claims in public nuisance and under the UCL. Plaintiffs' arguments to the contrary are without merit.

B. Plaintiffs Have Failed to Produce the Necessary Proof That Defendants Caused Harms Associated with the Illegal Sale, Acquisition and Use of Firearms by Third Parties.

"[T]o demonstrate actual or legal causation, the plaintiff must show that the defendant's act or omission was a 'substantial factor' in bringing about the injury. In other words, plaintiff must show some substantial link or nexus between the omission and injury." *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 778 (internal citations omitted). "Although proof of causation may be by direct or circumstantial evidence, it must be by 'substantial' evidence, and evidence 'which leaves the determination of these essential facts in the realm of mere speculation and conjecture is insufficient.'" *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 484.

Plaintiffs did not produce substantial and specific factual evidence that firearms sold by a particular defendant and used to cause harm in California were acquired by criminals through illegal straw purchases, illegal sales by retail dealers, illegal sales at guns shows, illegal sales by licensed dealers conducting business from non-storefront locations, thefts from retail dealers, or in any of the multiple ways alleged. 21JA05989-05995. Lacking this fundamental evidence, the next level of analysis – whether a remote manufacturer or distributor caused the illegal transaction or event to occur – cannot even be conducted. There can be no forest without trees, no house without bricks and no cause-in-fact without proof of an actual causal link between defendants' conduct and specific events of acquisition and misuse.[25]

---

[25] Plaintiffs assert that the trial court created an impermissible contradiction by finding that issues of fact existed, on the one hand, as to whether the practices of certain retailer defendants "facilitate the diversion of guns into the underground market" while finding on the other hand, that no issue of fact existed as to whether the practices of manufacturer and distributor defendants had the same result. Pltfs' Opening at 2 (citing 61JA17867.F-17867.G, 61JA17858). The trial court's ruling, in fact, is perfectly consistent and reveals a fundamental flaw in plaintiffs' theory of causation. It is retailers who actually make the sales which, although approved by the California DOJ, plaintiffs contend should not in many instances be made. The trial court found that triable issues of fact existed as to whether certain retailer defendants had caused firearms to be sold to criminals or persons intent on delivering them into an underground criminal market. Conversely, the manufacturer and distributor defendants do not make the retail sales about which plaintiffs complain – sales to straw purchasers, sales at gun shows, multiple sales – and cannot reasonably be held to have caused those sales to occur. The distinction is not contradictory, and was obvious to the trial court.

1. Expert opinions cannot substitute for factual evidence demonstrating the essential causal nexus.

In an effort to fill the evidentiary hole in their attempted proof that defendants are directly liable for causing criminal acquisition and misuse of firearms, plaintiffs offered what the trial court described as a "mountain of argument and 'evidence' most of which consists of inadmissible hearsay studies, monographs and reports." 61JA17857A. The substantial balance of plaintiffs' proffer consisted of declarations of experts and other witnesses, who essentially described the general awareness of firearm industry members that criminals acquire guns, the industry's concern about criminal firearm use and discussion among firearm industry members about the efficacy of measures they could voluntarily undertake. Plaintiffs' experts then offered their personal views of what defendants "should" voluntarily do to prevent third-party crimes, without regard to any duty to act imposed under California law, and based purely on speculation that any firearm would have been kept from a criminal in California if any defendant had acted differently. *See* 26JA07412-7465 and 26JA07488-7567. The trial court summarized the lengthy witness declarations submitted by plaintiffs as follows: "Taken in their entirety, plaintiffs' much publicized declarations . . . discuss what defendants 'ought to do' in light of generalized industry knowledge." 61JA17858.A.

Expert testimony cannot create a duty of care where a duty does not exist. *Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1438. Nor can expert testimony substitute for factual evidence. Though expert witnesses may analyze evidence, their testimony must be based on facts, not speculation or conjecture. *Noble v. Los Angeles Dodgers, Inc.* (1985) 168 Cal.App.3d 912, 918 ("The present case is a classic example of a plaintiff establishing what could be described as abstract negligence, in the context that the Dodgers' security didn't comport with plaintiffs' expert's or the jury's notion of 'adequacy,' but failing to prove any causal connection between the negligence and the injury"); *People v. Bassett* (1968) 69 Cal.2d 122, 146 (expert who never examined testatrix and accepted only those hospital records consistent with his own opinions could not "thus . . . lift himself by his own bootstraps. If his opinion is not based upon facts otherwise proved, or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence").

For this reason, California courts reject "ipso facto" expert explanations of events which do not actually establish cause-in-fact as to any specific injury. In *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, for example, plaintiff developed an infection after a retractor was left in his abdomen following surgery. Plaintiff's expert opined that a cause of the infection was the presence of the retractor. *Id.* at 1113. His opinion was based on a series of assumptions, including

that the retractor was contaminated, and that this contamination infected plaintiff. *Id.* at 1114. There was, however, no factual evidence supporting these assumptions. The Court of Appeal affirmed a trial court order striking the expert's opinions:

> [A]n expert's opinion based on assumptions of fact without evidentiary support or on speculative or conjectural factors has no evidentiary value and may be excluded from evidence.

Id. at 1116. The court therefore concluded that "proffering an expert opinion that there is some theoretical possibility the negligent act could have been the cause-in-fact of a particular injury is insufficient to establish causation." *Id.* at 1118 (citing *Saelzler*, 25 Cal.4th at 775-76).

Because expert testimony based on unsubstantiated assumptions is not evidence, California courts have not hesitated to dispose of claims on the ground that an expert's testimony is too speculative to establish causation, particularly where a plaintiff attempts to hold a defendant directly liable for the acts of independent third parties.[26] For example, in *Nola M. v. Univ. of Southern California* (1993) 16 Cal.App.4th 421, the plaintiff was attacked on a university campus. Although her expert testified

---

[26] California courts have also rejected expert testimony where it attempts to present hearsay evidence as if it were independent proof of fact. *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1525; *Stockinger v. Feather River Comm. College* (2003) 111 Cal.App.4th 1014, 1024-25.

that the university's security measures were inadequate, the court held that there was no evidence of causation:

> [A] trial in this type of case must do more than simply critique a defendant's security measures or compare them to some abstract standard espoused by the plaintiff's security expert. Yet that is precisely what happened here. Nola's expert found fault with all of USC's security efforts, including the physical plant, the number of guards and the way they worked, and explained how he could have done it better. But Nola's expert did not, and could not, say that more security guards or guards on foot instead of in cars or lower hedges or more light would have prevented Nola's injuries.

Id. at 435 (emphasis added). *See also Lupash*, 75 Cal.App.4th at 1438 ("A plaintiff . . . cannot use expert testimony as a conduit for speculative, remote or conjectural testimony *or to create the facts upon which a conclusion is based*") (emphasis added); *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1106; *Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1683 ("[T]he court is not bound by an expert opinion that is speculative or conjectural or that is based on an incorrect legal theory"); *Pacific Gas and Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1134 (where an expert's opinion is based on assumptions not supported by the record, his "opinion cannot rise to the dignity of substantial evidence").

The trial court properly rejected plaintiffs' effort to substitute assumptions and speculation, cloaked as expert testimony, for factual evidence of causation. Its decision should be affirmed.

2. Expert testimony cannot cure plaintiffs' failure to produce factual evidence of a causal nexus.

Plaintiffs' evidence fails because there is no specific factual evidence of affirmative wrongdoing on the part of any defendant. Indeed, their experts have conceded that they do not even hold the opinion that any defendant had engaged in wrongdoing, nor do they have a factual predicate for forming such an opinion. *See* 21JA05990-5994; 22JA06183-6278. Plaintiffs cannot now contradict these admissions in order to avoid summary judgment. *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652 (citing *Thompson v. Williams* (1989) 211 Cal.App.3d 566, 573-74 ("[a]fter-the-fact attempts to reverse prior admissions are impermissible" because a party cannot rely on contradictions in his own evidence to create a triable issue of fact)).

Based on the tracing of firearms recovered by law enforcement officers in California and around the country and certain "indicators" derived by law enforcement from trace data, plaintiffs argue that manufacturers and distributors "knew or should have known" that certain

retailers have committed "unfair" or "unlawful" business practices.[27] This contention is rebutted by plaintiffs' testimony and the testimony of their experts. Not one of plaintiffs' experts could opine that any specific defendant had engaged in wrongdoing or illegal activity based on the trace data, although each of them had analyzed the data. 21JA05989-96; 22JA06232-33; 22JA06262. To the contrary, plaintiffs' experts conceded that a concentration of traces does "not necessarily mean there's wrongdoing" on the part of the manufacturer, distributor or dealer. 22JA06210; 22JA06212; 22JA06220-21. They also conceded that plaintiffs' primary assumption – trace data by itself can be used to identify "high risk" or "corrupt" retail dealers – is fundamentally incorrect. 22JA06197; 22JA06200-21.

These concessions eliminate any triable issue of fact arising from law enforcement trace data. They are admissions against plaintiffs' interest, which cannot be disputed by subsequent declarations or argument in opposition to a summary judgment motion. *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 2 ("[w]here . . . there is a clear and

---

[27] This Court has concluded that it was an abuse of discretion to allow an expert to testify that certain facts were "indicators" of an employer's retaliatory intent and actions in a wrongful termination case. *Kotla v. Regents of the Univ. of California* (2004) 115 Cal.App.4th 283, 294. The Court found that expert testimony regarding "indicators" was an impermissible substitute for direct evidence, which invaded the province of the jury and lacked reliable foundation. *Id.* at 291.

unequivocal admission by the plaintiff, himself, in his deposition . . . we are forced to conclude there is no substantial evidence of a triable issue of fact") (citing *King v. Anderson* (1966) 242 Cal.App.2d 606, 610). In *D'Amico*, the court reasoned:

> [W]hen such an admission becomes relevant to the determination, on a motion for summary judgment, of whether or not there exist triable issues of fact (as opposed to legal issues) between the parties, it is entitled to and should receive the kind of deference not normally accorded evidentiary allegations in affidavits.

11 Cal.3d at 23; *see also Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 860 (plaintiffs' statements in declaration opposing summary judgment contradicted deposition testimony and were properly disregarded); *Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613 ("admissions or concessions made during the course of discovery govern and control over contrary declarations lodged at a hearing on a motion for summary judgment").[28]

---

[28] For this reason, plaintiffs' assertion that the trial court "drew factual conclusions adverse to plaintiffs in violation of basic principles of summary judgment," Pltfs' Opening at 26, is fundamentally wrong. As reflected in the trial court's order, the court summarized plaintiffs' evidence, but refused to overlook the admissions that plaintiffs' experts and fact witnesses had made in the course of discovery, consistent with California law. 61JA17852-857A. As the trial court concluded, "Suffice it to say, plaintiffs' opposition evidence consists of instances of misconduct by retailers at the very end of the distribution chain," *id.* at 61JA17852, but "no expert could opine that any specific manufacturer or distributor had engaged in wrongdoing based on their analysis of the [trace] data. [Exhibit citations omitted.] *Based on this evidence*, there is no evidence

The BATF itself has expressly rejected the assertion that data collected from trace requests provide manufacturers with knowledge of misconduct by distributors or retailers.

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

Commerce in Firearms in the United States (February 2000) ("*Commerce in Firearms*") at 22 (38JA10983-84). Trace data is simply "a starting point" for further and more detailed law enforcement investigation, not evidence that a dealer has "supplied the illegal gun market." *Youth Crime Gun Interdiction Initiative* at 17 (21JA05874).

Courts have also specifically rejected an inference of causation through trace data analysis. *Hamilton v. Beretta U.S.A. Corp.* (2001) 96 N.Y.2d 222, 238-39, 750 N.E.2d 1055; *Hamilton v. Beretta U.S.A. Corp.* (2d Cir. 2001) 264 F.3d 21; *People ex rel. Spitzer v. Sturm, Ruger & Co.,*

---

before the Court establishing a triable issue that any act or omission on the part of these moving defendants constitutes a substantial factor contributing to gun violence in California." 61JA17858-858A (emphasis added).

Inc. (N.Y. App. Div. 2003) 761 N.Y.S.2d 192, 198-200.[29] Answering questions certified by the Second Circuit Court of Appeals, the New York Court of Appeals rejected the plaintiffs' contention that trace requests provide manufacturers and distributors with adequate information to support a conclusion that independent retailers had sold firearms to those not entitled under law to purchase them:

> While manufacturers may be generally aware of traces for which they are contacted, they are not told the purpose of the trace, nor are they informed of the results. The BATF does not disclose any subsequently acquired retailer or purchaser information to the manufacturer. Moreover, manufacturers are not in a position to acquire such information on their own.

Hamilton, 750 N.E.2d at 1065-66. Plaintiffs' experts confirmed that the BATF does not disclose trace data identifying retail dealers who sell firearms that are later recovered by law enforcement and traced by the

---

[29] Plaintiffs' reliance on *NAACP v. AcuSport, Inc.* (E.D.N.Y. 2003) 271 F.Supp.2d 435, *appeal pending,* is misplaced. Pltfs' Opening at 45. The federal district court in *NAACP* simply refused to apply the governing New York law embodied in *Hamilton* and *People ex rel. Spitzer*, particularly as it pertained to the probative value of trace data as evidence of retailer, much less manufacturer or distributor, wrongdoing. *People ex rel. Spitzer,* 761 N.Y.S.2d at 195. ("The N.Y. Court of Appeals has never recognized a common-law public nuisance cause of action based on allegations like those in this complaint"). *See also City of Philadelphia v. Beretta U.S.A. Corp.* (E.D. Pa. 2000) 126 F.Supp.2d 882, 899, *aff'd*, (3d Cir. 2002) 277 F.3d 415, 424 n.14 ("trace request information does not inform law enforcement agencies that a particular licensed distributor or dealer has committed an illegal act. Consequently, the trace request information does not put a gun manufacturer on notice that a specific distributor or dealer is engaged in unlawful firearm trafficking").

BATF. "Dealer identities have been redacted from the FOIA National Trace Database after 1996." 26JA07426. *See also City of Chicago v. Dept. of Treasury* (7th Cir. 2002) 287 F.3d 628, 632 ("it is [the BATF's] policy to withhold certain information in the Trace . . . Database[] for a certain number of years in order to protect against . . . interference with an open or prospective law enforcement investigation," including the "names and addresses of . . . dealers").[30]

Rather than producing proof that any defendant's conduct caused firearms to be illegally acquired or misused in California, plaintiffs start from the fact that firearms are criminally misused. They then attempt to

---

[30] While plaintiffs acknowledge that the BATF does not publicly disclose law enforcement trace information identifying retailers or purchasers of traced firearms for fear of jeopardizing ongoing law enforcement investigations, they assert that each defendant should nevertheless assemble the information themselves and "self-police" downstream sellers of the firearms that defendants manufacture and sell. Pltfs' Opening at 7-8. Plaintiffs offer only speculation that it would be feasible for any defendant to assemble confidential law enforcement information from third parties, and they present no authority that any defendant has the right to demand such information. *See Hamilton*, 750 N.E.2d at 1065 ("manufacturers are not in a position to acquire such information on their own"). Moreover, the information, if assembled, would not provide evidence that "the [retailer] or someone else is violating the law," but would require follow-up investigations of the type that the BATF, the California DOJ and local law enforcement agencies have the jurisdiction, authority and tools to conduct. *Commerce in Firearms* at 22. 38JA10983-84. In contrast, defendants do not have the legal authority to conduct investigations into possible criminal conduct and could potentially interfere with law enforcement investigations if they attempted to perform such investigations. *Hamilton*, 750 N.E.2d at 1065 (investigation of dealers "is neither feasible nor appropriate for the manufacturers").

manufacture a "causation" theory by linking that criminal misuse backward to undisclosed criminal acquisitions by individuals, to unspecified illegal sales by retailers or others, and then up the "distribution chain" to distributors and manufacturers.[31] This is, in essence, an effort to establish causation through temporal sequence, a practice condemned by California courts. *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 394. Because plaintiffs failed to present evidence demonstrating a cause-in-fact nexus between any defendant's business conduct and any actual harm or threat of future harm, the trial court correctly entered summary judgment in defendants' favor. Defendants cannot be held directly liable for the harms associated with criminal firearms use in California.

II. PLAINTIFFS DID NOT SUBMIT EVIDENCE SUPPORTING IMPOSITION OF A DUTY TO CONTROL THIRD PARTIES WHO ILLEGALLY SELL, ACQUIRE AND USE FIREARMS – EVIDENCE THAT IS REQUIRED FOR IMPOSITION OF VICARIOUS LIABILITY.

Plaintiffs seek to hold defendants directly liable for lawfully selling firearms to "federally-licensed gun dealers" because "some of those dealers sell vast numbers" of firearms subsequently recovered from criminals. Pltfs' Opening at 1. Plaintiffs do not contend that any defendant placed a

---

[31] Contrary to plaintiffs' argument, defendants do not claim that they must prove their case on a "gun-by-gun" or "incident-by-incident" basis. 25JA07246 and *passim*. Defendants do assert that California law requires plaintiffs to produce factual evidence that supports the proposition that firearms have reached the hands of criminals because of the acts or omissions of these defendants.

single firearm in the hands of a person not entitled by law and licensed by the government to purchase it. As the trial court correctly noted, "There is no competent evidence before the Court that any criminal acquisition can be attributed to conduct by the moving parties" (61JA17851) and "no expert could opine that any specific manufacturer had engaged in any wrongdoing . . . ." 61JA17858.

In the absence of any causal nexus tying any defendant to the illegal acquisition of any firearm and the alleged harm in California, plaintiffs are effectively left to assert a vicarious liability claim. Indeed, plaintiffs' allegations, though disguised by UCL and public nuisance labels, are that defendants are legally responsible for the conduct of third parties who themselves cause criminal acquisition, sale and use of firearms. Plaintiffs' tactical decision to label their claims as they have and not plead or prove that which is required to establish vicarious liability for the acts of another can be ignored. The court is obligated to look past the form of a pleading to its substance. *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 339; *Parnham v. Parnham* (1939) 32 Cal.App.2d 93, 96 ("It is not what a paper is named, but what it is that fixes its character").

The defendants and the retailers in question are legally, financially, and physically independent of each other. Plaintiffs have not alleged or demonstrated the existence of any agency, partnership, joint venture or other legal relationship between individual defendants and retail firearm

dealers that could support the imposition of vicarious liability on the defendants for the acts of retailers or individual criminals. They have not presented evidence that any defendant has the authority or the legal obligation to exert control over the commercial conduct of any firearm retailer. Nevertheless, plaintiffs argue that the defendants' "failure" to exert control over unidentified retail dealers is a basis for liability.

Plaintiffs' arguments are contrary to California law. Vicarious liability does not apply to UCL claims. *Emery*, 95 Cal.App.4th at 960. In *Emery*, plaintiff attempted to hold VISA liable under section 17200 for the conduct of third-party merchants in soliciting participation in illegal foreign lotteries, using the VISA logo and accepting VISA in payment. *Emery,* 95 Cal.App.4th at 960, 962. The plaintiff alleged that both an actual and ostensible agency relationship existed between VISA and the merchants using its name. The trial court granted VISA's motion for summary judgment, finding that the case was "misconceived factually and legally":

> A defendant's liability must be based on his personal "participation in the unlawful practices" and "unbridled control" over the practices that are found to violate section 17200 . . . .

Id. at 960 (citing *People v. Toomey* (1984) 157 Cal.App.3d 1, 15). The appellate court affirmed and held that "[w]e need go no further than to remind plaintiff that his unfair practices claim under section 17200 cannot be predicated on vicarious liability." *Id.*

Thus, to hold any manufacturer or distributor liable under the plaintiffs' UCL allegations for an illegal straw purchase at an independent retailer's place of business, for example, plaintiffs would have to factually establish that the straw purchase occurred, that the retailer acted unlawfully by knowingly selling to a straw purchaser, and also that the manufacturer or distributor of that firearm personally participated in the sale or had "unbridled control" over the retailer's sales practices and failed to act. Plaintiffs' evidence plainly fails to meet this challenge.

For similar reasons, one cannot be vicariously liable for a public nuisance created or maintained by another. *Martinez*, 225 Cal.App.3d at 1565. In *Martinez*, a parking lot attendant sought to hold a telephone company liable under a public nuisance theory for failing to remove a public telephone that allegedly attracted criminals to the site. *Id.* at 1559. Plaintiff was shot during a robbery and contended that Pacific Bell was vicariously liable for his injuries because it had failed to remove telephones after being informed that they were being used "primarily or exclusively for the purposes of conducting illegal drug transactions." *Id.* at 1560. The appellate court sustained the trial court's order granting defendant's demurrer, concluding:

> Neither public policy, nor the principles of nuisance or tort law, require the [defendant] company providing public telephones to assume the duty of preventing such users from intentionally committing crimes on adjacent

> property of another, or to bear vicarious liability therefore. We reject appellant's contention that venerable nuisance concepts should be manipulated so as to impose that duty and that vicarious responsibility on the owners of nearby property, who lack the legal or practical ability to control such criminal actions of third parties.

Id. at 1569-70.

Martinez rests on a solid foundation of California precedent which establishes that, regardless of the legal theory underlying the claim, vicarious liability may not be imposed on one party for the criminal acts of independent third parties, absent a relationship of actual control. *Medina v. Hillshore Partners* (1995) 40 Cal.App.4th 477, 484 (landowner cannot be liable for homicidal acts of gang members who congregate around his property); *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128 (county and sheriff's department not vicariously liable because their employees failed to prevent woman's ex-husband from murdering her in county courthouse); *Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1241 (members of subdivision association not vicariously liable for one member's failure to secure vicious dogs, which escaped his property and bit plaintiff). These and other cases establish that where no agency relationship is established, the party against whom vicarious liability is sought must have actual knowledge of and direct control over the specific acts of crime or negligence for which they are allegedly responsible. *Holman v. State* (1975) 53 Cal.App.3d 317, 335 (defendant "must have

known" of the particular dangerous condition to be liable for it; evidence or claims that it "should have known" are inadequate).[32]

Although plaintiffs complain that the trial court improperly incorporated duty concepts into its ruling, their arguments employ the language of duty.[33] Pltfs' Opening at 10 (defendants "could have obtained data" from retailers); *id.* at 26 (expert's conclusion that defendants "should" implement these safeguards); 26JO7454-7459, 26JO97488-500 at ¶¶ 13-20. Far from distancing themselves from the negligence concepts, plaintiffs embrace them and argue that defendants have failed to exercise reasonable care in the distribution of their products. Pltfs' Opening at 34-36.

---

[32] The trial court's ruling is also supported by substantial precedent from other jurisdictions. *See, e.g., City of Philadelphia,* 126 F.Supp.2d at 899; *Penelas v. Arms Technology, Inc.* (Fla. Ct. App. 2001) 778 So.2d 1042, 1044; *McCarthy v. Olin Corp.* (2d Cir. 1997) 119 F.3d 148, 157.

[33] Plaintiffs' criticism of the trial court's distinction between misfeasance and non-feasance is also flawed. Under California law, liability for nonfeasance is reluctantly imposed. *See Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112 (where defendant did not affirmatively act to create the peril, there is no duty to prevent the peril, in the absence of a special relationship). In attempting to demonstrate that courts have imposed UCL liability where defendants have failed to act, rather than affirmatively acting, plaintiffs rely entirely on cases where defendants' alleged omissions have violated existing statutes or regulations and constituted "unlawful" acts under the UCL. *See, e.g., Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26 (violation of the Cartwright Act); *People v. McKale* (1979) 25 Cal.3d 626 (violation of Mobilehome Parks Act and other statutes); *AICCO, Inc. v. Ins. Co. of N. Am.* (2001) 90 Cal.App.4th 579 (violation of Civil Code section 1457). These cases do not establish that a failure to act can form the basis for a UCL claim *where one has no duty to do so and where the failure does not violate any law or regulation.*

Having taken that stand, plaintiffs cannot ignore California law rejecting the imposition of a duty to prevent the unlawful acts of others without evidence of a special relationship between the parties or a relationship of control by the defendant over the criminal actor.[34] *See, e.g., Medina*, 40 Cal.App.4th at 486 (foreseeability of assault does not create a duty in the absence of a relationship); *Zelig*, 27 Cal.4th at 1129 (quoting *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1499 (same)); *Richards v. Stanley* (1954) 43 Cal.2d 60, 65; *Tanja H. v. Regents of the Univ. of Calif.* (1991) 228 Cal.App.3d 434, 440-41. Nor can plaintiffs rely on expert testimony to "create a legal duty of care where none otherwise exists." *Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1438 n.6 (citing *Benavidez*, 71 Cal.App.4th at 865).

Plaintiffs here failed to produce evidence that defendants exerted "actual" or "unbridled" control over independent retail sellers of firearms or had actual knowledge of wrongdoing by those retailers. In the absence of

---

[34] *Ileto v. Glock* (9th Cir. 2003) 349 F.3d 1191, *request for rehearing en banc pending*, does not support a contrary view. Disregarding substantial contrary California public nuisance law, a federal court in a 2-1 decision found that public nuisance allegations against firearms manufacturers survived defendants' motion to dismiss, just as the trial court in this case found that plaintiffs' unsubstantiated allegations survived defendants' demurrers. Here, the question is not whether a cause of action has been stated but whether plaintiffs' evidence is sufficient to create a triable issue of fact on essential elements of their claims – a question not reached by the court in *Ileto*.

this evidence, any theory of vicarious liability is unavailable to establish either public nuisance or UCL liability.

III. PLAINTIFFS DID NOT PRODUCE EVIDENCE OF OTHER ESSENTIAL ELEMENTS OF THEIR CAUSES OF ACTION.

Other reasons support the trial court's summary disposal of plaintiffs' case. First, none of the conduct alleged by plaintiffs meets the definition of "unfair" or "unlawful" under section 17200 of the UCL. Second, plaintiffs' evidence conclusively demonstrates that their case falls outside the recognized boundaries of California public nuisance law. Third, in the absence of proof that any defendant controlled the means by which criminals acquire firearms, no triable issue of public nuisance exists.

A. Plaintiffs Did Not Produce Evidence of an Unfair or Unlawful Act or Practice on the Part of Each Manufacturer and Distributor.

With regard to plaintiffs' UCL claim, the trial court properly found that "there is no evidence that [these defendants] are engaged in any activity which is unlawful or fraudulent." 61JA17858. Nor is there evidence that the defendants' conduct can be considered "violative of any duty imposed by law or public policy thus rendering their nonfeasance unfair within the meaning of section 17200." 61JA17858A.

Plaintiffs argue that defendants' business practices fall within either the "unlawful" or "unfair" prongs of section 17200. Their claim that these defendants have engaged in "unlawful" business practices rests entirely on

the assertion that "each manufacturer, distributor and dealer defendant has . . . creat[ed] a public nuisance in violation of Civil Code section 3479, *et seq.*" 25JA07260. Plaintiffs have expressly abandoned claims of unlawful practices against these defendants based on alleged violations of the myriad statutes that specifically create duties on the part of firearm manufacturers and distributors. 61JA17853A; 25JA07260. Moreover, as set forth in section III.B., below, plaintiffs have failed to prove essential elements of a public nuisance claim under California law, and their "unlawful" practices claim was therefore properly dismissed.

The crux of plaintiffs' UCL claim is that the defendants have engaged in "unfair" business practices by selling firearms to federally licensed retailers despite the purported existence of "indicators" that some of these retailers are "associated" or "linked" with firearms which are subsequently recovered from criminals by law enforcement. Pltfs' Opening at 1, 7, 28-29. Plaintiffs' position perverts the meaning of "unfair" business practices under California law.

While UCL section 17200 is "intentionally broad," it does not create unlimited liability for any act undertaken in the course of business. *Smith v. State Farm Mut. Auto. Ins. Co.* (2001) 93 Cal.App.4th 700, 719-20. In determining whether a practice is "unfair," courts "may not apply purely subjective notions of fairness," particularly in cases involving complex economic or social issues. *Cel-Tech*, 20 Cal.4th at 184. Because an

"undefined standard of what is 'unfair' fails to give businesses adequate guidelines as to what conduct may be challenged and thus enjoined and may sanction arbitrary or unpredictable decisions about what is fair or unfair," *id.* at 185, findings of unfairness must be "tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id.* at 186-87. This Court has observed that *Cel-Tech* suggests that "*any* claims of unfairness under the UCL should be defined in connection with a legislatively declared policy." *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1166; *see also Lavie*, 105 Cal.App.4th at 512, n.8; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940; *Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 854.[35]

Plaintiffs purport to "tether" their "unfair" business practices claim to California firearm laws, but they do not claim that defendants violated any of these laws. Instead, they predicate their "unfair" practices claim on their own overly simplistic and subjective interpretation of firearm policy in California: that imposition of liability on manufacturers and distributors who lawfully participate in the licensed "distribution system" is consistent

---

[35] Plaintiffs' reliance on cases involving claims of "fraudulent" business practices, articulating the standard of whether conduct is likely to deceive the public, is misplaced. Pltfs' Opening at 28 (citing *Bank of the West,* 2 Cal.4th at 1267 (relying on *Chern v. Bank of America* (1976) 15 Cal.3d 866, 876, and *Children's Television,* 35 Cal.3d at 211 (deceptive advertising cases)) and *South Bay Chevrolet v. Gen. Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 877 (claims that contract terms were likely to deceive)).

with "California's strong public policy to keep guns out of the hands of criminals."[36] *See* Pltfs' Opening at 29. Federal and California law and policy regulating firearms reveal a complex set of interlocking, sometimes competing, but legislatively balanced considerations. These include, for example, policies permitting those who are entitled under law to purchase, own and use firearms for socially beneficial purposes, such as law enforcement, self-protection, hunting and recreation, and prohibiting those who are not entitled under law from purchasing, owning or using firearms, in order to protect public safety. *See* Statement of Facts at pp. 10-14.

This is precisely the circumstance in which California courts have determined that the imposition of subjective or one-sided notions of "unfair" business practices would be improper. In *Gregory,* 104 Cal.App.4th 845, plaintiff attempted to rely on its interpretation of public policy to argue that the defendant leaseholder's maintenance of its commercial property in a vacant condition furthered urban blight, which

---

[36] Plaintiffs misstate the significance of the repeal of California Civil Code section 1714.4 and the remaining content of section 1714(a), implying that this event expresses a policy that the manufacturers and distributors of firearms are now fair targets for liability even absent the legal prerequisites for liability, such as duty, causation, control, or actual unfair or unlawful conduct. Although the repeal did eliminate a statutory defense available to firearm manufacturers in product liability litigation, it does not affect the existing articulation of common law product liability law or other branches of tort law. As to the present litigation, the repeal of section 1714.4 has no effect. As plaintiffs argued below, "[T]his statute never applied to the claims in this case." 25JA07250. Nor does its repeal.

was condemned by statute and was, therefore, an "unfair" practice under the UCL. The plaintiff argued that defendant's acts were "injurious and inimical to the public health, safety and welfare of the people." *Id.* at 854.

Rejecting plaintiff's position, this court found that the policy on which she relied was only part of a larger statutory framework, the whole of which could be seen "as harmonizing the policy of condemning blight with distant policies favoring the free use of property." *Id.* at 855. Balancing these competing policies "is a common legislative function," *id.*, the judicial assumption of which "would put the court in the untenable position of making or approving commercial decisions without clear guidelines." *Id.* at 856. Similarly, if business conduct is authorized legislatively, it cannot be considered "unfair competition." *Id.* at 720.

Criminal violence is a complex socio-psycho-economic problem of the first order. That fact, however, does not justify the inappropriate use of the UCL. Plaintiffs' claims place this Court at the center of the same policy debate waged by every legislative body – including the California Legislature – that has considered firearm legislation: how to harmonize the policy of keeping firearms out of the hands of criminals and other persons disqualified under law from possessing them with the policy of permitting access by authorized persons. The United States Code, Code of Federal Regulations, California Penal Code and local laws and ordinances represent the balancing of those multiple interests through requirements for federal

licensure of commercial firearm sellers, background checks and approvals of individual firearm purchasers, waiting periods, purchase limitations, design criteria, multiple restrictions on both commercial and private sales, and other laws and regulations governing how guns are manufactured, sold and possessed. Common to all these legislative declarations of public policy is this basic fact: the sale of firearms by federally licensed manufacturers and distributors to federally licensed retailers is an authorized business practice, strongly regulated but permitted and protected by law. Defendants' sale of firearms within the parameters of those laws and regulations cannot be "unfair" without completely disconnecting the definition of "unfair" business practices from legislatively declared policy at the federal, state and local levels.[37]

---

[37] In densely regulated industries, like the firearms industry, statutes and regulations governing the activities of its members should define the standard of care. *See Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547-553 (holding that a drug manufacturer satisfied its duty to warn by providing warnings in English as required by federal and state regulations). The standard of care for highly regulated industries is "peculiarly susceptible to legislative and administrative investigation . . . based on empirical data and consideration of the viewpoints of all interested parties." *Id.* at 553. "Lacking the procedure and resources to conduct the relevant inquiries, we conclude that the prudent course is to adopt for tort purposes the existing legislative and administrative standard of care." *Id.* Here, there is no allegation or proof that any defendant violated any statute or regulation to which plaintiffs purport to tether their "unfair" practices claim.

B. Plaintiffs Did Not Produce Evidence to Support Essential Elements of a Public Nuisance Cause of Action and, Therefore, Also Fail to Support Their Claim of "Unlawful" Business Practices.

This Court may affirm the trial court's ruling on any legally sound basis. *Barkley*, 47 Cal.App.4th at 313. Multiple such bases exist here.

1. Plaintiffs' evidence demonstrates that this case does not fall within the parameters of a California public nuisance claim.

Plaintiffs' own evidence conclusively demonstrates that their public nuisance claim falls outside the parameters of California public nuisance law. Plaintiffs broadly assert that defendants' regulated and lawful commercial sale of firearms to other federally licensed entities is a public nuisance. Pltfs' Opening at 1 (summarizing claims as based on defendants' "practice" of "indiscriminately supplying the universe of federally-licensed gun dealers"). Plaintiffs do not contend and have not produced evidence that any of the defendants violated a single one of the many laws and regulations that govern their business conduct. This evidence alone precludes a public nuisance claim based on statutory violations.

In over 900 California state decisions stretching back to 1851, no court has ever recognized a public nuisance cause of action for the lawful production, distribution and sale of non-defective products. Rather, California courts have accepted the theory only where (1) the purported nuisance involves a defendant's use of or effect on real property; and

(2) the purported nuisance arises from specific violations of statutes or ordinances.[38]

Indeed, the expansion of public nuisance law that plaintiffs envision has been expressly rejected by California courts. In *City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 587, the Court of Appeals rejected a public nuisance action brought against asbestos manufacturers, distributors and suppliers. The plaintiffs claimed that the deterioration of asbestos-containing building materials created a nuisance, arguing that "[t]he stream of commerce can carry pollutants every bit as effectively as a stream of water." *Id.* at 584-85.

The court rejected this claim, notwithstanding the seemingly broad definition of nuisance in Cal. Civ. Code section 3479, noting that public nuisance actions generally relate to the use or condition of property, not to the design, sale or condition of products. *Id.* at 586. Recognizing that the application of a nuisance theory to products "would become a monster that would devour in one gulp the entire law of tort," the court affirmed the

---

[38] In fact, the public nuisance cases plaintiffs cite in their Opening Brief all fall within these two categories. *See, e.g., Selma Pressure Treating Co. v. Osmose Wood Preserving Co.* (1990) 221 Cal.App.3d 1601, 1606-07 (allegedly contaminated property by those in control in violation of Water Code and Health and Safety Code); *City of Bakersfield v. Miller* (1966) 64 Cal.2d 93, 96 (alleged violation of municipal building codes); *County of San Diego v. Carlstrom* (1961) 196 Cal.App.2d 485, 488-89 (fire hazard created by materials stored without required county permit).

dismissal of the claim on the pleadings. *Id.* (quoting *Tioga Public School Dist. #15 v. United States Gypsum Co.* (8th Cir. 1993) 984 F.2d 915, 921).

Like the *City of San Diego* court, numerous courts across the country have expressly rejected efforts to expand public nuisance liability to apply to the lawful sale of non-defective firearms[39] and, more generally, to the lawful sale of non-defective products of other kinds.[40] Thus, under California law, the trial court properly granted summary judgment to defendants on plaintiffs' public nuisance claim.

2. Plaintiffs' evidence demonstrates an affirmative lack of control by defendants over the alleged nuisance.

Plaintiffs' evidence also establishes that defendants do not control the alleged public nuisance – the "crime gun problem" or "flood of guns" on California streets – an essential element of proof for their claim. Pltfs'

---

[39] *Penelas v. Arms Technology, Inc.* (Cir. Ct. Miami-Dade Cty. Dec. 13, 1999), 1999 WL 1204353 at *4 ("[p]ublic nuisance does not apply to the design, manufacture and distribution of a lawful product"); *City of Philadelphia*, 126 F.Supp.2d 882; *Camden County Bd. of Chosen Freeholders* (D.N.J. 2000) 123 F.Supp.2d 245, *aff'd*, (3d Cir. 2001) 273 F.3d 536, 540; *People ex rel. Spitzer*, 761 N.Y.S.2d at 197-98; *District of Columbia v. Beretta U.S.A. Corp.* (App.D.C. 2004) No. 03-CV-24, 2004 WL 905959 *1.

[40] *See, e.g., City of Bloomington v. Westinghouse Elec. Corp.* (7th Cir. 1989) 891 F.2d 611, 613 (no public nuisance action against manufacturer of PCBs based on pollution occurring because of improper waste disposal); *Detroit Bd. of Educ. v. Celotex Corp.* (Mich. App. 1994) 493 N.W.2d 513, 521 (manufacturers and sellers of purported defective products could not be held liable on a nuisance theory because it would "significantly expand, with unpredictable consequences, the remedies available to persons injured by products").

on California streets – an essential element of proof for their claim. Pltfs' Opening at 1. Indeed, plaintiffs' claim is predicated on defendants' "failure to" control this problem, resulting from the criminal acts of third parties.

Proof of control over the nuisance is an essential element of plaintiffs' nuisance claim. *Martinez*, 225 Cal.App.3d at 1569-70 ("We reject [the] contention that venerable nuisance concepts should be manipulated so as to impose . . . vicarious liability on owners of nearby property, who lack the legal or practical ability to control [the] criminal actions of third parties"); *see also People ex rel. Spitzer*, 761 N.Y.S.2d at 198 ("by asking this court to allow pursuit of a common-law public nuisance cause of action, plaintiff would have us summarily ignore: . . . the importance and fairness of considering such concepts as remoteness, duty, proximate cause and the significance of the indisputable intervention of unlawfully and frequently violent acts of criminals – over whom defendants have absolutely no control – who actually, directly and most often intentionally cause the cited harm . . . ."). In the absence of evidence that any defendant controlled the nuisance in question, the trial court properly granted summary judgment in defendants' favor.

IV. THE COURT SHOULD ABSTAIN FROM REVISING THE COMPREHENSIVE REGULATORY FRAMEWORK GOVERNING DEFENDANTS' COMMERCIAL ACTIVITIES.

Plaintiffs' claims for injunctive relief arise against the backdrop of an extensive legislative and regulatory framework which is the result of

governments attempting to weigh the various, often competing, interests associated with firearm ownership, sale and use in this country. Plaintiffs' claims are premised on the notion that a state Superior Court, rather than the United States Congress, the California Legislature, municipal legislative bodies and their administrative and regulatory designees, should assume the task of redesigning that framework and the specific guidelines under which firearms may be distributed by these defendants, and should thereafter assume the burden of monitoring their compliance throughout the country. Plaintiffs' claim for injunctive relief mandating new regulatory requirements and altered commercial relationships attempts to place those tasks squarely on the court.

As this and many other jurisdictions have recognized, the courts are the wrong institutions through which to achieve complex legislative ends. In case after case involving similar attempts to judicially legislate some form of "gun control," courts have wisely steered clear of the complex social, economic and political issues underlying the debate and referred plaintiffs to the legislative branches of government.[41]

---

[41] *See, e.g., People ex rel. Spitzer,* 761 N.Y.S.2d at 203-04 ("Whatever intentions or beliefs underlie this lawsuit's protective goals, the courts are not designed or equipped for such all-embracing new undertakings"); *Hamilton,* 750 N.E.2d at 1066 (in light of an extensive federal statutory and regulatory scheme, "we should be cautious in imposing novel theories of tort liability while the difficult problem of illegal gun sales in the United States remains the focus of a national policy debate"); *City of Philadelphia*, 126 F.Supp.2d at 902 ("[T]he recognition of the legal duty for

In this case, there is a substantial basis in California law for judicial abstention from revision of the already extensive legal and regulatory framework in which these defendants conduct their commercial activities. In *Desert Healthcare District v. Pacificare, FHP, Inc.* (2001) 94 Cal.App.4th 781, the court explained:

> [B]ecause the remedies available under the UCL, namely injunctions and restitution, are equitable in nature, courts have the discretion to abstain from employing them. Where a UCL action would drag a court of equity into an area of complex economic policy, equitable abstention is appropriate. In such cases, it is primarily a legislative and not a judicial function to determine the best economic policy.

Id. at 795.

In *People ex rel. Dept. of Transportation v. Naegle* (1985) 38 Cal.3d 509, plaintiff sought to enjoin outdoor advertising on Indian reservations as a public nuisance and as an "unlawful" business practice under the UCL. The court held that even if the defendant's "conduct could somehow be construed as violative of federal law, state court injunctive relief under the

---

manufacturers to victims of gun violence is a matter properly addressed to Congress or the Pennsylvania Legislature"); *McCarthy,* 916 F.Supp. at 372 ("As judges . . . [w]e are constrained to leave legislating to that branch of government"); *Patterson v. Gesellschaft* (N.D.Tex. 1985) 608 F.Supp. 1206, 1216 ("[T]he judicial system is, at best, ill-equipped to deal with the emotional issues of handgun control . . . . this is a matter for the legislatures, not for the courts"); *Halliday v. Sturm, Ruger & Co., Inc.* (Md. App. 2002) 792 A.2d 1145, 1158-59 ("[W]e have consistently recognized that common law principles should not be changed contrary to the public policy of the State set forth by the General Assembly of Maryland").

theory of unfair competition is inappropriate" because both state and federal agencies were charged with the responsibility of enforcing existing statutory proscriptions relating to such advertising. *Id.* at 523. In so holding, the court relied on *Diaz v. Kay-Dix Ranch* (1970) 9 Cal.App.3d 588, a case in which migratory farm workers sued under the predecessor of the UCL to enjoin employment of illegal immigrants. Holding that injunctive relief was improper, the court reasoned:

> Plaintiffs seek the aid of equity because the national government has breached the commitment implied by national immigration policy. It is more orderly, more effectual, and less burdensome to the affected interests, that the national government redeem its commitment.

Id. at 599.

The judicial abstention doctrine was applied by this Court in *California Grocers' Ass'n v. Bank of America* (1994) 22 Cal.App.4th 205, a case in which the plaintiff alleged that a bank's check-processing fees were unconscionable and violative of the UCL. This court held that injunctive relief was an abuse of discretion:

> Judicial review of one service fee charged by one bank is an entirely inappropriate method of overseeing bank service fees . . . 'The control of charges' . . . is better accomplished by statute or regulation authorized by statute than by *ad hoc* decisions of the courts . . . This case implicates a question of economic policy: whether service fees charged by banks are too high and should be regulated. "It is primarily a legislative and

> not a judicial function to determine economic policy."[42]

Id. at 218 (citation omitted); *see also Cel-Tech*, 20 Cal.4th at 185; *Foley*, 47 Cal.3d 694 at n. 31 ("Legislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties may present evidence and express their views); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 596 (Brown, J., dissent) ("The fact that the Legislature has adopted an institutional framework for dealing with the problem [availability of cigarettes to children] undermines the utility of privately prosecuted unfair competition suits as a statewide solution to a statewide medical and social problem"); *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1503 (improper for court to set minimum age requirement for car rentals because it was not permitted to engage in complex economic

---

[42] The concern over *ad hoc* court decisions in areas otherwise governed by regulations and regulatory agencies has particular force in this case. The injunctive relief requested by plaintiffs would necessarily apply only to those manufacturers and distributors who are respondents to this appeal. Plaintiffs did not bring suit against all manufacturers and distributors doing business in California or across the country. Those not sued would not be constrained in their business activities by such an injunction and would enjoy a distinct competitive advantage; more importantly, those not sued, and the defendants as well, could be subjected to an entirely different mandatory injunction prescribing their commercial activities in another court. This militates for legislative, rather than judicial, oversight. *See Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 694 ("significant policy judgments affecting . . . commercial relationships [are] better suited for legislative decision making").

regulation under the guise of judicial decision-making); *Gregory*, 104 Cal.App.4th 845, 855 (balancing of competing policies is a common legislative function); *Gatherer v. Purdue Pharma L.P.* (2002) No. BC257853, 2002 WL 32144622 *1 (Superior Court abstained from exercising jurisdiction over methods used to sell Oxycontin because "it would improperly intrude into the prescription drug industry that the federal government heavily regulates").

Judicial abstention is particularly appropriate where, as in this case, federal, state and local legislatures have acted extensively, and continue to do so, with regard to firearm manufacture, distribution, acquisition and use and where the question before the court is whether those legislative choices or those advanced by plaintiffs reflect the most ideal regulatory scheme. Plaintiffs' claims challenge not only the extensive, legitimate legislative decisions already made in California but those of other states.[43] Plaintiffs'

---

[43] The dormant Commerce Clause of the United States Constitution prohibits the imposition of one state's policy decisions on other states. *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 571 (one State may not establish "policy for the entire Nation . . . or even impose its own policy choices on neighboring States"). Plaintiffs attempt to use the UCL and public nuisance law to do precisely what the Constitution prohibits: to regulate other states' commerce in firearms by compelling manufacturers and distributors to make substantial changes in their methods of distribution and their legal and financial relationships with independent retail sellers to conform nationally with a legislative and regulatory framework imposed by a single court in California. This is constitutionally impermissible. *Healy v. Beer Institute* (1989) 491 U.S. 324, 336-37; *Air Transp. Ass'n. of Am. v. City and County of San Francisco* (N.D. Cal. 1998) 992 F.Supp. 1149, 1162 (city ordinance that regulated behavior in city and "elsewhere in

criticism of federal, state and local governmental enforcement of existing laws and regulations and legislative decisions to fund law enforcement and regulatory efforts are also matters that legislative and regulatory bodies, not courts, are best equipped to address. *See Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 138 ("The question of what type or level of regulation is adequate or appropriate is uniquely a question for executive or legislative policy choice . . . If the Department of Insurance is without resources to address this area of responsibility with the level of vigor the department finds appropriate, the department can report its inabilities to the legislature . . . .").

The trial court's decision granting summary judgment in defendants' favor is amply supported by the doctrine of judicial abstention. The trial court's order should be affirmed for this reason, as well as for the substantive legal and evidentiary reasons set forth above.

Am. v. City and County of San Francisco (N.D. Cal. 1998) 992 F.Supp. 1149, 1162 (city ordinance that regulated behavior in city and "elsewhere in the United States" held invalid under dormant Commerce Clause); *accord, Partee v. San Diego Chargers Football Co.* (1983) 34 Cal.3d 378, 385 (state antitrust law could not be invoked because "[p]rofessional football is a nationwide business"); *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 265; *San Diego Bldg. Trades Council v. Garmon* (1959) 359 U.S. 236, 246-47.

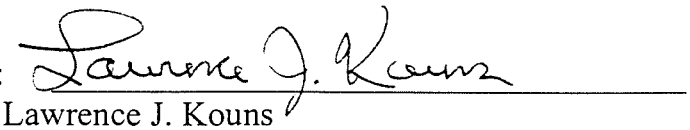
CONCLUSION

Because plaintiffs have failed to show the existence of triable issues of fact supporting the essential elements of their public nuisance and UCL claims, the trial court properly granted summary judgment in defendants' favor. The trial court's order should be affirmed.

WILDMAN, HARROLD, ALLEN & DIXON, LLP

and

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By: 

Lawrence J. Kouns
Attorneys for Respondent Sturm, Ruger & Company, Inc. on behalf of all respondents listed on inside cover pages

1962173.1

CERTIFICATE OF WORD COUNT

The text of Respondent Manufacturers and Distributors Opening Brief consists of 13,992 words, as counted by Microsoft Word, Version 2000, word-processing program used to generate the brief.

DATED: May 6 2004

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

By _____

Lawrence J. Kouns
Attorneys for.Respondent
Sturm, Ruger & Company, Inc.

1961901.1

PROOF OF SERVICE BY MAIL

People v. B & B Group, Inc.,

Case No.: A103211, consolidated with No. A105309

I, Marge Burglund, declare as follows:

I am employed with the law firm of Luce, Forward, Hamilton & Scripps LLP, whose address is 600 West Broadway, Suite 2600, San Diego, California 92101-3372. I am readily familiar with the business practices of this office for collection and processing of correspondence for mailing with the United States Postal Service; I am over the age of eighteen years, and am not a party to this action.

On May 6, 2004, I served the following:

BRIEF OF RESPONDENT MANUFACTURERS AND DISTRIBUTORS; APPENDIX OF NON-CALIFORNIA AUTHORITIES

on the parties listed below by placing a true copy (copies) thereof in a separate envelope(s), addressed as shown, for collection and mailing on the date indicated below pursuant to the ordinary business practice of this office which is that correspondence for mailing is collected and deposited with the United States Postal Service on the same day in the ordinary course of business: **SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Diego, California on May 6, 2004.

Marge Burglund

MARGE BURGLUND

1962502.1

APPELLATE COURT SERVICE LIST

PLAINTIFFS/APPELLANTS' ATTORNEYS

William S. Lerach
Frank J. Janecek, Jr.
Michael J. Dowd
Jonah H. Goldstein
Lerach Coughlin Stoia & Robbins LLP
401 B Street
Suite 1700
San Diego, CA 92101

Rockard J. Delgadillo
Don Kass
Office of City Attorney
200 North Main Street
1600 City Hall E.
Los Angeles, CA 90012

Dennis A. Henigan
Brian J. Siebel
Daniel R. Vice
Brady Center to Prevent Gun Violence
Legal Action Project
1225 Eye Street, N.W.
Suite 1100
Washington, DC 20005

Dennis J. Herrera
Owen J. Clements
Kristine A. Poplawski
Ingrid M. Evans
Office of City Attorney
1390 Market Street
6th Floor
San Francisco, CA 94102-5408

Patrick J. Coughlin
Ex Kano Sams II
Jason T. Baker
Milberg Weiss Bershad Hynes & Lerach, LLP
100 Pine Street
Suite 2600
San Francisco, CA 94111

Lloyd W. Pellman
Lawrence Lee Hafetz
Judy W. Whitehurst
Los Angeles County Counsel
500 West Temple Street
Suite 648
Los Angeles, CA 90012

Robert J. Nelson
Richard M. Franco
Lieff, Cabraser, Heimann & Bernstein, LLP
275 Battery Street
30th Floor
San Francisco, CA 94111-3339

Samuel L. Jackson
Gustavo L. Martinez
Office of City Attorney
980 9th Street
10th Floor
Sacramento, CA 95814

Michael Jenkins
Sayre Weaver
Educational Fund to Stop Gun Violence
1023 15th Street, N.W.
Suite 600
Washington, DC 20005

Manuela Albuquerque
Matthew J. Orebic
Office of the City Attorney
2180 Milvia Street
Berkeley, CA 94704

Thomas F. Casey, III
Brenda B. Carlson
Office of the County Counsel
400 County Center
Redwood City, CA 94063

Michael S. Lawson
Thompson, Lawson LLP
1714 Franklin Street
Suite 350
Oakland, CA 94612

Richard E. Winnie
Rose Kwiatkowski
Office of Alameda County Counsel
1221 Oak Street
Suite 450
Oakland, CA 94612

Legrand H. Clegg II
Celia Francisco
Compton City Attorney's Office
P.O. Box 5118
205 South Willowbrook Avenue
Compton, CA 90220

John A. Russo
Randolph W. Hall
J. Patrick Tang
Office of the Oakland City Attorney
One Frank Ogawa Plaza
6th Floor
Oakland, CA 94612

Emmerline Foote
Office of City Attorney
One Manchester Boulevard
Suite 860
Inglewood, CA 90301

Susanne N. Caballero
Bingham McCutchen LLP
3 Embarcadero Center
Suite 1800
San Francisco, CA 94111

Alan M. Caplan
Bushnell, Caplan & Fielding
221 Pine Street
Suite 600
San Francisco, CA 94104-2715

Charles T. McCue
Law Offices of Charles T. McCue
2985 Reynard Way
San Diego, CA 92103

Celia Elizabeth Francisco
Office of the City Attorney
205 S. Willowbrook Ave
Compton, CA 90220

DEFENDANTS/RESPONDENTS' ATTORNEYS

B & B GROUP, INC. and
S.G. DISTRIBUTING CO.

C.D. Michel
Trutanich-Michel LLP
407 North Harbor Boulevard
San Pedro, CA 90731

BERETTA U.S.A. CORP. and
FABBRICA D'ARMI PIETRO
BERETTA S.p.A.

Craig A. Livingston
Livingston Law Firm
1600 South Main Street
Suite 380
Walnut Creek, CA 94596

Lawrence S. Greenwald
Catherine A. Bledsoe
Gordon, Feinblatt, Rothman,
Hoffberger & Hollander, LLC
233 East Redwood Street
Baltimore, MD 21202-3332

BROWNING ARMS COMPANY

Denis J. Moriarty
Haight, Brown & Bonesteel LLP
6080 Center Drive
Suite 800
Los Angeles, CA 90045

William M. Griffin III
Jonann E. Coniglio
Friday, Eldredge & Clark
2000 Regions Center
400 West Capitol Avenue
Little Rock, AR 72201-3493

GLOCK, INC., HI-POINT FIREARMS,
H&R 1871, INC. and KEL-TEC
CNC INDUSTRIES, INC.

Denis J. Moriarty
Haight, Brown & Bonesteel LLP
6080 Center Drive
Suite 800
Los Angeles, CA 90045

John F. Renzulli
Renzulli, Pisciotti & Renzulli, LLP
300 East 42nd Street
New York, NY 10017

CARL WALTHER GmbH

Friedrich W. Seitz
Murchison & Cumming, LLP
801 South Grand Avenue
9th Floor
Los Angeles, CA 90017

COLT'S MANUFACTURING COMPANY, INC.

Robert C. Wright
Laurie E. Barber
Wright & L'Estrange
701 B Street
Suite 1550
San Diego, CA 92101

Thomas E. Fennell
Jones Day
2727 North Harwood Street
Dallas, TX 75201

EXCEL INDUSTRIES, INC.

Steven A. Silver
Law Offices of Steven A. Silver
83 East Harrison Avenue
Porterville, CA 93257

TAURUS INTERNATIONAL MANUFACTURING, INC. and FORJAS TAURUS S.A.

Denis J. Moriarty
Haight, Brown & Bonesteel LLP
6080 Center Drive
Suite 800
Los Angeles, CA 90045

Timothy A. Bumann
Bridgette E. Eckerson
Budd, Larner P.C.
127 Peachtree Street, NE
Suite 636
Atlanta, GA 30303

NORTH AMERICAN ARMS, INC.

John A. Gladych
Gladych & Associates
4400 MacArthur Boulevard
Suite 230
Newport Beach, CA 92660

PHOENIX ARMS

Denis J. Moriarty
Haight, Brown & Bonesteel LLP
6080 Center Drive
Suite 800
Los Angeles, CA 90045

Michael J. Zomcik
Tarics & Branisa, P.C.
5005 Riverway Drive
Suite 500
Houston, TX 77056-2196

HECKLER & KOCH, INC.

Charles L. Coleman, III
Holland & Knight LLP
50 California Street
28th Floor
San Francisco, CA 94111-4624

INTERNATIONAL ARMAMENT CORPORATION

Raymond J. Liddy
Selman Breitman LLP
402 West Broadway
Suite 400
San Diego, CA 92101

NATIONAL GUN SALES

Christopher L. Rudd
Frank Sandelmann
Jon-Jamison Hill
Gorry, Meyer & Rudd LLP
2029 Century Park East
Suite 400
Los Angeles, CA 90067

NATIONAL SHOOTING SPORTS FOUNDATION, INC. and SPORTING ARMS AND AMMUNITION MANUFACTURERS' INSTITUTE, INC.

Susan L. Caldwell
Koletsky, Mancini, Feldman & Morrow
3460 Wilshire Boulevard
8th Floor
Los Angeles, CA 90010

Douglas E. Kliever
101 D Street, S.E.
2nd Floor
Washington, DC 20003

RSR WHOLESALE GUNS, INC.

Wayne A. Wolff
Sedgwick, Detert, Moran & Arnold
One Embarcadero Center
16th Floor
San Francisco, CA 94111

SIGARMS, INC.

Robert M. Anderson
Wilson, Elser, Moskowitz, Edelman
& Dicker
1055 West 7th Street
Suite 2700
Los Angeles, CA 90017

Robert L. Joyce
Wilson, Elser, Moskowitz, Edelman
& Dicker
3 Gannett Drive
White Plains, NY 10604

SMITH & WESSON CORP.

George J. Berger
Allen Matkins Leck Gamble & Mallory
501 West Broadway
Suite 900
San Diego, CA 92101

Jeffrey S. Nelson
Shook, Hardy & Bacon L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108

ELLETT BROTHERS, INC.

Alan J. Lazarus
Drinker Biddle & Reath LLP
50 Fremont Street
20th Floor
San Francisco, CA 94105-2235

OTHER

Clerk of the Court
Supreme Court of California (5 copies)
350 McAllister Street
San Francisco, CA 94102-4783

Judicial Council
Carlotta Tillman
Civil Case Coordination
455 Golden Gate Avenue
6th Floor
San Francisco, CA 94102

Bill Lockyer
Attorney General – State of California
Department of Justice
1300 I Street
17th Floor
Sacramento, CA 95814

Steve Cooley
Los Angeles County District Attorney
18-709 Criminal Courts Building
210 West Temple Street
Los Angeles, CA 90012

Kamala Harris
San Francisco County District Attorney
Hall of Justice
880 Bryant Street
Room 325
San Francisco, CA 94103

Bonnie M. Dumanis
San Diego County District Attorney
Hall of Justice
330 West Broadway
San Diego, CA 92101

Clerk of the Court
San Diego Superior Court
330 West Broadway
San Diego, CA 92101

Office of the District Attorney
Appellate Division
P.O. Box X-1011
San Diego, CA 92112

PRODUCT LIABILITY ADVISORY COUNCIL, INC., AMICUS CURIAE FOR RESPONDENT

Harvey M Grossman
PO Box 360919
Los Angeles, CA 90036

James Beck
Dechert LLP
4000 Bell Atlantic Tower
Philadelphia, PA 19103-2793

Hugh F. Young, Jr.
Product Liability Advisory Council
1850 Centennial Park Drive, Suite 510
Reston, VA 21091

1962493.1