CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION ONE

Nos. A105309 and A103211

THE PEOPLE, EX REL. ROCKARD J. DELGADILLO
AS CITY ATTORNEY, et al.,
Plaintiffs/Appellants,
vs.
ELLETT BROTHERS, INC.,
Defendant/Respondent.

THE PEOPLE, EX REL. ROCKARD J. DELGADILLO
AS CITY ATTORNEY, et al.,
Plaintiffs/Appellants,
vs.
B & B GROUP, INC., et al.,
Defendants/Respondents.

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

[CORRECTED] APPELLANT'S REPLY BRIEF

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INTRODUCTION

Two years ago, the California Legislature added critical language to the California Civil Code expressing the policy of the State with respect to legal claims regarding firearms distribution:

> The design, ***distribution***, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section.

Cal. Civ. Code §1714(a) (emphasis added). The chief sponsors of the bill drafted a letter for the record to make clear the bill's intent, namely: "to preserve those causes of action against manufacturers and sellers of firearms and ammunition including, but not limited to, . . . public and private nuisance actions and statutorily based actions . . . ." Assemb. Daily J. 2001-2002, Reg. Sess., at 8232 (2002).

Defendants' multiple briefs, comprising 147 pages, pretend that this legislative policy does not exist. Instead, they rewrite the record, distort the law, and attempt to mislead this Court by repeatedly setting up and knocking over straw man arguments of their own creation. Their arguments ignore the core claims of plaintiffs' case.

First, defendants attempt to mislead the Court into thinking this case is something it is not – a tort case seeking damages brought by individual victims of gun violence. Accordingly, they ask the Court to apply a causation standard that would be relevant in such a case – *i.e.*, whether defendants' conduct was a "substantial factor" in injuring specific plaintiffs – to the wholly different case here. Plaintiffs' actual claims seek civil penalties and injunctive relief under Business and Professions Code §17200 and California's public nuisance statute for the harm and *risk of harm to the public* wrought by defendants' unfair and unlawful business practices. Section 17200 and public nuisance claims are fundamentally different in nature from negligence and many other types of tort claims. A plaintiff

seeking compensatory damages under negligence law must prove an actual injury to him or herself caused by defendants' negligent conduct. Under §17200 and public nuisance law, the core issue is the extent to which defendants have created an unreasonable and unnecessary *risk* to the community. A plaintiff can bring a §17200 claim seeking to impose civil penalties on someone who is engaged in dangerous unfair practices, regardless of whether anyone has yet been harmed. Likewise, a plaintiff can bring a public nuisance claim seeking injunctive relief against a manufacturer for threatening public health and safety. No California case has ever required plaintiffs to prove "substantial factor" causation of individual injuries to establish such claims, as defendants demand.

In addition to applying the wrong standard, defendants argue in defiance of the maxim that all evidence is to be construed against the moving party, and summary judgment denied if there remain disputed issues of material fact. Plaintiffs introduced more-than-sufficient evidence to establish defendants' *civil* liability under §17200 and public nuisance law. Unable to counter plaintiffs' evidence, defendants spend pages arguing that plaintiffs have not established that anyone is engaged in *criminal "wrongdoing"* – a claim that plaintiffs *did not make.*

Second, defendants argue they have no duty to control the conduct of members within their firearm distribution chains or the criminals who desire and wield their weapons. This feint conveniently ignores the defendants' own conduct – which is all that is at issue here – in steadily supplying a concentrated and identifiable number of high-risk firearms dealers who foreseeably and continuously supply guns to criminals in California. It also contradicts the law, as duty is not an element of §17200 or public nuisance claims.

Defendants pretend to be like passive, innocent, landowners plagued by criminal violence instead of the active creators of a system of

distributing lethal weapons that ensures that criminals will be armed. Passive landowners do not profit when criminals invade their premises, while defendant gun manufacturers and distributors profit handsomely when those they supply facilitate the diversion of defendants' guns into the criminal market. This is not a case brought against a landowner or businessperson who failed to protect his patrons from a one-time unforeseeable criminal attack. Firearms diversion into the criminal market occurs over and over again from the same high-risk dealers supplied by defendants, making this among the strongest cases for imposing a duty of care – if one were actually required under §17200 or public nuisance law.

Third, defendants similarly mischaracterize their role in contributing to the public nuisance of illegal guns in California, claiming they have no control over the ultimate user of their firearms, or even those within their own distribution chain. The former point is irrelevant, and the latter is both irrelevant and false. The critical fact, which defendants cannot challenge, is that defendants control who they supply guns to and the terms and conditions of those sales. The vast majority of gun dealers are linked to few if any crime gun traces, so high-risk gun dealers to which most crime guns are traced readily stand out from the norm. It is disingenuous for defendants to argue that their steady supply of these high-trace dealers (who also exhibit other evidence of high-risk business practices) in no way contributes to the illegal gun market in California. Plaintiffs need only show that defendants' conduct threatens harm to Californians to obtain injunctive relief under the public nuisance statute. Plaintiffs have in fact shown much more.

Defendants' other assertions – that public nuisance actions must be tied to property or to illegal conduct – have no legal foundation, and were recently rejected in separate cases before a panel of this Court, the Ninth

Circuit, and the Supreme Court of Indiana (interpreting a public nuisance statute identical to California's).

Fourth, defendants ask the Court to abstain from enjoining their offensive conduct, suggesting that only the Legislature can address firearms distribution issues. The Legislature summarily *rejected* this view when it amended Civil Code §1714 to affirm that the distribution of firearms is not exempt from the duty to use ordinary care. Moreover, if defendants' conduct is unfair or unlawful under the Business and Professions Code, it must be penalized. Regardless of the scope that injunctive relief might ultimately take in this case, there are no grounds for this Court to abstain from its proper role in adjudicating these claims.

The trade association defendants also fail to exonerate themselves. Their brief simply ignores the substantial and material evidence of their role in contributing to the public nuisance and defendants' unfair business practices. The trade association defendants also misconstrue the law as it applies to their active and affirmative support for the manufacturers' continuing supply of guns to high-risk dealers.

Contrary to defendants' hyperbolic rhetoric, this case does not threaten to expose defendants or any other supplier of a dangerous product to absolute and perpetual liability. If the evidence (here or in future cases) proves that defendants distribute their products in a reasonably safe manner, they will not face liability under the Business and Professions Code, public nuisance statute, or any other part of California law. The sky is not falling. Plaintiffs have presented evidence that these defendants have engaged in unfair practices and created a public nuisance. For such conduct, they should be as accountable as any other party. This Court should reverse the grant of summary judgment in defendants' favor, and remand this case for a trial on the merits of plaintiffs' claims.

ARGUMENT

I. DEFENDANTS' CAUSATION ARGUMENTS DISTORT THE LAW AND REWRITE THE FACTUAL RECORD

Summary judgment is unjustified unless defendants can show that one or more required elements of plaintiffs' causes of action cannot be established. Cal. Civ. Proc. Code §437c. Rather than address the elements of plaintiffs' claims, however, defendants largely attack elements of causes of action plaintiffs do *not* assert. Defendants also rewrite the factual record in defiance of the fundamental rule of summary judgment that the moving parties' evidence must be strictly construed and the opposing parties' evidence liberally construed, with any doubts as to the propriety of granting summary judgment resolved against doing so. *See Branco v. Kearny Moto Park, Inc.*, 37 Cal.App.4th 184, 189 (1995).

A. Plaintiffs' §17200 And Public Nuisance Claims Do Not Require Proof That Defendants' Conduct Was A "Substantial Factor" In Causing Specific Injuries; Defendants' Business Practices Need Only Cause Or Create A Risk Of Harm To The Public

As defendants repeatedly concede, to establish a §17200 claim for unfairness, plaintiffs need only show that defendants' business practices have "caused or *threaten[] to cause* harm to someone," including "members of the general public." Br. of Resp't Mfrs. and Distribs. ("Mfr. Br.") at 19 (emphasis added). *See also id.* at 21 (admitting "risk of future harm" provides basis for §17200 claim); Br. of Resp't Mfrs. Beretta U.S.A. Corp. and Fabbrica d'Armi Pietro Beretta S.p.A. ("Ber. Br.") at 16 (plaintiffs must show that defendants' business practices cause injuries or a "threat" of injury); *id.* at 31 n.35 (same). Under §17200, the question is not whether the act caused harm, but the extent to which it is *likely* to do so. *Bank of the W. v. Super. Ct.*, 2 Cal.4th 1254, 1267 (1992) (plaintiff "need not plead and prove the elements of a tort" to recover under §17200); *South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.App.4th 861, 877-

78 (1999).[1] This can be done using either the risk/utility analysis outlined in *Motors, Inc. v. Times-Mirror Co.*, 102 Cal.App.3d 735, 740 (1980), or the public policy test of *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal.App.3d 509, 530 (1984). *See* Pl.'s/Appellants' Opening Br. ("Pl. Br.") at 28.[2]

The reason that a threat or risk of harm is sufficient for liability for unfairness under §17200 is to effectuate the statute's unique nature and broad reach. The statute allows any person to seek relief from dangers for the sake of the public as a whole, rather than restricting standing or remedies to limited sets of aggrieved individuals, to enable the courts to respond to evolving business conduct that threatens harm to the public. *Barquis v. Merchs. Collection Ass'n*, 7 Cal.3d 94, 111-12 (1972).[3]

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[1] The prospective focus in many §17200 cases looks at whether the business practice is unfair such that it *risks* harm to "the interest of the general public." *Corbett v. Super. Ct.*, 101 Cal.App.4th 649, 664 (2002) (quoting §17200's predecessor statute) (citations omitted); *see also People v. Toomey*, 157 Cal.App.3d 1, 21 (1984) (discussing §17200's "objective of preventing future violations").

[2] This calculus would be no different if the Court applied the FTC test for unfairness that defendants urge. *See* Ber. Br. at 13, Mfr. Br. at 20. Under that standard, a practice can be unfair if it "causes *or is likely to cause* substantial injury." 15 U.S.C. §45(n) (emphasis added). As defendants' own authority notes, even if the California Supreme Court were to adopt this test, it would not introduce a reliance or damages requirement – or the related level of causation necessary to those requirements – into §17200 cases. *Lavie v. Proctor & Gamble*, 105 Cal.App.4th 496, 512 n.8 (2003).

[3] If §17200 simply incorporated the elements of common law torts, as defendants suggest, it would offer little protection to the public beyond that already provided by the common law tort system. Instead, §17200 "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable 'new schemes which the fertility of man's invention would contrive.'" *Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 181 (1999) (citations omitted); *see also People ex rel. Mosk v. Nat'l Research Co. of Cal.*, 201 Cal.App.2d 765, 772 (1962) ("[I]t would be impossible to draft in advance

Accordingly, the requirements of actual and proximate causation that must be satisfied for many tort claims simply are not elements of §17200 claims. *See Saunders v. Super. Court*, 27 Cal.App.4th 832, 839 (1994) ("A plaintiff suing under section 17200 does not have to prove he or she was directly harmed by the defendant's business practices.").

Similarly, a dangerous condition is a public nuisance and proof of a threat or risk is sufficient for a public nuisance claim. *See, e.g., Selma Pressure Treating Co., Inc. v. Osmose Wood Preserving, Inc.*, 221 Cal.App.3d 1601, 1604, 1620 (1990) (defendant "created or assisted in the creation of a public nuisance" where its chemical disposal practices "might threaten the safety of the underlying water supply" because of "the dangerous propensities of the waste chemicals"); *City of Bakersfield v. Miller*, 64 Cal.2d 93, 99-101 (1966) (building is public nuisance if it risks public safety); *County of San Diego v. Carlstrom*, 196 Cal.App.2d 485, 491 (1961) ("[t]he greater the number of people threatened, the greater becomes the need for abatement correction"). The storage of explosives or "harboring a vicious dog," for example, can be declared public nuisances without having to wait for an explosion or dog bite. W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* §90, at 643-45 (5th ed. 1984) (hereinafter "*Prosser and Keeton*"). The focus of public nuisance, like §17200, is on risk or danger, not injury. *See Motors, Inc.*, 102 Cal.App.3d at 740. That is especially true in this case, where plaintiffs seek only injunctive relief and not damages on their public nuisance claims. *Restatement (Second) of Torts* §821B cmt. i ("harm need only be threatened

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detailed plans and specifications of all acts and conduct to be prohibited, since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery.") (citations omitted).

and need not actually have been sustained at all" for injunction to be awarded on public nuisance claim).[4]

Although neither §17200 nor public nuisance claims require proof that defendants have already caused specific injuries, defendants insist that plaintiffs must prove which of their acts was a "substantial factor" in bringing about "the injury," Mfr. Br. at 22, a "specific injury," or a "particular injury." *Id.* at 25-26.[5] But the cases defendants cite for this – *Saelzer v. Advanced Group,* 25 Cal.4th 763 (2001) and *Leslie G. v. Perry & Assoc.*, 43 Cal.App.4th 472 (1996) – are both *negligence* cases in which injured individuals sought compensatory damages, not §17200 or public nuisance cases seeking injunctive relief and/or civil penalties. There is no comparison between the different causes of action. For example, while negligence and other torts focus on compensating individuals for past injuries and require proof that defendant's conduct was a substantial factor in causing those specific injuries, §17200 "focuses solely on conduct" and does not require "individualized proof of... injury... to prevent the use or employment of an unfair practice." *Albillo v. Intermodal Container Services, Inc.*, 114 Cal.App.4th 190, 206 (2003), quoting *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund*, 24 Cal.4th 800, 827 (2001);

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[4] Plaintiffs' public nuisance claim also gives rise to a claim for unlawful practices under §17200. *See Farmers Ins. Exch. v. Super. Ct.,* 2 Cal.4th 377, 383 (1992); Cal. Civ. Code §§3479-80.

[5] Defendants' "undisputed facts" attempt to take this even further. They asked plaintiffs to show that a specific "incident" involving a "specific firearm" was caused by an illegal sale completed in a specific manner, as if plaintiffs were pursuing a damages case based on specific injuries to specific individuals. *See* Mfrs. Br. at 9 n.7. This ignores the nature of the §17200 and public nuisance claims plaintiffs actually have made, which focus on the harm and risk of harm to the public from the 10,000 crime guns recovered in California each year and how those crime guns have been sold by defendants through high-risk dealers. *See infra* §I(B) (outlining plaintiffs' evidence).

Comm. on Children's Television, Inc. v. Gen. Foods Corp., 35 Cal.3d 197, 211 (1983). The inquiry is limited to whether defendants' conduct was unfair. *See, e.g., Prata v. Super. Ct.*, 91 Cal.App.4th 1128, 1144-46 (2001) (finding that trial court used wrong standard under §17200 in requiring individualized proof of harm); *Corbett*, 101 Cal.App.4th at 672 ("Under the UCL, a plaintiff need not show reliance or injury... the manner of proof differs between UCL claims and other tort claims").

Defendants' further argument, that plaintiffs must prove specific instances where their conduct caused harm, is invented out of whole cloth. The manufacturers' brief argues:

> 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 [gun] acquisition and misuse.

Mfr. Br. at 23.

Section 17200 cases do not require proof of a "brick" or a "tree" to establish that harm or risk of harm to the public is widespread or that defendants' conduct has contributed to that risk. *See, e.g., Smith v. State Farm Mut. Automobile Ins. Co.*, 93 Cal.App.4th 700, 721 & n.24 (2001) (finding §17200 claim established by general proof of danger that insurance companies' practice could result in unwanted and wasteful expenditure by insured, rather than requiring specific proof of actual harm); *Saunders*, 27 Cal.App.4th at 840 (finding that court reporters' contractual relationships with insurance companies could be an unfair practice if it risks compromising reports' impartiality, without suggesting that more specific proof of harm would be required); *Motors, Inc.*, 102 Cal.App.3d at 740 (describing risk-utility element of "unfairness" determination and mentioning no other causation requirement). In *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, 104 Cal.App.4th 508, 531 (2002), the court even affirmed a trial court award of civil penalties, injunctive relief, and

restitution for violations of §17200 "without proof that all consumers were deprived of money or property" by the unfair business practice.

The statute itself contemplates that no individualized harm is required: "Any person who engages, has engaged, or *proposes to engage in* unfair competition may be enjoined in any court of competent jurisdiction." Cal. Bus. & Prof. Code §17203 (emphasis added). Defendants' argument does not square with this provision, because surely there could be no "brick" or "tree" in a situation where the practice had not yet begun – yet the Legislature nonetheless allows liability in that situation.

Moreover, not even the lower court required plaintiffs to meet defendants' fabricated causation standard for the manufacturers or distributors.[6] In holding that plaintiffs provided sufficient evidence to defeat summary judgment by two *dealer* defendants, the court also never suggested that plaintiffs had proven their conduct caused "specific events of [gun] acquisition and misuse," or that they had to do so for liability under §17200. *See* Op. at 43-45 (61JA17867F-67H) (relying on expert testimony and trace data analysis of former Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") agents Joseph Vince, Jr. and Gerald Nunziato).

Defendants' demand for such proof is further undermined by their citation of *Pines v. Tomson*, 160 Cal.App.3d 370 (1984), in which plaintiffs brought §17200 claims seeking civil penalties and injunctive relief against publishers of a "Christian Yellow Pages" that accepted ads only from those affirming they are born-again Christians. The court held that plaintiffs alleged sufficient injury to the public from defendant's discriminatory practice to have standing under §17200, even though there was no allegation that specific members of the public suffered discrimination.

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[6] As explained in plaintiffs' opening brief, the lower court dismissed the manufacturers and distributors because it held they had no *duty*. Dismissal on this basis was wrong as a matter of law. *See* Pl. Br. at 33-38.

The decision in *American Philatelic Society v. Claibourne*, 3 Cal.2d 689 (1935), discussed in our opening brief, illustrates that the focus of claims under §17200 and its predecessor statute has always been on the creation of risk, eliminating the need for any proof of specific causation or harm. The suit sought an injunction against a defendant who was altering inexpensive stamps to look like rare stamps. There was no fraud or deception, as defendant sold only to dealers and stated clearly that the stamps were imitations. Plaintiffs, however, complained that defendant should have expected some of these dealers would be "unscrupulous" and try to pawn them off to third parties as the real thing, although this had not yet occurred. *Id.* at 692. The Court found that the risk of this happening was sufficient to state a claim under §17200. Plaintiffs were entitled to relief merely by showing the danger created by defendants placing the tools of fraud into the hands of dealers, the court held, and that it was no defense "that the threatened fraud can only be consummated with the cooperation of an unscrupulous dealer." *Id.* at 692, 699. *See also Children's Television*, 35 Cal.3d at 211 (allowing claim where "members of the public are likely to be deceived" without showing "actual deception" of specific individuals).

Defendants accept that in *Claibourne* the "threatened harm" was "direct," the "likelihood of harm virtually certain" and that "flooding the market with counterfeit stamps would *inevitably* defraud those who bought the counterfeits" even though no transactions had yet taken place. Ber. Br. at 15 n.22 (emphasis added).[7] Yet those same elements are even stronger in the present case. For example, instead of the *hypothetical* unnamed "unscrupulous dealers" of *Claibourne*, in this case plaintiffs' experts

[7] The manufacturers' brief admits that the "risk of future harm" was "evident or implicit" in the *Claibourne* case and that was sufficient to state a §17200 claim. Mfr. Br. at 21.

identified the real thing. Former ATF analysts Joseph Vince, Jr. and Gerald Nunziato analyzed the tracing path of nearly 40,000 crime guns recovered in California and testified that specific dealers utilized by specific defendants engaged in "high risk business practices that facilitate the diversion of guns into the underground market." *See* Pl. Br. at 7-12. The lower court was persuaded by this evidence on summary judgment. *See* Op. at 43-45 (61JA17867F-67H).

Further, in contrast to the *Claibourne* defendants, the defendants here know or should know who these high-risk dealers are, as ATF provides defendants with specific notice as to which of their guns – by serial number – are traced to crime, thereby allowing defendants to easily identify who within their own distribution networks sold those guns. *See Vince* ¶¶19-23 (26JA7508-09); *Higgins* ¶23 (26JA7496); 43JA12625-12629, 49JA14260 (letters from ATF to gun makers Taurus and Sturm, Ruger explaining that tracing data would allow them to determine whether a large number of traces were linked to specific dealers and adjust their "business practices" accordingly). Defendants' continued supply of these high-risk dealers certainly poses a greater threat of harm than was required for liability in *Claibourne*. Indeed, it actually causes great harm to the public in California.[8]

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[8] The manufacturers' brief argues the lower court was not inconsistent when it held, based on the trace data analysis of plaintiffs' experts, that the dealer defendants caused firearms to be diverted into the underground market in California, but then exonerated manufacturers supplying those very dealers by holding manufacturers had no *duty to prevent* the dealers' diversions. *See* Mfr. Br. at 23 n.25. This argument completely misses the import of *Claibourne*, which enjoined the sales practices of certain stamp makers, not the sales practices of any stamp dealers, on the mere *threat* that there *might* be "unscrupulous dealers" who *might* try to pawn off counterfeit stamps as real. *Claibourne*, 3 Cal.3d at 692, 699. Certainly gun makers must be at least as liable under §17200 when they continuously supply what the lower court termed "bad retail dealers in California" that

In the public nuisance context, the recent unanimous decision by the Indiana Supreme Court in *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003) illustrates why public nuisance claims for injunctive relief are, like §17200, also focused on the threat or risk of harm. The Indiana public nuisance statute is identical to California's. *Compare* Cal. Civ. Code §3479 *with* Ind. Code §32-30-6-6. The Court in *City of Gary* held that a gun maker's decision to create and maintain an "unreasonable chain of distribution of handguns [is] sufficient to give rise to a public nuisance." *City of Gary*, 801 N.E.2d at 1241. The Court explained that a public nuisance claim seeking injunctive relief "turns on whether the activity, even if lawful, can be *expected to* impose such costs or inconvenience on others that those costs should be borne by the generator of the activity, or the activity must be stopped or modified." *Id.* at 1231 (citing *Prosser and Keeton* §88, at 629-30) (emphasis added).

The Court firmly rejected the notion that doctrines of remoteness, proximate cause or difficulty of proof of damages bar public nuisance claims seeking injunctive relief. *City of Gary*, 801 N.E.2d at 1240. In a section devoted solely to the issue of injunctive relief, the Court explained why such claims can proceed where evidence of specific transactions causing harm is lacking or where plaintiff is unable to prove specific harm necessary to recover damages:

> For the reasons given, we agree that proof of damages from any specific use of an unlawfully sold weapon, or from the sale itself, may turn out to be so inextricably intertwined with other factors that as a matter of law the City [of Gary] may have difficulty in establishing a claim for money damages. However, *precisely because there may be no effective damage remedy we conclude that the City has stated a claim for*

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they know or should know "facilitate the transfer of guns into the wrong hands." Op. at 18 (61JA17857A).

> *injunctive relief.* Tort law has historically viewed injunctive relief as available only if there is no adequate remedy at law.

Id. at 1246 (emphasis added) (citing Dobbs, *Law of Remedies* §2.5, at 123 (2d ed. 1993)).[9]

The law in California is the same. *See, e.g., Anderson v. Souza*, 38 Cal.2d 825, 833-34 (1952) (granting injunctive relief for plaintiffs complaining of low flying airplanes even though their damages could not be measured); *Galbreath v. Hopkins*, 159 Cal. 297, 301 (1911) (enjoining defendant from draining rain water onto plaintiff's land when "[t]here was ... no evidence of any specific amount of damage in money she suffered thereby"); *Dept. of Fish and Game v. Anderson-Cottonwood Irrigation Dist.*, 8 Cal.App.4th 1554, 1564 (1992) (granting injunctive relief when statute immunizes defendant from monetary relief).

The public nuisance cases cited by defendants – *Martinez v. Pacific Bell*, 225 Cal.App.3d 1557 (1990) and *Vasquez v. Almeda*, 49 Cal.2d 674 (1958), *see* Mfr. Br. at 18, Ber. Br. at 17-18 – discuss causation in the context of plaintiffs seeking to recover *damages* for individualized injuries and are therefore irrelevant to a claim for prospective injunctive relief to prevent conduct from creating a risk of harm to the community at large.[10]

The specific causation demanded by defendants is also not required for plaintiffs' §17200 unlawfulness claim, which is based on defendants' contribution to a public nuisance in California. *See Hobby Indus. Ass'n of Am. v. Younger*, 101 Cal.App.3d 358, 372 (1980) (§17200 unlawfulness

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[9] Although plaintiffs cited the *Gary* decision at two places in our opening brief, *see* Pl. Br. at 33, 44, defendants ignore it entirely.

[10] Similarly, public nuisance cases plaintiffs rely on for other reasons, including *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1212 (9th Cir. 2003) and *City of Modesto Redevelopment Agency v. Super. Ct.*, 119 Cal.App.4th 28 (2004) involve claims for damages. Their discussions of "substantial factor" causation stem entirely from that fact.

claim does not require proof beyond what is required by the underlying statute, in this case the public nuisance statute; "[t]he only defense available is that the conduct is not unlawful"). As Beretta admits, "[u]nder the unlawful prong, a plaintiff need only show that a business practice violated some law... If the practice violates a law, the analysis ends." Ber. Br. at 31 n.35 (citation omitted).

B. Plaintiffs Have Provided Overwhelming Evidence That Defendants' Business Practices Have Caused And Pose A Risk Of Harm To The Public And Have Contributed To A Public Nuisance

Even though evidence of a threat of harm would be sufficient to defeat summary judgment in this case, plaintiffs have submitted more-than-sufficient evidence that defendants' business practices also cause harm to the public and contribute to an ongoing public nuisance.

The harm, and the public nuisance, is the large pool of crime guns in California. Every year on average, 10,000 crime guns, most of them handguns and a large percentage of which are new, are recovered by law enforcement in California and traced. The pool of California crime guns is actually much larger, as most crime guns are never recovered. *See* Pl. Br. at 6.

Defendants have continuously supplied this pool of crime guns by choosing to sell their firearms to the public through, among others, a concentrated and identifiable number of "high-risk" gun dealers that have sold large numbers of guns recovered in crime and traced, and whose sales practices exhibit other gun trafficking indicators identified by the Bureau of Alcohol, Tobacco, Firearms and Explosives. *See Vince* ¶¶47-53, 54-73 (26JA7516-19, 7519-23); *Nunziato* ¶¶43, 54-55 (26JA7426-27, 7431). Many of these dealers have sold dozens or even hundreds of guns traced to crime each year, year after year. *See Vince* ¶¶42, 44, 54, 63 (26JA7514-16, 7519, 7521); *Nunziato* ¶¶41, 43, 45, 47-49 (26JA7425-30); 32JA9129-

34JA9869 (profiles of crime guns sold by manufacturers, distributors and dealers).[11] However, it is not just high numbers of crime gun traces that causes these dealers to stand apart from the norm. Each of these high-risk dealers shows other unmistakable signs of facilitating gun trafficking, including: having numerous crime guns traced to the store that the dealer cannot account for, making a significant volume of multiple sales,[12] selling high numbers of guns that are recovered in a short "time-to-crime", and other factors. *See Vince* ¶¶37-73 (26JA7514-23); *Nunziato* ¶¶53-55 (26JA7431).

Defendants have chosen to continue selling their guns through these high-risk dealers even though they have a ready alternative and they know or should know who the high-risk dealers are. According to hundreds of thousands of crime gun traces compiled by ATF, the vast majority of gun dealers – 85% – have no crime gun traces or other indicators of gun trafficking or crime gun diversion. *See Vince* ¶25, App. A ¶y (26JA7510, 7537-38). There is substantial record evidence that defendants could obtain aggregate information about their dealers' crime gun traces and other gun trafficking indicators from their own distribution systems, in the same way they obtain information about inventory levels and other relevant business information. *See* Pl. Br. at 23-24 (citing evidence). Moreover, the record reflects that ATF and the U.S. Department of Justice have offered to give

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[11] The lower court concluded, based on this evidence, that "[t]he high numbers of traces linked to Traders [Sports] in these databases are 'overwhelming indicators of gun trafficking,' given that the majority of FFLs have no gun traces associated with them." Op. at 45 (61JA17867H). The court also held that plaintiffs' tracing evidence was sufficient to raise triable issues "concerning Andrews' [Sporting Goods] engagement in high risk practices that facilitate the diversion of guns into the underground market." *Id.* at 43 (61JA17867F).

[12] California now prohibits multiple sales precisely because they played a central role in gun trafficking. *See* Cal. Penal Code §12072(c)(6) (1999).

gun makers (as opposed to the general public) extensive tracing information and have asked them on multiple occasions to use that data to identify high-risk dealers within their distribution networks and stop supplying them.[13]

The high-risk dealers identified by experts Vince and Nunziato may or may not be engaged in *criminal* conduct. Whether they are or not is irrelevant for purposes of this lawsuit, which seeks a *civil* remedy. The important facts are: (1) that it is more likely than not that these dealers either engage in sales to gun traffickers or utilize high-risk business practices that facilitate the diversion of guns into the criminal market in California,[14] and (2) that defendants supply them with the very firearms that ended up in the crime gun pool in California when they know or should know who the high-risk dealers are. The facts in evidence demonstrate that these dealers are the source of thousands of crime guns recovered in California. *See Vince* ¶¶42-53 (26JA7514-19).

By continuously supplying these high-risk dealers defendants have caused harm, pose a continuous risk of harm, and contribute to the public

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[13] Defendants' statement that ATF does not disclose dealer-specific trace information to the public under the Freedom of Information Act is irrelevant. *See* Mfr. Br. at 32 & n.30; Ber. Br. at 22 n.26. The evidence here is incontrovertible that ATF has offered such information to the defendant gun makers, precisely to enable them to do what they now claim to be unable to do – better control gun distribution to reduce the diversion of guns into the illegal market. *See Gun Violence Reduction: National Integrated Firearms Violence Reduction Strategy* 40 (2001) (39JA11429); *Vince* ¶¶83-84 (26JA7525-26); 43JA12625-29, 49JA14260 (letters by former ATF agent Forrest Webb – who *defendants* hired as an expert witness – stating that gun makers could use trace data to determine whether "there is an unusually high number of [their] firearms being traced to certain Federal firearm licensees" and if so, "look at their business practices more carefully"); ATF Press Release, Feb. 4, 2000 (38JA11040) (trace data will be made available to "enable the manufacturers . . . to police the distribution of the firearms they sell").

[14] *See supra* p.16 n.11 and accompanying text (noting that the lower court was persuaded of this fact by plaintiffs' evidence).

nuisance in California. This simple and straightforward link between the defendants' conduct and the massive pool of California crime guns is legally sufficient to support plaintiffs' §17200 and public nuisance claims.

Selling or distributing a dangerous product or substance through irresponsible intermediaries has been recognized by courts as the cause of downstream harm in many other contexts. In *Philadelphia v. Stephan Chemicals Co.*, 544 F.Supp. 1135, 1152-54 (E.D. Pa. 1982), for example, the court held that a waste disposal company could be liable for using irresponsible intermediaries to dispose of toxic waste. *See also Shockley v. Hoechst Celanese Corp.*, 793 F.Supp. 670, 673 (D.S.C. 1992), *aff'd in relevant part*, 996 F.2d 1212 (4th Cir. 1993) (manufacturer could be liable for nuisance because it delivered leaky barrels of toxic chemicals to a facility it knew to be sloppy and unsafe and the facility later spilled chemicals); *State of N.J. v. Gloucester Envt'l Mgmt. Serv., Inc.*, 821 F.Supp. 999, 1012-13 (D.N.J. 1993) (municipalities could be liable for disposal of toxic waste even though they used private contractors to dump the waste); *Gray v. Westinghouse Elec. Corp.*, 624 N.E.2d 49, 52-54 (Ind. Ct. App. 1993) (defendant who generated chemicals placed in city dump by irresponsible third parties could be liable in nuisance although it did not dump chemicals, own or control chemicals when they were dumped, own or control property where they were dumped, or own or control independent contractor who dumped them).[15] Moreover, no proof was required in these cases that specific persons had been injured.

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[15] Defendants have also been held liable in negligence for selling or disposing of dangerous products through irresponsible intermediaries. *See, e.g., Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1483-87 (11th Cir. 1994) (mineral spirits manufacturer can be held liable for injury caused by retailer's negligent sales where it knew its product was commonly sold in dangerous manner by retailers); *Suchomajcz v. Hummel Chem. Co.*, 524 F.2d 19, 24-25 (3d Cir. 1975) (manufacturer could be liable for negligently

In this case, the evidence of causation is actually stronger. For example, defendants themselves have understood for more than a decade that their practice of supplying high-risk dealers causes harm and poses a continuous risk of harm to the public. *See* Pl. Br. at 13-19. Former gun industry lobbyist Robert Ricker discussed attending meetings of defendant industry members and their lawyers in the mid-1990s in which the problem of corrupt firearms dealers fueling the illegal market, and what the industry should do about it, was discussed. *See Ricker* ¶16 (26JA7561). He further testified that at some point lawyers for defendants felt the mere discussion of this "bad dealer" problem was dangerous. They terminated further talks because they were concerned that if outsiders realized their clients could do something about firearms retailers diverting guns to criminals they might be forced to take action or face legal liability. *Id.* Defendants attempt to belittle Mr. Ricker's powerful testimony by claiming he only testified generally about "the industry" and failed to name names. *See* Ber. Br. at 21. In fact, Mr. Ricker specifically identified numerous defendant manufacturer and trade association executives by name who attended meetings during which it was decided that the gun industry as a whole would continue supplying gun dealers regardless of evidence that many were diverting guns to criminals. *See Ricker* ¶¶11, 16 (26JA7556, 7561). These same executives were informed by ATF that even a few crime gun traces per year for a particular dealer could "indicate a significant trafficking problem with that dealer exists," *id.* ¶14 (26JA7559-60), but decided to continue supplying them with guns. *See id.* ¶¶16-17 (26JA7561-

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selling chemical to irresponsible fireworks kit maker). Indeed, in one case, the U.S. Supreme Court held a manufacturer/distributor *criminally* liable for distributing morphine to a doctor because it knew or should have known that the doctor was selling the drug illegally merely by his quantity of purchases. *See U.S. v. Direct Sales*, 319 U.S. 703, 710-13 (1943).

62). Ricker also testified about the warnings that defendants received in 1994 from Bill Bridgewater, head of the 8,000-member National Alliance of Stocking Gun Dealers (NASGD), about the widespread diversion of firearms from licensed dealers into the illegal market. *See id.* ¶¶11-13 (26JA7556-59).[16] Rather than address these problems, defendants' response was to sanction and try to silence Mr. Bridgewater. *See id.* ¶12 (26JA7557-58).

In addition to Mr. Ricker's sworn and unchallenged testimony, Robert Hass, former Smith & Wesson senior vice-president of marketing and sales, testified that the industry is aware that "the black market in firearms ... is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal firearms licensees." *Hass* ¶¶20-21(51JA14721). Robert Lockett, a current Kansas gun dealer, also testified how the industry's failure to require distributors and dealers to adhere to strict guidelines fuels the illegal gun market. *Lockett* 23:3-6 (52JA15249), 25:11-26:25 (52JA15251-52).

Industry documents, moreover, confirm that defendants knew in the early 1990s, through their trade associations, of the "potential for illegal firearms transactions through ostensibly 'legal' FFL [Federal firearms licensee] channels," the existence of "unscrupulous FFL holders," and the fact that there were "tens of thousands of FFL holders throughout the country whose firearms transactions are not subject to regular inspection or proper oversight." 47JA13556. Shortly thereafter, one of the defendant trade associations published a brochure in which its members claimed to

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[16] Carole Bridgewater, former secretary/treasurer of NASGD and publisher of its magazine, testified how gun industry members, including defendants, have known since 1993 that many of the licensed dealers they supply divert their guns into the black market. *See Bridgewater* ¶¶4-14 (26JA7543-48). Sturm, Ruger received similar warnings directly from its dealers in response to a questionnaire it sent out. *See* Pl. Br. at 15 (citing evidence).

"pledge to sell our products to only *legitimate retail firearms dealers*," 41JA14124 (emphasis in original), because they felt "such action would result in fewer of our products ending up in the hands of *unethical* dealers." *Id.* (emphasis added). In 1999, the other defendant trade association even pledged to ATF officials to look for ways to help identify "problem dealers" (49JA14252-254), but then never did so. *Delfay* 162:4-12 (50JA14627).

In numerous public reports, ATF has also explained how firearms dealers are the source of widespread crime gun diversion, and how those diversions are concentrated among a tiny percentage of firearms dealers. *See Vince* ¶¶17-18, 25, App. A (26JA7507, 7510, 7529-40); *Zimring* ¶5 (26JA7569). ATF delivered this message directly to members of the gun industry, including defendants, in face-to-face meetings that were regularly held starting in December 1995. *See* 46JA13531-33, 47JA13717-24; *Scott* 57:17-70:9(54JA15659-71).

This evidence alone is sufficient to raise a material issue of fact that defendants' practice of continuously supplying high-risk dealers creates a risk of serious harm to the public. But plaintiffs introduced much more detailed evidence, showing defendant-by-defendant how their guns were recovered in crime in California after defendants funneled those guns through specific high-risk dealers. Joseph Vince, Jr., former head of ATF's Crime Gun Analysis Branch, carefully explained the record against a number of these high-risk dealers, including Traders' Sports and Andrews Sporting Goods, Inc. *See Vince* ¶¶46-53, 56-62, 65-71 (26JA7516-22). Through careful analysis of thousands of crime guns traced through these stores, including breakdowns of how many guns were traced over time and per year, how many of those were recovered with a short time-to-crime, how many multiple sale transactions had occurred, how many times an ATF trace had ended with a suspect "completion code" at that dealer, and

other factors, Mr. Vince concluded that each dealer was, more likely than not, either engaged in sales to gun traffickers or in high-risk business practices that facilitate the diversion of guns into the illegal market in California. *See id.* ¶¶46, 48-49, 72-73 (26JA7516-17, 7522-23). He further showed through a series of profiles how each of the manufacturer and distributor defendants continued supplying these and other high-risk dealers with new firearms that ended up being used in crime. *See id.* ¶¶56-62, 64-73 (26JA7519-23); *see also Nunziato* ¶¶41, 43, 45, 47-49 (26JA7425-30); 32JA9129-34JA9869.[17] The lower court was persuaded by this evidence and denied summary judgment to Traders' Sports and Andrews' Sporting Goods. *See* Op. at 43-45 (61JA17867F-67H). Defendants have no basis for their repeated suggestion that plaintiffs' case is based on expert opinion unsupported by facts. There is substantial evidence that the continued supply of these and other high-risk dealers by the remaining defendants causes harm to the public, creates a continuous risk of harm, and contributes to a public nuisance.

C. Defendants' Attempts To Rewrite The Factual Record Should Be Rejected

Defendants' seek to assail plaintiffs' evidence on several grounds, none of which has merit. First, they claim that plaintiffs have not proven that either defendants or the high-risk dealers defendants have supplied have committed "wrongdoing." *See* Ber. Br. at 21-25, Mfr. Br. at 28-34. But there is no requirement under §17200 or public nuisance law to prove "wrongdoing," apart from a showing of "unfairness" under §17200 and conduct contributing to a dangerous condition for purposes of public

[17] Defendants ignore this testimony and analysis in making the ridiculous assertion that plaintiffs introduced no evidence regarding how each defendant helps fuel the illegal market. *See* Mfr. Br. at 22-23; Ber. Br. at 19-21. On summary judgment, plaintiffs' evidence must be liberally construed, not completely disregarded. *See Branco*, 37 Cal.App.4th at 189.

nuisance liability. A business act or practice is unfair if it meets either of two tests: (1) if the harm it threatens outweighs its benefits, *Motors, Inc.*, 102 Cal.App.3d at 740, or (2) if it "offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th 632 (1996). Similarly, contributing to an unreasonable risk of harm to the public is sufficient to sustain a public nuisance claim. *See Motors, Inc.*, 102 Cal.App.3d at 740. No independent showing of "wrongdoing" is required under any of these legal standards.

Defendants also confusingly use the term "wrongdoing" to mean *criminal* conduct even though this is a *civil* lawsuit. *See* Ber. Br. at 21-25; Mfr. Br. at 28-34. Defendants then argue that because crime gun traces alone do not prove *illegal* conduct they cannot be used to establish a risk sufficient to justify a *civil* remedy.

For example, defendants' briefs quote an ATF study to the effect that

> "crime gun traces do not necessarily indicate *illegal* activity by licensed dealers or their employees.... [W]hen trafficking indicators are present, it is important to find out if the FFL or someone else is *violating the law.*"

Mfr. Br. at 31, Ber. Br. at 23, quoting 38JA10983-84 (emphasis added). The question of illegal activity is central to *ATF*'s inquiry, as it is a federal agency tasked to uncover and help prosecute *criminal* conduct. *See* 6 U.S.C. §531(b).[18] That has no bearing on whether one can conclude that it

[18] Contrary to defendants' assertion, *see* Mfr. Br. at 33 n.30, plaintiffs do not suggest that defendants should do their own investigations of possible criminal conduct by gun dealers. Nor was ATF asking defendants to do criminal investigations when it repeatedly requested gun manufacturers to use trace information to take action against dealers exhibiting indications that they are engaged in practices that help divert guns into the illegal market. *See supra* p. 17 n.13.

is more likely than not that a dealer with unusually high numbers of crime gun traces and other gun trafficking indicators is engaged in "high risk business practices that facilitate the diversion of guns into the underground market," as Mr. Vince concludes. The dealer does not have to be guilty of a *crime* for this to be so.[19]

Shoddy sales practices falling short of criminal liability can funnel hundreds or even thousands of guns into the illegal market over time. For example, a dealer selling dozens of guns over time to the same buyer, or one whose security is so lax that a juvenile can walk out of the store with an assault rifle, may not be guilty of a crime but is certainly fueling the illegal market. Defendants once recognized this fact by drawing up a "Code of Practice" through their trade associations that called for dealers to "go beyond" the law to block straw purchases, *see* 48JA13938-39; 48JA14041; 47JA13560; *Sanetti* 298:7-15 (53JA15610), but then suppressed it. *See Delfay* 98:12-99:5 (50JA14616-17), 101:9-102:17(50JA14619-20). [20]

The lower court, based solely on plaintiffs' experts' analysis of ATF crime gun trace data, concluded there was a triable issue of fact that defendant dealers Traders' Sports and Andrews Sporting Goods were engaged in such high-risk business practices sufficient for liability under §17200. *See* Op. at 43-45 (61JA17867F-67H). The court based this conclusion, in part, on the fact that these dealers exhibited "'overwhelming indicators of gun trafficking' given that the majority of FFLs have no gun

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[19] To prove *illegal* gun trafficking requires a heightened mens rea, *see, e.g.,* 18 U.S.C. §924(a)(1)(D) (requiring "willful[]" violation for prosecution of most federal gun trafficking provisions), proved beyond a reasonable doubt. *See Higgins* ¶¶12-17 (26JA7491-94) (discussing difficulties ATF faces in proving criminal violations by dealers).

[20] ATF reports also recognize this fact. *See Vince* ¶¶26, App. A ¶¶ a, b, g, z (26JA7510, 7529-30, 7531, 7538).

traces associated with them." Op. at 45 (61JA17867H).[21] The court did not conclude that there was a triable issue that the dealers were guilty of *unlawful* conduct under §17200. *Id.*[22]

Defendants attempt to further mislead the Court by claiming that the testimony of one of plaintiffs' experts – former ATF agent Joseph Vince, Jr. – should be disregarded because he could not say in a deposition that ATF data proved defendants, or their distributors or dealers, were engaged in "wrongdoing." *See* Ber. Br. at 24, Mfr. Br. at 28-30. A single page of deposition testimony, however, clears up the confusion defendants have attempted to sow, and explains why there is no contradiction between Mr. Vince's deposition testimony and his extensive and detailed declaration. Here is the critical exchange between the questioner for defendants and Mr. Vince:

> Q. Have you done any analysis ... to conclude that any particular manufacturer specifically engaged in any kind of *wrongful* or improper conduct ...
>
> A. *That they were involved in any* ***criminal*** *activity?*
>
> Q. Well, okay, that's the question.
>
> A. No, sir, I did not.

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[21] The *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (2001) case, heavily relied on by defendants, *see* Mfr. Br. at 31-33, 51; Ber. Br. at 22, 51, 55-56, has no relevance here, as that court was evaluating whether *individual* plaintiffs could recover damages in *negligence* for their personal injuries even though they were unable to identify any guns that injured them. However, the *Hamilton* court also noted that plaintiffs' theory of duty failed after trial for lack of evidence, holding: "Without a showing that specific groups of dealers play a disproportionate role in supplying the illegal gun market, the sweep of plaintiffs' duty theory is far wider than the danger it seeks to avert." *Id.* at 237-38. Here, plaintiffs' experts identified those "specific groups of dealers." *See Vince* ¶¶42-73 (26JA7514-23); *Nunziato* ¶¶43-49; 32JA9129-34JA9869.

[22] Similarly, the irresponsible intermediary cases cited above did not hinge on proof of unlawful conduct. *See supra* pp. 18-19 & n.15.

Q. Have you analyzed the data to conclude that any specific distributor was engaged in *illegal* activity?

A. No, sir, I did not.

Q. Have you analyzed the data to conclude that any specific retail dealer was engaged in *criminal* activity?

A. No, sir, I did not.

Vince Dep. at 338 (22JA6262) (emphasis added).

It is clear from this exchange that Mr. Vince understood "wrongdoing" to mean *illegal* or *criminal* conduct. After all, as a former ATF agent charged with investigating criminal activity, that was a logical assumption. Yet, as he also stated clearly in his deposition, he was not engaged to analyze the potential *criminal* conduct of dealers for this lawsuit, and his declaration makes no attempt to do so. Instead, his declaration addresses the risks defendants create by continuously supplying gun dealers that sell aberrant numbers of crime guns recovered in California and exhibit other indicators of gun trafficking. There is thus no inconsistency between his deposition testimony and his later sworn testimony. Indeed, the lower court overruled objections filed by certain defendants to the declaration of Mr. Vince. *See* Op. at 44 (61JA17867G).[23]

Nothing in the cases cited by defendants permits an expert's declaration to be disregarded on summary judgment when it is entirely consistent with his prior deposition. *See* Mfr. Br. at 28-30, Ber. Br. at 25-26. For example, in *Benavidez v. San Jose Police Dept.*, 72 Cal.App.4th 853, 861 (1999), the court held there must be "a clear and unequivocal admission" in the witness's deposition. *See also D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 21 (1974). Furthermore, the admission must be one that "directly contradicts" the subsequent declaration. *Benavidez*, 71 Cal.App.4th at 861, quoting *Barton v. Elexsys Internat., Inc.*,

[23] The court also overruled objections to Mr. Nunziato's declaration. *Id.*

62 Cal.App.4th 1182, 1191 (1998). In *Benavidez*, the plaintiff's declaration "that she told the officers she wanted to go to a shelter... *directly and unequivocally contradict[ed]* her testimony that she... did not tell them she wanted to leave her apartment." *Id.* (emphasis added). The court only took the extreme step of disregarding the declaration because there was no way to reconcile the plaintiff's two statements; if one was true, then the other had to be false. Similarly, in *Visueta v. General Motors Corp.*, 234 Cal.App.3d 1609, 1612-13 (1991), two statements about the accessibility of a truck's parking brake were completely irreconcilable. No such contradiction exists here.[24]

Second, defendants argue that Mr. Vince's testimony is based on speculation because there is no empirical evidence that if defendants were to distribute firearms differently, fewer guns would be recovered in crime. *See* Ber. Br. at 24-25 & n.28. But this is a "Catch-22." Defendants seek to exonerate themselves because no one in the gun industry has distributed firearms responsibly and so it cannot be known whether to do so would have any effect on reducing the supply of guns to criminals.

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[24] Moreover, this Court has warned that any decision to disregard a declaration should be made with caution:

> [A]n uncritical application of the *D'Amico* decision can lead to anomalous results, inconsistent with the general principles of summary judgment law.... A summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence.

Price v. Wells Fargo Bank, 213 Cal.App.3d 465, 482 (1989) (internal citations omitted). *See also Scheiding v. Dinwiddie Const. Co.*, 69 Cal.App.4th 64, 77-78 (1999) (holding that *D'Amico* and similar cases should not be liberally applied); *Niederer v. Ferreira*, 189 Cal.App.3d 1485 (1987) (declining to reject declaration where even contradictory statements were satisfactorily explained).

This argument cannot protect defendants under California law. If a business practice creates a risk of public harm or contributes to a public nuisance – and defendants' continued gun sales through high-risk dealers clearly has those effects – there is no separate requirement under §17200 or public nuisance law for plaintiffs to prove that eliminating or changing the practice would eliminate the harm or abate the nuisance, as such a result will naturally follow if the risk-creating conduct is abated. *See, e.g., People v. First Fed. Credit Corp.*, 104 Cal.App.4th 721, 735-36 (2002) (upholding permanent injunction stemming from §17200 liability by focusing on the "unscrupulous" nature of the defendant's practice, without discussing any potential effects the relief might have); *City of Modesto Redevelopment Agency v. Super. Ct.*, 119 Cal.App.4th 28, 38 (2004) ("liability for nuisance does not hinge on whether the defendant . . . is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance"). Here, the substantial record evidence that the crime gun market is fueled by defendants' distribution practices strongly supports an inference that changes in those practices would reduce the flow of guns into that market and abate the nuisance. *See, e.g., Fox* ¶¶13-18 (26JA7471-73) (explaining how the concentration of California crime gun traces among dealers connected to defendants increases the likelihood that steps taken by manufacturers would have the effect of preventing a significant number of guns from entering the underground market in California).[25]

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[25] The manufacturers' citation to *Noble v. Los Angeles Dodgers, Inc.*, 168 Cal.App.3d 912 (1985), *Nola M. v. University of Southern California*, 16 Cal.App.4th 421 (1993) and similar cases, where expert witnesses were unable to opine that particular preventive measures would have been sufficient to prevent an injury to specific victims who brought those lawsuits, *see* Mfr. Br. at 25-27, has no relevance here, where the issue is the increased risk of harm *to the general public* that defendants' business

Moreover, Beretta's argument is undermined by its own practices. When it sets terms in its distribution agreements to discourage retail dealers from selling Beretta guns to anyone outside the United States, *see* Pl. Br. at 24, it clearly expects this restriction to have the desired effect. After all, Beretta could terminate its relationship with any dealer who does not comply.

Defendants also argue that because Mr. Vince did not investigate the circumstances of individual retail sales, his opinion drawn from looking at the aggregate conduct of each high-risk dealer is "unsupported by any fact." *See* Ber. Br. at 22-25; Mfr. Br. at 23-34.[26] This completely misses the point of plaintiffs' evidence, which is focused on the overall business practices of particular gun dealers.[27]

One does not need to know the specific circumstances of each individual gun transaction to be able to conclude that, when looked at from a broader perspective, the patterns of crime gun traces, multiple sales, inability to account for guns traced to the store, short time-to-crime gun

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practices create. *Jennings v. Palomar Pomerado Health Systems, Inc.,* 114 Cal.App.4th 1108 (2003), is also inapposite, as in that case the expert was asked, in a negligence case, to opine whether a specific infection within the body of plaintiff was caused by a retractor that was left in his body after surgery. No such proof is required here.

[26] Beretta also attacks Mr. Vince for not looking at crime incident reports, *see* Ber. Br. at 7, but fails to mention that these reports, unlike trace data, contain no information about the distribution flow of crime guns and their connection to high-risk dealers.

[27] Mr. Vince notes that the secretive nature of "straw sales" and other particular gun transactions makes it inherently difficult to say with certainty that a dealer is "corrupt" or "knowingly" selling to straw buyers. Nonetheless, this does not negate his ability to conclude, based on detailed trace data analysis, that the dealer's conduct is facilitating the diversion of guns into the illegal market. *See Vince* ¶¶74-76 (26JA7523). As we have already discussed, this conclusion does not depend on proof of *criminal* conduct by the dealer. *See supra* at pp. 25-26.

sales, and other crime gun diversion evidence associated with particular dealers make it more likely than not that those dealers are either "engaged in sales to gun traffickers" or have adopted "high-risk business practices [that] have facilitated the diversion of guns into the underground market in California." *Vince* ¶76 (26JA7523).[28] Similarly, no environmental expert asked to assess the risks of disposal facilities would need to look at how each drop of chemical leaked out of a disposal facility's containers, or whether specific people were poisoned by the hazardous waste, if aggregate data on the amount leaking from the facility were made available to him. Evidence of the leaks themselves would be sufficient to hold the manufacturer responsible for disposing of its chemicals at a leaky facility, especially if safer alternatives were available. *See, e.g.*, *Shockley*, 793 F.Supp. at 674 (holding manufacturer liable for nuisance for delivering toxic chemicals to facility known to have loose operation). Indeed, in *United States v. Direct Sales Co.*, 319 U.S. 703, 710-13 (1943), a drug manufacturer was held *criminally* liable for supplying large amounts of morphine to a small-town doctor where it should have known, from the quantities ordered, that he was diverting it to the underground market. This

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[28] Contrary to Beretta's suggestion, *see* Ber. Br. at 22 n.25, it is not necessary to compare sales volumes to trace volumes of each dealer to assess the risk inherent in selling guns through high-trace dealers. ATF itself does not list sales volume as one of the factors that it looks at when investigating gun trafficking through dealers. *See Vince* ¶36(26JA7513) (citing ATF, *Commerce in Firearms in the U.S.* (2000)). Moreover, Mr. Vince's conclusions are not based simply on the sheer number of crime guns traced to a store. *See Vince* ¶¶ 28 (discussing multiple sales), 31 (discussing serial number obliteration), 36 (listing indicators such as short time-to-crime), 38-42 (discussing significance of "completion codes"), 46-53 (applying indicators to specific dealers) (26JA7511-19). Finally, even though presumably defendants are in a position to know the sales volume of their downstream dealers, defendants have offered no evidence, through their experts or otherwise, that the concentration of crime gun traces in a few dealers can be explained by a similar concentration in sales volume.

was true even though there was no proof that the manufacturer knew of any specific diversions by the doctor. The Court noted that the dangerous nature of the product – referencing both drugs and guns in its discussion – made "a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully." *Id.* at 710-11.[29]

D. Beretta's Assertion That §17200 Claims Must Involve Harm To Consumers Or Competitors Is Internally Inconsistent And Contrary To Law

In an argument made by no other defendant, Beretta claims that §17200 actions cannot be brought on behalf the general public if they are threatened by injury because of an unfair practice, but only by injured "competitors and consumers." Ber. Br. at 26-32. Under Beretta's theory, the courts are powerless to stop an unfair practice unless it threatens injury to a consumer targeted by the defendant or someone who has "business dealings" with that defendant. *Id.* at 26, 30.

Beretta's artificial limit is contradicted by the broad scope of the statute. Indeed, whenever the Legislature has amended §17200, it has only expanded its scope, never narrowed it. For example, in 1992 the

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[29] Further, criminal liability for the drug manufacturer in *Direct Sales* was predicated purely on *indicators* – the quantity, frequency, and period of time over which the morphine orders were made – such that it "must have known" that the doctor it supplied was distributing the drug illegally. *Direct Sales*, 319 U.S. at 705. Defendants' notion that plaintiffs' experts may not testify concerning "indicators" of gun trafficking in a civil case, *see* Mfr. Br. at 29 n.27, is thus absurd. The lone case they cite, *Kotla v. Regents of University of California*, 115 Cal.App.4th 283, 291 (2004), rejected an expert's testimony regarding "indications" of the mental intent of an employer accused of retaliatory discharge where the expert lacked any reliable foundation for his testimony and was invading the province of the jury. Here, no one's state of mind is at issue and no testimony even approaches that subject. Moreover, in this case the indicators discussed by plaintiffs' experts were formulated by a federal agency, and the lower court considered the data sufficient to deny summary judgment under §17200 as to two dealer defendants.

Legislature expanded "the definition of unfair competition to include '*any* unlawful, unfair, or fraudulent business act or practice.'" *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 570 (1998) (emphasis in original), quoting §17200. Likewise, §17204 allows claims to be brought "by any person acting for the interests of itself, its members or *the general public*." Cal. Bus. & Prof. Code §17204 (emphasis added). *See also Prata*, 91 Cal.App.4th at 1144 (§17200 protects "members of the public"); *First Fed. Credit Corp.,* 104 Cal.App.4th at 732 (§17200 actions are "brought to protect the public"). Moreover, §17204 specifically authorizes municipalities – *i.e.*, the plaintiffs herein – to bring suit "in the name of the people of the State of California" to protect "the general public." As the other defendants concede, this statute allows claims to be brought on behalf of *three* classes of potentially injured parties, "members of the general public, a specific consumer or a competitor." Mfr. Br. at 19.

Perhaps recognizing that its radical interpretation of §17200 is contradicted by the case law, Beretta carves out exceptions to try to fit its novel "rule" into what the case law actually holds. Thus, Beretta concedes that courts actually *have* allowed claims to stop an unfair practice that did *not* directly harm direct consumers or competitors. For example, Beretta concedes that acts may be unfair if they "cause[] a health or safety risk" to those "who come into direct contact with" the consequences of the unfair practice even if they are not targets of the practice and have no business dealings with defendants, such as children threatened with injury by razor blades supplied in newspaper ads. Ber. Br. at 32 n.36 (citing *In re Phillip Morris, Inc.,* 82 F.T.C. 16 (1973)). Beretta has no credible explanation why the public's risk of coming into "direct contact" with Beretta's unfairly-distributed guns is any different than the risks of "direct contact" faced by the children in *Phillip Morris*.

Likewise, Beretta concedes that §17200 cases may be brought where "harm to the public" is "threatened." Ber. Br. at 15 n.22. Beretta cites *Claibourne*, 3 Cal.2d 689, in which a stamp company threatened to sell stamps simulated to look like rare stamps, thereby reducing the value of authentic stamps held by third parties. Neither consumers of the simulated stamps nor competitors of the stamp company were directly threatened with harm. It was the potential *indirect* harm to *third party* stamp holders whose stamps would lose value that was sufficient for the court to enjoin the practice. *See id.* at 694-96 ("It is not appellants' contention that respondent intends or is attempting to deceive and directly defraud the dealers or stamp collectors who receive his price list."). Beretta cannot reconcile this seminal case with its phantom restrictions on §17200.

II. DEFENDANTS CAN ADVANCE NO REASON WHY PLAINTIFFS' §17200 AND PUBLIC NUISANCE CLAIMS SHOULD BE DISMISSED ON DUTY GROUNDS

California Civil Code 1714(a) establishes an overarching policy that gun manufacturers and distributors are not exempt from the duty to use ordinary care in the manner in which they distribute firearms.

Beretta's brief, which spends ten pages attempting to argue that defendants have no duty to distribute firearms responsibly, *see* Ber. Br. at 33-43, does not even *mention*, much less address, this critical policy statement. The manufacturers' brief mentions it in a single footnote, claiming that because §1714.4, which once provided limited immunity for gun manufacturers, has no relevance to this case, its repeal cannot be relevant. *See* Mfr. Br. at 44 n.36. But this argument ignores the fact that the California Legislature did more than repeal §1714.4 two years ago. The Legislature *added* the following sentence to the civil code section setting out the duty of care:

> The design, ***distribution***, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section.

Cal. Civ. Code §1714(a) (emphasis added).

Thus, while it is true, as defendants belatedly admit, that §1714.4 never had relevance to this lawsuit because its immunity provisions did not reach defendants' conduct, the recent legislative delineation of California policy with regard to the duties of gun makers and distributors is *exceedingly* relevant.[30] After all, one of the tests for determining whether a practice is unfair is if it "offends an established public policy." *Cmty. Assisting Recovery, Inc. v. Aegis Sec. Ins. Co.*, 92 Cal.App.4th 886, 894 (2001). Defendants cite recent case law suggesting that "*any* claims of unfairness under the UCL should be defined in connection with a legislatively declared policy." *Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal.App.4th 322, 353 (2004), quoting *Schnall v. Hertz Corp.*, 78 Cal.App.4th 1144, 1166 (2000). Defendants also argue "that the public policy which is a predicate to [a §17200] action must be 'tethered' to specific constitutional, statutory or regulatory provisions." *Gregory v. Albertson's, Inc.*, 104 Cal.App.4th 845, 854 (2002).[31] However, any formulation of the public policy test for unfairness is satisfied by reference to §1714(a). Defendants' attempt to rely on these cases in arguing for dismissal, *see, e.g.,* Mfr. Br. at 43-46, cannot come to grips with how

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[30] Defendants only recently accepted the view that §1714.4 has no relevance to this case. When seeking demurrer, they argued it was a central reason why this lawsuit could not proceed. *See* 1JA239-40, 11JA2906 ("The court may consider the *policy* determination of the Legislature as expressed in Civil Code § 1714.4(b)(2)") (emphasis in original).

[31] These articulations of the *public policy* test have no impact on the alternative *risk/utility* test for determining whether a business practice is unfair. *See, e.g., Pastoria v. Nationwide Ins.*, 112 Cal.App.4th 1490, 1497-98 (2003) (applying *Smith v. State Farm* risk/utility test against insurer who failed to disclose impending material changes in a health insurance policy).

§1714(a) expressly satisfies appellate courts' concerns that §17200 violations be firmly grounded in "legislatively declared policy."

The Legislature's §1714(a) pronouncement also disposes of defendants' argument, *see* Mfr. Br. at 10-14, 50-57; Ber. Br. at 51-57, that the existence of federal, state and local laws regulating gun distribution precludes courts from taking action where defendants' distribution practices threaten public harm. *See infra* §IV. In fact, the significance of the gun control laws cited by defendants is precisely the opposite of what defendants claim. Each of these laws is designed to prevent the distribution of firearms to criminals. *See, e.g.,* Cal. Penal Code §12021 (prohibiting possession of handguns by criminals and juveniles). Because defendants' distribution of guns through high-risk dealers undermines the effectiveness of this policy, each of the laws listed by defendants is not grounds for dismissal, but is an additional and independent tether to which the unfairness determination can attach.

Even so, this does not mean that duty is a required element of plaintiffs' §17200 or public nuisance claims, as defendants attempt to argue. The relevance of §1714(a) is twofold. First, it establishes that defendants cannot escape liability on the grounds that they have *no* duty to distribute firearms responsibly. Second, it confirms that defendants' practices, in addition to being unfair because their risks outweigh their potential utility, are unfair for violating California public policy.

A. Defendants' Falsely Characterize Their Continued Profitable Supply Of High-Risk Gun Dealers As "Nonfeasance"

The lower court's fundamental legal error was to characterize defendants' business practices as "nonfeasance" and decide, therefore, that they had no duty of care to "prevent" downstream sellers from supplying guns to criminals. The lower court simply grafted negligence law's

requirement to establish a duty of care on to plaintiffs' wholly different causes of action brought under §17200 and California's public nuisance statute without citing any authority in support. *See* Pl. Br. at 27-38. Defendants attempt to defend this error, *see* Ber. Br. at 33-43; Mfr. Br. at 38-40, but likewise offer no relevant authority.

Beretta begins by attempting to recast plaintiffs' case as seeking §17200 liability "for *failing to prevent* retailers from selling guns to criminals where defendants have no legal duty to so do." Ber. Br. at 33 (emphasis added). This is not plaintiffs' complaint, as has been thoroughly explained above. *See supra* §I(B). Defendants' decision to continuously supply a concentrated and identifiable number of high-risk gun dealers that have sold large numbers of guns recovered in crime in California – not the "failure to prevent" anything – is the core of plaintiffs' lawsuit.

The §17200 cases relied on by Beretta at page 33 of its brief do not even support the "failure to prevent harm" theory that Beretta attempts to impose on plaintiffs' case. The court in *Korens v. R. W. Zukin Corp.*, 212 Cal.App.3d 1054, 1059 (1989) refused to order landlords to pay interest on security deposits when "[t]he Legislature has in fact repeatedly refused to enact proposed legislation which would explicitly make interest payable on tenants' security deposits." In *Sumitomo Bank of Cal. v. Taurus Developers*, 185 Cal.App.3d 211, 222-23 (1986), the court refused to hold a condominium builder liable for failure to disclose latent defects in the property before it was purchased "as is" by the original lender in a foreclosure sale. Likewise, the court in *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001), refused to find an auditor liable under §17200 for violating California public policy where the dismissal of all other claims against defendant indicated compliance with such policy. None of these cases was based on a failure to prevent harm. All reflect policy decisions courts made that the conduct in question was not unfair.

None was decided in the context of an express legislative policy statement that the conduct in question requires ordinary care. *See* Cal. Civ. Code §1714(a).[32]

Further, Beretta acknowledges that duty is not an issue in §17200 cases except in a "nonfeasance" case. *See* Ber. Br. at 33-34 n.37. Indeed, Beretta cites *Pamela L. v. Farmer*, 112 Cal.App.3d 206 (1980), which explains the principle as it applies in negligence.

> [G]enerally a person has no duty to control the conduct of a third person . . . in the absence of a 'special relationship' either to the third person or the victim . . . *[but this] has no application where the defendant, through his or her own action (misfeasance) has made the plaintiff's position worse and has created a foreseeable risk of harm from the third person*. In such cases the question of duty is governed by the standards of ordinary care.

Id. at 209 (emphasis added).

Plaintiffs explained in their opening brief that neither the misfeasance/nonfeasance dichotomy, nor negligence law's duty and causation requirements, are relevant to plaintiffs' §17200 or public nuisance claims. *See* Pl. Br. at 29-41. However, even if plaintiffs had to work within that dichotomy, the evidence establishes clear misfeasance by Beretta's own definition: "[M]isfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., defendant has created a risk." *Lugtu v. Cal. Highway Patrol*, 26 Cal.4th 703, 716 (2001), quoting *Weirum v. RKO Gen., Inc.*, 15 Cal.3d 40, 49 (1975) (cited in Ber. Br. at 36). That is the precise allegation in the case at hand – that defendants, by continuously supplying high-risk dealers that are the source

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[32] For the same reason, defendants' attempt to distinguish plaintiffs' §17200 cases involving nonfeasance is unavailing. *See* Ber. Br. at 34-35; Mfr. Br. at 39 n.33. Defendants claim they have no duty to distribute firearms responsibly when, in fact, §1714(a) requires them to do so.

of thousands of crime guns recovered in California, have created a risk that has made the California public's position worse.

Accepting these basic legal principles, Beretta then tries desperately to paint defendants' profitable sale of guns through high-risk dealers as "nonfeasance." *Id.* at 37-38. But the cases Beretta cites are not at all analogous to defendants' conduct here. All involve defendants' failure to prevent harm, rather than active conduct that increased the risk of harm. For example, in *City of Sunnyvale v. Superior Court*, 203 Cal.App.3d 839, 841-42 (1988), where a police officer failed to arrest a motorist who had open alcohol containers in the vehicle, the court explained that "the Legislature has provided immunity for the consequences of a decision not to arrest; hence no duty can be premised on any omission to take [the motorists] into custody." Police decisions that affirmatively create a peril to the victim can yield liability, the court added. *Id.* at 844. In *Wise v. Superior Court*, 222 Cal.App.3d 1008, 1014-15 (1990), where the wife of a sniper failed to prevent him from taking to the roof and shooting motorists, the court held she had done nothing to increase the risk to victims and expressly rejected the claim that she had any role in supplying him with the guns he used.

Premises liability cases cited by defendants, *see* Mfr. Br. at 25-26, 37-40; Ber. Br. at 17-18, 38, 50-51, which often hinge on whether a landowner's "failure to prevent" harm (or nonfeasance) can yield liability, are also factually distinguishable. Defendants in this case are a far cry from passive landowners plagued by criminal violence on their premises, who do not profit, as defendants do, from criminal conduct.[33] As noted

[33] Defendants rely on several premises liability cases – *e.g., Medina v. Hillshore Partners*, 40 Cal.App.4th 477 (1995), *Martinez v. Pac. Bell*, 225 Cal.App.3d 1557 (1990), and *Owens v. Kings Supermarket*, 198 Cal.App.3d

criminologist James Alan Fox testified, the criminal market for handguns is very large. *Fox* ¶¶5-12 (26JA7468-70) (concluding that 25% of handguns sold in 1991 had been used in crime by the end of 2001). Defendants certainly know they are profiting from supplying the dealers who feed this market. *See Ricker* ¶¶8-17 (26JA7554-62).

In premises liability cases, courts are also reluctant to impose a duty to take precautions against illegal acts since such acts are inherently difficult for the owner of the premises to foresee. For this reason, many premises liability cases evaluate whether similar crimes or harms have occurred in the past, giving notice to a passive landowner to take precautions against future harm. *See, e.g., Wiener v. Southcoast Childcare Ctrs., Inc.*, 32 Cal.4th 1138 (2004). In this case, the diversion of guns from high-risk dealers is constant. *See, e.g., Vince* ¶46, App. A ¶y (26JA7516, 7537-38) (discussing how the average number of crime gun traces from defendant Traders' Sports exceeds 100 per year, while only 1.2% of dealers nationally have as many as 10 gun traces per year). Defendants receive unprecedented notice of this constant diversion. *See id.* ¶19-23 (26JA7508-09). Thus, it is extremely foreseeable that continuing to supply high-risk dealers fuels the illegal market.[34] It is also highly profitable.[35]

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379 (1988) – *where the plaintiff was not even injured on the premises.* Defendants' active supply of the criminal gun market is hardly similar to the passive landowners and businesses in those cases.

[34] Indeed, the evidence is overwhelming that defendants have known this fact for more than ten years. *See supra* §I(B).

[35] *Avis Rent A Car System, Inc. v. Superior Court*, 12 Cal.App.4th 221 (1993), cited by Beretta at pages 36-37 of its brief, is not even analyzed within the misfeasance/nonfeasance rubric. As a "key-in-the-ignition case," *i.e.*, a case where thieves stole a vehicle and injured others while driving the stolen vehicle, the court analyzed whether "special circumstances" that give rise to foreseeability exist, including such variables as the kind of vehicle in question, the neighborhood in which the vehicle was left, and the distance (temporally and geographically) between

There are numerous instances where defendants have been held accountable for affirmative conduct that increases the risk that third-party negligent or criminal acts will occur. The cases below, although based in negligence, would support liability even if duty were an issue in this case.[36] *See, e.g., Weirum,* 15 Cal.3d at 47-48 (radio station could be liable for running contest that encouraged participants to speed to certain locations); *Bigbee v. Pacific Tel. & Tel. Co.*, 34 Cal.3d 49, 58 (1983) (phone company could be liable for placing phone booth near busy road where it was foreseeable that cars would jump the curb and strike the booth); *Anaya v. Turk*, 151 Cal.App.3d 1092, 1101-02 (1984) (lessee liable where drug dealing in his apartment created a risk that visitor would be shot); *Restatement (Second) of Torts* §449 ("if the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for the harm caused thereby"); *Prosser & Keeton* §33, at 203. In each of these cases, an actor's criminal conduct actually inflicted the injury. Yet each court also held that the party creating the risk of injury from the criminal act was also responsible. *See also Landeros v. Flood*, 17 Cal.3d

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the car theft and the plaintiff's harm. In this case, foreseeability is overwhelming given the notice ATF provides through hundreds of thousands of crime gun traces that defendants could readily link to specific dealers. Further, courts *have* found liability in some of the "key" cases against vehicle owners, where there was foreseeable risk. *See, e.g., Hergenrether v. East*, 61 Cal.2d 440 (1964) (leaving keys in truck parked on skid row); *Richardson v. Ham*, 44 Cal.2d 772 (1955) (leaving keys in bulldozer later driven by youths).

[36] Of course, as negligence cases involving individuals seeking damages for their specific injuries, the discussion of "substantial factor" causation in these cases is no more relevant to plaintiffs' §17200 and public nuisance claims than the cases relied on by defendants. *See supra* §I(A). They are cited here to show how conduct can increase the risk of harm.

399, 411-12 (1976) (holding physician liable for misdiagnosing battered child even though parents inflicted the abuse); *Jackson v. Ryder Truck Rental, Inc.*, 16 Cal.App.4th 1830, 1848-49 (1993) (holding truck servicing company liable for failing electrical system even though plaintiff was injured by reckless driver); *Braman v. State*, 28 Cal.App.4th 344, 356-57 (1994) (Department of Justice could be responsible for permitting suicide victim's access to gun even though suicide victim pulled the trigger).[37]

B. Defendants Also Falsely Claim That They Must Have A Duty To Control The Illegal Conduct Of Third Parties To Be Held Liable

Defendants claim that they cannot be liable because they do not "control" their downstream dealers. Ber. Br. at 38-40; Mfr. Br. at 40. This, however, is a factual assertion contradicted by the record. There is overwhelming evidence, based on defendants' documents and deposition testimony, that defendants control who they supply guns to and the terms and conditions of those sales.[38] Beretta, for example, exerts control over its downstream dealers to keep them from selling Beretta guns outside the United States. If dealers violate this policy, presumably Beretta can terminate them, just as other defendants have terminated distributors and dealers for various financial reasons. *See* Pl. Br. at 23-25 (discussing extensive record cites).

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[37] Beretta's reliance on *Jacoves v. United Merch. Corp.*, 9 Cal.App.4th 88 (1992) and *Holmes v. J.C. Penney Co.*, 133 Cal.App.3d 216 (1982), does not change this analysis. *See* Ber. Br. at 39 n.39. The *Jacoves* court established that gun sellers have a duty not to sell to persons they know or have reason to know are likely to be a danger. 9 Cal.App.4th at 118. The *Holmes* court held that CO_2 cartridges were less dangerous than slingshots, and had many benign uses. 133 Cal.App.3d at 219-20. Neither case set the kind of "special relationship" limits advocated by defendants.

[38] Sturm, Ruger does not even negotiate the terms and conditions it imposes on downstream distributors. *See Sanetti*, 192:10-194:20 (53JA15605-07).

Defendants' also argue that they do not control the criminals who wield their guns. This argument is irrelevant, as numerous courts have held. *See, e.g., Ileto v. Glock, Inc.*, 349 F.3d 1191, 1207 (9th Cir. 2003) (defendants' supply of the illegal market, rather than control of specific criminals, is sufficient for liability), *City of Gary*, 801 N.E.2d at 1235 (same); *City of Cincinnati v. Beretta USA Corp.*, 768 N.E.2d 1136, 1143 (Ohio 2002) (same); *James v. Arms Tech., Inc.*, 820 A.2d 27, 52-53 (N.J. Super. Ct. App. Div. 2003) (same).

Defendants rely on *Emery v. Visa International Service Ass'n*, 95 Cal.App.4th 952 (2002) to suggest that their relations with dealers cannot support liability, but the case actually weakens their position. In *Emery*, plaintiffs claimed that solicitations to enter foreign lotteries were illegally sent to California residents, and that these letters said payment could be made using VISA and other credit cards. Plaintiffs did not sue those who operated the lotteries, those who sent the letters, or any bank that issued a VISA credit card. Instead, they sued an organization that was not involved in any way in the preparation or distribution of the letters. *See id.* at 956-57.

Defendants' business practices at issue here are of a fundamentally different nature than VISA's. VISA is an international clearinghouse for the exchange of funds among independent financial institutions. *See id.* VISA does not sell or distribute any products through the merchants who accept its cards. Further, VISA had "no regular, direct dealings at all with any of the merchants." *Id.* at 960.[39] Here, defendant manufacturers *do*

[39] It is worth noting that even despite its very distant relationship with merchants who use its card in transactions, VISA cooperated with law enforcement in investigations of merchants who may be using its logo in illegal transactions. Indeed, VISA issued a cease and desist letter to the merchants at issue in the *Emery* case following initiation of that suit. *See* 95 Cal.App.4th at 957.

have relationships and regular dealings with the distributors and dealers that sell their products. Many of the defendant manufacturers sell guns directly to dealers, and even those that do not, like Sturm, Ruger, maintain direct and regular contact through sales representatives, trade shows, association membership and correspondence, as well as collecting and maintaining databases of information about their dealers.[40] While VISA had almost no "business practices" *at all* vis-à-vis the merchants that used their cards, the business practices of gun manufacturers vis-à-vis their dealers are carefully managed, active and constant. Courts have already distinguished *Emery* on these grounds. *See, e.g., Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146, 1187 & n.33 (C.D. Cal. 2002) (holding that internet age verification service could be liable under §17200 for violation of publicity rights by web sites of service's subscribers and distinguishing *Emery* because relationship between service and its subscribers was closer than that of VISA clearinghouse and merchants).[41]

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[40] *See, e.g.,* 49JA14340 (sales representative contacts); 49JA14179 (letter from dealer discussing contact at trade show, stating, "Now is the time for you [Ruger] to decide if you want the legitimate storefront dealer to survive; by supporting a clean distribution system that supports your company"); *Bridgewater* ¶2, 26JA7543 (describing association membership); 49JA14190, 49JA11654 (correspondence contacts); *Sanetti* 136:4-25, 53JA15592 (discussing dealer database).

[41] It should also be noted that the outcome in *Emery* hinged not on a duty analysis but on application of the "risk-utility test" to determine whether VISA's business practices were unfair. *Emery*, 95 Cal.App.4th at 965. The court concluded that §17200 claims failed in *Emery* because the risks of a few merchants misusing the VISA payment system were outweighed by the tremendous utility of this system, which handles thousands of transactions every second for thousands of banks and millions of merchants around the world. *See id.* at 956. Indeed, the court found no evidence that the existence of the VISA system increased any sort of risk or danger to anyone. Foreign lotteries could easily accept payment through other means, and those who bought foreign lottery chances with a VISA card stood an even better chance of getting money refunded than those who paid

Martinez v. Pacific Bell, 225 Cal.App.3d 1557 (1990) also does not support defendants' argument about control. In *Martinez*, the court granted demurrer to a phone company sued for placing a pay phone in an area that came to be used by drug gangs. The plaintiff was robbed and shot in a parking lot *near* the phone booth, and sued the phone company for creating a public nuisance. The court held the phone company could not be held vicariously liable for the crime committed by the gang members, especially where plaintiff was seeking a kind of premises liability for a crime that did not occur on defendant's own premises. *Id.* at 1562-63.

Vicarious liability cases like *Martinez* seek to hold a defendant liable for the conduct of someone else, without a showing that defendant's conduct itself is actionable. In this case plaintiffs are not seeking to hold manufacturers and distributors vicariously liable for the high-risk practices of their dealers, but for their own decision to continuously sell guns through these dealers – a decision over which they have complete control. Defendants' sale of guns through high-risk dealers creates great risk, and the supply of those guns to the criminal market in California is the inevitable and foreseeable result. Placement of the phone booth in *Martinez*, in stark contrast, did not increase the risk of a crime occurring nearby, so the phone company's control of that placement was irrelevant.[42] Here, criminal gun acquisition is precisely the risk created by the sale of guns through identifiable high-risk dealers. Defendants could adhere to a

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by cash or check. *See id.* at 965. Here, there is no utility in continuing to supply, in the lower court's words, "bad retail dealers in California." Op. at 18 (61JA17857A).

[42] The other vicarious liability cases cited by defendants are similarly distinguishable. *See, e.g., Medina v. Hillshore Partners*, 40 Cal.App.4th 477 (1995); *Zelig v. County of L.A.*, 27 Cal.4th 1112 (2002); *Cody F. v. Falletti*, 92 Cal.App.4th 1232 (2001); *Holman v. State*, 53 Cal.App.3d 317 (1975) (cited in Mfr. Br. at 38-40). In those cases as well, defendants did nothing to increase the risk to plaintiffs.

simple principle: "If you want to be a seller of our handguns, you cannot be linked to significant indicators of gun trafficking or diversion." *Nunziato* ¶21 (26JA7420).[43] Selling guns in defiance of that principle fuels the criminal gun market in California.

C. Even If Duty Were An Issue, Defendants Would Be Required To Establish They Should Be Exempt From The Duty Of Care Owed By All In California; They Failed To Make This Showing

Even if duty were an element of the plaintiffs' causes of action, defendants would be required to establish that they should be *exempt* from the duty of care owed by all parties under California law:

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

Cal. Civ. Code §1714(a). No exceptions are made to this duty "unless clearly supported by public policy." *Rowland v. Christian*, 69 Cal.2d 108, 112 (1968). Defendants assert no such exemptions based on public policy, nor could they, given the California Legislature's recent reaffirmation that distribution of firearms is not exempt from the universal duty to use ordinary care. *See* Cal. Civ. Code §1714(a).

Beretta does attempt a brief analysis of the factors relevant to the duty issue as set forth in *Rowland*, but has to rewrite the facts in evidence to do so. On foreseeability, Beretta claims that crime gun trace data "would not provide a basis for foreseeing which sales will result in criminals acquiring guns." Ber. Br. at 41. This, of course, misses the point of plaintiffs' expert testimony, which established which gun *dealers* supplied

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[43] Other industries have actually taken action to prevent diversion of their products to criminal misuse. *See, e.g., PDK Labs. Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 789-90 (D.C. Cir. 2004) (discussing steps taken by a pharmaceutical company with respect to its downstream sellers to prevent diversion of drugs to methamphetamine producers).

by defendants are "more likely than not" either involved in sales to gun traffickers or employ high-risk sales practices. *Vince* ¶¶46-73 (26JA7516-23). Moreover, Beretta conveniently ignores the mountain of additional evidence of foreseeability. Indeed, defendants frequently discussed the problem of "bad retail dealers" and whether they should adjust their distribution practices to deal with them, but ultimately rejected both internal warnings about the risks they were creating and ATF's repeated urgings to use trace data to control sales to gun dealers. Thus, the relevant risks are not just "foreseeable" by defendants in this case, they have been *foreseen*. *See supra* §§I(A)-(B).[44]

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[44] Beretta complains that if the court required defendants to "cut off dealers" on the basis of trace data alone, it would amount to a "private revocation of those dealers' federal licenses." Ber. Br. at 41 n.40. This claim is flawed for several reasons. First, Beretta itself requires dealers not to sell its guns outside the United States, and presumably would "cut off" any dealer who egregiously violated this policy. *See* Pl. Br. at 24. Second, as Professor Gundlach testified, it is not unusual for other industries to implement Codes of Conduct for their dealers in an attempt to prevent diversion of their products into the criminal market. *See Gundlach* ¶¶89-96 (26JA7460-63); *PDK Labs.*, 362 F.3d at 789 (discussing pharmaceutical company's decision to "cut off sales to distributors suspected of selling its drug products in bulk" and other steps). Indeed, defendant gun makers openly considered a watered down "Code of Practice" themselves, through their trade associations, before deciding not to implement such a policy. *See supra* p.24 (citing evidence). Third, the federal government, including the Department of Justice, has openly requested gun manufacturers to take just this step, among others, to curb the supply of guns to the illegal market. *See Gun Violence Reduction* at 34 (39JA11429) ("To properly control the distribution of firearms, gun manufacturers and importers should: identify and refuse to supply dealers and distributors that have a pattern of selling guns to criminals and straw purchasers"). The Indiana Supreme Court also recommended this step in its *Gary* decision. 801 N.E.2d at 1237 ("At a minimum, the distributors and manufacturers can stop doing business with those few dealers in the Gary area known to be sources of unusually high volumes of illegal sales.").

As for the closeness of the connection between defendants' conduct and the attendant harm – *i.e.*, the illegal gun market in California – courts have found the link to be quite close even in cases seeking damages, rejecting remoteness as a grounds for dismissal in very similar gun cases brought by municipalities. *See, e.g., City of Cincinnati*, 768 N.E.2d at 1149 ("the court of appeals erred in concluding that appellant's claims were too remote for recovery"); *City of Gary*, 801 N.E.2d at 1240, 1242 (rejecting claim that "damages are too remote from the activity of some defendants to be recoverable"); *James*, 820 A.2d at 39, 43-44 ("[B]ased on the City's pleadings, the multiple 'links' that form defendants' remoteness argument in fact fold into a single link"); *City of Chicago*, 785 N.E.2d 16, 31 (Ill. App. Ct. 2002) (rejecting claim that injuries are too remote), *appeal allowed,* 788 N.E.2d 727 (Ill. 2003).

Further, if moral blame attaches to criminals who foreseeably misuse firearms, it certainly attaches to those whose actions facilitate the supply of guns to criminals. Defendants in fact profit handsomely from supplying this illegal market, as Professor Fox established. *See Fox* ¶¶5-12 (26JA7468-70) (estimating size of criminal market). Beretta just makes up its assertion that "[r]etail sellers of firearms already have sufficient incentives to sell their products responsibly." Ber. Br. at 42. If this were so, ATF would not have been able to identify enough bad dealers to write a report like "Following the Gun," which details large scale firearms diversion by federally licensed dealers. *See Vince* App. A ¶z (26JA7538); *Wachtel* ¶7 (26JA7575-76) (identifying California dealers that have supplied the illegal market). In fact, the incentives run in favor of diversion, not against it. *See Higgins* ¶¶8, 14-15 (26JA7490, 7492-93); *Vince* ¶¶11-12 (26JA7504-06). Finally, if it is not too much of a burden to oversee downstream gun dealers to ensure market share and profitability, as defendants do, *see* Pl. Br. at 23-25 (citing record), how could it be too great

a burden where public safety is at stake? Accordingly, Beretta's attempt to exonerate itself would fail if *Rowland*'s duty analysis were applicable to plaintiffs' §17200 or public nuisance claims. Of course, there is no such requirement.

III. DEFENDANTS OFFER ONLY WIDELY-DISCREDITED ARGUMENTS AGAINST PLAINTIFFS' PUBLIC NUISANCE CLAIM

In an attempt to revive arguments rejected by the lower court at the demurrer stage, defendants invent a series of insupportable special limitations on California's public nuisance statute. These limitations are not justified by any precedent or policy, or the statute itself. *See* Cal. Civ. Code §3479. As with plaintiffs' §17200 claim, plaintiffs presented substantial evidence that defendants' reckless distribution practices create a public nuisance.

A. Defendants' Assertion That Public Nuisance Claims Must Be Tied To Property Or Illegal Conduct Is Meritless

Defendants argue that public nuisance liability in California is confined to only two contexts: cases involving real property or violations of statutes or ordinances. *See* Ber. Br. at 45; Mfr. Br. at 47-48. There is no such rule in California and defendants cite absolutely no authority for limiting the broad public nuisance statute in this way.[45]

One of the leading cases on the state of public nuisance law in California, *People ex rel. Gallo v. Acuna,* 14 Cal.4th 1090, 1108-09 (1997), discusses the history of the statute dating back to the time of the Crown,

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[45] *City of Bakersfield*, 64 Cal.2d 93 and *People v. Lim,* 18 Cal.2d 872 (1941), cited by Beretta at 44-45, do not hold otherwise. In *City of Bakersfield* the building was found to be a nuisance even though it was built in accordance with existing statutes. *City of Bakersfield*, 64 Cal.2d at 101. *People v. Lim* discusses conduct that is also a crime. *Lim*, 18 Cal. 2d at 880. Neither case held that liability for a public nuisance can *only* be found if the nuisance also violates a statute.

and explains that whether an act is criminal in nature does not determine whether it is also a public nuisance. "[C]onduct which unreasonably . . . interferes with the public health, safety, peace, comfort or convenience is a public nuisance . . . even if that conduct is not specifically prohibited by the criminal law." *Id.* at 1108, quoting *Armory Park v. Episcopal Cmty. Servs.*, 712 P.2d 914, 923 (Ariz. 1985). The court in *Gallo* also reiterated the obvious differences between private nuisances, which are land-based, and public nuisances, which are not. *Id.* at 1103; *see also Ileto*, 349 F.3d at 1213-14.

Defendants claim, further, that product manufacturers can never be liable in public nuisance for distributing a lawful product. Defendants rely principally on a series of cases in which the courts held that plaintiffs could not revive time-barred products liability claims against asbestos manufacturers by asserting them under the label of public nuisance. *See City of San Diego v. U.S. Gypsum Co.*, 30 Cal.App.4th 575, 585 (1994) (barring claim "because City has essentially pleaded a products liability action, not a nuisance action"); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992). *See also Tioga Pub. Sch. Dist. #15 of Williams County, N.D. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir 1993) (rejecting asbestos product liability claim brought under nuisance theory). These cases are irrelevant here because plaintiffs' nuisance claim does not concern whether defendants' products are defectively designed or manufactured and so cannot be characterized as a products liability claim.

California courts have flatly rejected similar attempts to distort and exaggerate the rulings in the asbestos cases. For example, the same argument was made in *Selma Pressure Treating Co.* and the court's rejection of that argument was unequivocal: "We do not find the [asbestos] cases categorically relieve manufacturers or suppliers of goods from liability for nuisance." *Id.*, 221 Cal.App.3d at 1619 n.7. In *City of*

Modesto, 119 Cal.App.4th at 39-40, a panel of this Court also distinguished *City of San Diego* as seeking to prevent recovery for a product liability action disguised as a public nuisance action. The Court specifically found that cases against gun manufacturers like those brought by the plaintiffs here are not disguised product liability actions and so would not be affected by the ruling in *City of San Diego*. *Id.* at 873 n.8. ("the theory in [the gun] cases was not that the products were defective or that the defendants failed to warn of their dangers."). *See also Ileto*, 349 F.3d at 1213 n.29 ("here we do not have 'a products liability action in the guise of a nuisance action.'") (citations omitted).

Further, courts in other states addressing similar claims against these same defendants have held that their conduct violates public nuisance law and have rejected the specific limitations sought by defendants here. *See, e.g., City of Gary*, 801 N.E.2d at 1232-36 (nuisance liability under statute identical to California's not limited to property or violations of law); *James*, 820 A.2d at 50-53 (rejecting defendant's limitations on public nuisance law); *City of Cincinnati*, 768 N.E.2d at 1143-44 (same); *City of Chicago*, 785 N.E.2d at 31 (same); *White v. Smith & Wesson Corp.*, 97 F.Supp.2d 816, 829 (N.D. Ohio 2000) (same); *City of Boston v. Smith & Wesson Corp.*, 12 Mass.L.Rptr. 225, 2000 WL 1473568, *14 (Mass. Super. Ct. 2000) (same). Defendants' citation to contrary authority is disingenuous.[46]

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[46] Defendants continue to rely, for example, on the discredited Third Circuit decision in *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001). *See* Ber. Br. at 47; Mfr. Br. at 49 n.39. Only the Beretta brief, however, notes that *Camden County* was disagreed with by *James*, Ber. Br. at 47 n.43, but it omits the crucial point – that New Jersey courts have in fact "allowed a public nuisance claim to proceed against manufacturers [of] lawful products that are lawfully placed in the stream of commerce," *id.* at 47, in *direct contradiction to the Camden County quote* in Beretta's brief. *See James*, 820 A.2d at 38. The Third Circuit has been equally unsuccessful in predicting Pennsylvania law in gun

B. Defendants Mischaracterize Plaintiffs' Evidence And Case Law On The Control Defendants Have Over The Public Nuisance

Defendants assert that California law requires a defendant to "control" a nuisance in order to be held liable for helping to create it. Defendants' claim, however, confuses control of the harm with control of the conduct that contributes to the harm. California cases do not require defendants to do more than control their own nuisance-contributing conduct. In *City of Modesto*, for example, a panel of this Court ruled that to be held liable for creating a public nuisance, a defendant need not have the ability to control the harm itself. 119 Cal.App.4th at 41-42. "[T]he critical question is whether the defendant created or assisted in the creation of the nuisance." *Id.* at 38. *See also Ileto*, 349 F.3d at 1212 (affirming there is no "control requirement" under California law); *Newhall Land & Farming Co. v. Super. Ct.*, 19 Cal.App.4th 334, 343 (1993) (party need no longer own the property to be liable for nuisance, nor even have an interest in the property when the nuisance was created); *Shurpin v. Elmhirst*, 148 Cal.App.3d 94, 101 (1983) ("not only is the party who maintains the nuisance liable but also the party or parties who create or assist in its creation"); *People v. Montoya*, 137 Cal.App.Supp. 784, 787 (1933) (rejecting alcohol seller's argument that it cannot be responsible for nuisance because customers' illegal and disorderly acts occurred outside business premises and beyond its control); *Hardin v. Sin Claire*, 115 Cal.

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cases. Beretta cites to *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002), which held that Pennsylvania law would also not support such claims, yet a state court has already refused to follow that decision. *See Jefferson v. Rossi*, Apr. Term 2001, No. 2218 (Pa. Ct. C.P. Aug 2, 2002) (attached as Ex. 1) (rejecting gun distributor's summary judgment motions in negligent distribution and public nuisance suit).

460, 463 (1896) ("any person creating or assisting to create and maintain the nuisance was liable to be sued for its abatement").[47]

Of course, in this case defendants are in a position to control their own contribution to the public nuisance by changing their distribution practices. As discussed at length above, defendants control the supply of guns to dealers and can set the terms and conditions of those sales. Defendants distribute guns through high-risk dealers that they know or should know facilitate the diversion of thousands of guns into criminal's hands. Even after being repeatedly asked by the federal government to change their distribution practices, and discussing the matter within the industry, defendants have chosen to maintain their harmful distribution systems. Thus, there is more than enough record evidence to establish that defendants have sufficient control to be liable. *See supra* §I(B) (reciting record evidence).

Numerous courts have held that defendants have sufficient control to be liable for public nuisance claims. *See, e.g., City of Gary*, 801 N.E.2d at 1235 (defendants control who they supply guns to, which is sufficient for public nuisance claim); *City of Cincinnati*, 768 N.E.2d at 1142 (defendants can be liable if they "control the creation and supply of this illegal, secondary market for firearms, not the actual use of the firearms that cause injury"); *James*, 820 A.2d at 52 ("The 'instrumentality' defendants 'control' is the creation and supply of this illegal market."); *White*, 97 F.Supp.2d at 829 (same); *City of Boston*, 12 Mass.L.Rep. 225, 2000 WL

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[47] Cases cited by Beretta are not to the contrary, as Beretta again confuses public nuisances with land-based private nuisances. *See* Ber. Br. at 49. *Longfellow v. County of San Luis Obispo*, 144 Cal.App.3d 379, 384 (1983), states only that "former owners of land are not liable for injury sustained by persons while on the land after the property has been transferred," and in *Kelliher v. Fitzgerald*, 54 Cal.App. 452, 458-59 (1921), the court found that

1473568 at *14 n.62 (same). *See also Sunset Amusement Co. v. Bd. of Police Comm'rs*, 7 Cal.3d 64, 84 (1972) (criminal acts encouraged or assisted by defendants' "methods of operation . . . may be said to lie within their reasonable control"); *Selma Pressure Treating Co.*, 221 Cal.App.3d at 1624 (rejecting manufacturers' argument that they cannot be liable for nuisance because product user's illegal behavior is superseding cause of harm).[48]

IV. DEFENDANTS' CLAIM THAT THIS COURT SHOULD ABSTAIN DEFIES PRECEDENT AND THE LEGISLATURE'S OWN RECENT POLICY PRONOUNCEMENT

Defendants have an insurmountable task in asking this Court to abstain from adjudicating the issues in this case. They must convince this Court to ignore the fact that, *during the pendency of this case*, the Legislature specifically provided that legal claims concerning "distribution ... of firearms" are the proper province of the judiciary. Cal. Civ. Code §1714(a). Defendants did not even address this legislative policy.

A. California Civil Code §1714(a) Makes Clear That Abstention Is Inappropriate

As plaintiffs have explained, the California Legislature enacted California Civil Code §1714(a) while this case was ongoing in the Superior Court. The Legislature passed this provision as part of legislation repealing

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defendants could not be expected to control the weather, but still had to abate the nuisance they created.

[48] Defendants' reliance on *Martinez*, 225 Cal.App.3d 1557, is completely misplaced. *See* Mfr. Br. at 37-38, Ber. Br. at 50-51. As discussed at page 44 above, the plaintiff in *Martinez* sought damages from a telephone company for a shooting incident that occurred near one of its pay phones. Whereas in *Martinez* the plaintiffs sought to impose vicarious liability for conduct wholly out of the defendant's control, *see Martinez* at 1569, here plaintiffs are seeking to hold defendants liable only for their distribution of their own product. Defendants here control their contribution to an ongoing public nuisance created by their continued supply of high-risk gun dealers.

a law that had granted limited immunity from lawsuits to gun makers. *See* Cal. Civ. Code §1714.4 (repealed 2002). The Legislature's action was a response to the California Supreme Court's ruling in *Merrill v. Navegar, Inc.*, 26 Cal.4th 465 (2001), which had dismissed a suit alleging that a gun maker "acted negligently by manufacturing, marketing, and making available for sale to the general public" a military-style assault pistol. *Id.* at 473. The Court decided *Merrill* was a product liability suit banned by §1714.4. The Court based its ruling on "[t]he public policy the Legislature established in section 1714.4" precluding such suits. *Id.* at 470.

The Legislature responded to *Merrill* not only by repealing §1714.4, but also by adding language to the Civil Code reaffirming that the public policy of California supports a duty of ordinary care for gun makers. *See* Cal. Civ. Code §1714(a). With this case pending and defendants having raised §1714.4 as a possible bar to this suit,[49] the Legislature made clear that the policy of the state supported not only product liability suits, but also "public . . . nuisance" and "statutorily based actions" against gun makers – the very claims at issue here. Assemb. Daily J. 2001-2002, Reg. Sess., at 8232 (2002). The Legislature declared that the state's policy strongly supports holding gun makers and sellers accountable for their "distribution ... of firearms" if they do not "use ordinary care and skill." Cal. Civ. Code §1714(a). Indeed, firearms are the *only* product specifically identified in §1714(a), *making clear the Legislature's determination that firearm distribution cases are particularly suited for resolution by the courts*. Defendants' extraordinary assertion that this Court should abstain from deciding the issues here and in other gun cases, in the face of specific legislative language to the contrary, must be rejected.

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[49] The lower court rejected this claim on demurrer. *See* Oct. 4, 2000, Order (11JA3026-28).

B. Absent §1714(a), Abstention Would Still Be Inappropriate

Even if the Legislature had not amended § 1714(a) to expressly allow firearm distribution suits, defendants' insistence that plaintiffs' remedies for their civil claims somehow lie with the Legislature or ATF would still have no merit. Faced with a similar argument, the court in *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal.App.4th 963 (1992), rejected a claim that allowing a §17200 suit was inappropriate because "regulation of businesses in an attempt to safeguard the public health is traditionally a legislative function." *Id.* at 974. The court correctly noted that a suit to stop an unfair practice is not prohibited because the Legislature also regulates that product, as nothing prohibits "one branch from taking action properly within its sphere that has the incidental effect of duplicating a function or procedure delegated to another branch." *Id.*, quoting *Younger v. Super. Court*, 21 Cal.3d 102, 117 (1978). Moreover, plaintiffs here are not asking the court to "mandat[e] new regulatory requirements" or "achieve complex legislative ends." Mfr. Br. at 51. Plaintiffs are seeking to apply §17200 and public nuisance law to enjoin unfair conduct and impose mandatory civil penalties – a task the Legislature has made clear is one for the courts. *See* Cal. Civ. Code §1714(a).[50]

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[50] Defendants' alleged concern that non-party competitors would not be affected by an injunction is legally irrelevant and meritless. Courts have allowed injunctive relief where far fewer industry actors were involved. In *Stop Youth Addiction*, 17 Cal.4th at 558-59, the Court allowed a suit for injunctive relief against a single cigarette retailer and in *Consumer's Union*, 4 Cal.App.4th at 965-66, 976, injunctions were imposed on a single dairy. In *Consumer's Union*, the court stated that because §17200 creates plaintiff prosecutors they are similar in some ways to criminal prosecutors: "absent charges of invidious discrimination, prosecutors have broad discretion to choose which defendants to prosecute and in what order." *Id.* at 975. Moreover, if an injunction were issued here, it would be utterly reckless for

Indeed, abstention would be particularly inappropriate here, because if defendants' conduct constitutes an unfair business practice the trial court *must* impose civil penalties. The law requires that "[a]ny person who engages . . . in unfair competition *shall be liable* for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation . . . in a civil action brought in the name of the people of the State of California . . . ." Cal. Bus. & Prof. Code §17206(a) (emphasis added). When monetary relief is requested and unfair practices are found the court *may not abstain*: "The court shall impose a civil penalty for each violation of this chapter." *Id.*, §17206(b). The amount of the award is discretionary, but granting it is not. *See Hewlett v. Squaw Valley Ski Corp.*, 54 Cal.App.4th 499, 537 (1997) (upholding trial court finding of $125 penalty per tree for each of 1,320 trees illegally cut). *See also People v. Orange County Charitable Servs.*, 73 Cal.App.4th 1054, 1071 n.10 (1999) (each act constitutes separate violation); *People v. Custom Carpets, Inc.*, 159 Cal.App.3d 676, 686 (1984) (penalty is mandatory).[51]

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other gun makers to engage in the same conduct, exposing them to great potential liability.

[51] Whereas plaintiffs here seek mandatory civil penalties, in all but one of defendants' §17200 abstention cases the plaintiffs were private parties not entitled to seek such penalties. *See Lazar v. Hertz Corp.*, 69 Cal.App.4th 1494 (1999) (individual plaintiff's request for injunctive relief against rental car agency); *Cal. Grocers Ass'n, Inc. v. Bank of Am.*, 22 Cal.App.4th 205 (1994) (plaintiff trade group's request for injunctive relief against high check-processing charges); *Shvarts v. Budget Group, Inc.*, 81 Cal.App.4th 1153 (2000) (individual plaintiffs' request for injunctive relief against rental car fuel charges); *Wolfe v. State Farm Fire & Cas. Ins. Co.*, 46 Cal.App.4th 554 (1996) (homeowner plaintiff's request for injunctive relief against insurance company); *Diaz v. Kay-Dix Ranch*, 9 Cal.App.3d 588 (1970) (plaintiff migrant workers' action against farm operators); *Desert Healthcare Dist. v. Pacificare, FHP, Inc.*, 94 Cal.App.4th 781 (2001) (hospital's action against insurance company). The only §17200 abstention case cited by defendants where the plaintiff was a public agency involved a case where the federal government completely occupied the field. *See*

When previously asked to defer in §17200 actions, courts have consistently declined to do so unless the Legislature expressly preempts judicial action. *See, e.g.*, *Stop Youth Addiction*, 17 Cal.4th 553 (allowing suit against retailer selling cigarettes to minors); *Children's Television*, 35 Cal.3d 197 (allowing suit against cereal manufacturers); *Alta-Dena Certified Dairy*, 4 Cal.App.4th 963 (allowing suit against dairy product manufacturers); *Consumer Justice Ctr. v. Olympian Labs, Inc.*, 99 Cal.App.4th 1056 (2002) (sustaining injunction against dietary supplement manufacturer); *United Farm Workers of Am., AFL-CIO v. Dutra Farms*, 83 Cal.App.4th 1146 (2000) (upholding judgment against farm operator); *Hewlett*, 54 Cal.App.4th 499 (upholding judgment against ski resort). There has been no express preemption of §17200 cases against gun sellers. Indeed, the Legislature has gone out of its way to preserve such claims.[52]

Moreover, seeking civil relief under §17200 does not seek "enforcement" of criminal laws, as defendants contend. The Court in *Stop Youth Addiction*, 17 Cal.4th at 576, made clear that "the fact a [§17200] action is based upon, or may even promote the achievement of, policy ends underlying [criminal or regulatory provisions] does not, of itself, transform the action into one for the 'enforcement' of [criminal statutes or regulatory schemes]." *Id.*

The present case is not an "enforcement" action brought because ATF has inadequate resources or has failed "to perform its duties." Ber. Br.

People ex rel. Dept. of Transp. v. Naegele Outdoor Ad. Co. of Cal., 38 Cal.3d 509 (1985).

[52] Defendants incorrectly suggest that regulations for firearm sales, many of which were enacted after the conduct at issue here occurred, prevent this Court from considering this case. *See* Mfr. Br. at 10-14. A glaring omission from defendants' list, however, is any legislative policy allowing gun distribution, though legal, to be conducted in an unfair way that creates a nuisance. No law mandates that defendants sell to high-risk dealers.

at 52-55. Rather, defendants are under a legal obligation to refrain from engaging in conduct that endangers public health and safety regardless of whether ATF is well-funded, or aggressive in the discharge of its duties. Defendants' argument is the equivalent of claiming that a company should not be liable for discharging hazardous substances into a stream because there are government agencies with enforcement responsibilities for dealing with hazardous waste. The fact that ATF could seek to revoke the licenses of corrupt dealers who violate the law should not insulate from civil liability gun makers and distributors who supply dealers in a manner that is unfair and creates a nuisance. Here the regulatory agencies with which defendants insist plaintiff's remedies lie have repeatedly asked the defendants to reform their sales practices, yet the defendants have irresponsibly declined to do so. *See supra* p. 17 n.13.

Rather than advocating abstention, the California Supreme Court has made clear that §17200 suits can proceed despite regulation by the state. In *Stop Youth Addiction*, 17 Cal.4th at 571-72, the defendant cigarette retailer argued that the courts should abstain in plaintiff's suit to disgorge defendant's profits from selling tobacco products to minors because of the criminal statutes regulating cigarette sales. The court disagreed, holding: "[T]he mere fact the Legislature has enacted penal laws concerning minors and tobacco does not impliedly repeal any UCL remedy." *Id.* at 572. In fact, cigarettes and firearms are both regulated *by the same federal agency* (ATF) and it is illogical that abstention would be inappropriate for tobacco litigation, but somehow appropriate for firearms cases. Furthermore, the Court stressed: "We have recognized, moreover, that 'even though a specific statutory enforcement scheme exists, a parallel action for unfair competition is proper pursuant to applicable provisions of the Business and Professions Code.'" *Id.*, quoting *People v. McKale*, 25 Cal.3d 626, 632 (1979).

C. Abstention Is An Extraordinary Act Limited To Two Rare Circumstances, Neither Of Which Applies Here

Judicial abstention in §17200 cases is an extraordinary doctrine rarely invoked by the courts. California courts have only deferred to the Legislature in two types of cases – 1) those that intrude upon "complex economic policy" or 2) those where the Legislature has completely "occupied the field." The precedent cited by defendants falls squarely into these two exceptions, whereas the case here involves neither one.

1. Plaintiffs' claims do not intrude upon "complex economic policy"

Courts abstain in rare cases when a ruling would require dictating "complex economic policy." This typically involves setting insurance or interest rates or implementing price controls. In *Wolfe v. State Farm Fire & Cas. Ins.*, 46 Cal.App.4th 554 (1996), the court declined to require insurers to continue issuing homeowner policies with earthquake coverage after an earthquake. To implement plaintiff's proposed injunction, the court would have had to engage in "microeconomic managing" involving "the court in evaluating the potential risk being undertaken by each individual homeowners/earthquake insurer and analyzing their respective financial conditions to determine whether they would remain sufficiently solvent to undertake those risks." *Id.* at 567. Moreover, the Legislature enacted a remedy as the litigation progressed and so the court "decline[d] the invitation to undo what the legislature has done." *Id.* at 568. Here, of course, the Legislature has expressly recognized the judiciary's proper role in gun distribution cases. *See* Cal. Civ. Code. §1714(a). The limited holding of *Wolfe* was further narrowed in *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal.4th 26 (1998), where the Court confined judicial

abstention in the insurance area to "activities related to rate setting." *Id.* at 33.[53]

Similarly, in *California Grocers Ass'n, Inc. v. Bank of America*, 22 Cal.App.4th 205 (1994), the court refused to declare bank check charges unconscionably high because doing so would amount to judicial price control. The court recognized "the general preference for legislative or administrative oversight of price control: The control of charges, if it be desirable, is better accomplished by statute or by regulation . . . ." *Id.* at 218 (citation omitted). *See also Freeman v. San Diego Ass'n of Realtors*, 77 Cal.App.4th 171, 203 n.35 (1999) (declining to enjoin real estate listing practices because to do so "would place this court in the role of a price control board").

In addition, courts have refused to abstain even when the regulatory schemes at issue were complex, if they did not involve rate setting or price control. In *Hewlett*, 54 Cal.App.4th 499, the court allowed a §17200 suit to proceed where a detailed system of environmental regulations were in place. The ski resort defendant had been through several rounds of extensive permitting processes lasting over a decade, but the court still allowed a related §17200 claim to proceed. *Hewlett* demonstrates that the mere existence of a "complex" regulatory regime does not support abstention.[54]

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[53] Defendants also rely on *Crusader Ins. Co. v. Scottsdale Ins. Co.*, 54 Cal.App.4th 121 (1997). This case did not even involve a §17200 claim. When a similar claim was brought under §17200 in *Stevens v. Super. Ct.*, 75 Cal.App.4th 594, 604 n.9 (1999), the same court that decided *Crusader* allowed the *Stevens* case to go forward because of the breadth of §17200.

[54] Defendants' citation to *Korens v. R.W. Zukin Corp.*, 212 Cal.App.3d 1054 (1989) is also unhelpful, as that case likewise asked the court to decide complex economic policy. Plaintiff tenant sued her former landlord seeking interest on a security deposit. Plaintiff's claim defied the "ordinary presumption that only a debtor-creditor relationship is created" by a

2. Neither Congress nor the California Legislature have completely occupied the field of firearms regulation

Judicial abstention may be invoked in rare cases where the Legislature has stated that a cause of action should not exist or has completely "occupied the field." For example, in *Lazar v. Hertz Corp.*, 69 Cal.App.4th 1494 (1999), the court determined that §17200 could not be used to bring an age discrimination claim against car rental agencies because the Legislature contemplated that a minimum age requirement for renting a car should exist. There, "the legislative scheme anticipat[ed] and expressly approv[ed] the adoption of minimum age requirements by car rental companies." *Id.* at 1503.

Defendants' other authority also involves cases where the Legislature has clearly expressed its will to preempt certain cases, whereas here it has stated just the opposite policy. *See Desert Healthcare Dist.*, 94 Cal.App.4th 781, 793 (health care contracts were not an unfair practice because they were specifically approved by the Legislature); *Ochs v. Pacificare of Cal.*, 115 Cal.App.4th 782, 793-94 (2004) (Legislature created "safe harbor" preventing §17200 claim); *Shvarts*, 81 Cal.App.4th 1153, 1158-59 (Legislature contemplated and approved of service charges for refueling rental cars); *Drennan v. Sec. Pac. Nat'l Bank*, 28 Cal.3d 764 (1981) (federal law prevents judicial regulation of conditional sales contracts).

Courts have abstained where a comprehensive scheme entirely occupies the field. California courts have rarely invoked this exception and have done so in areas where federal law impliedly preempts state law. In *People ex rel. Dept. of Transp. v. Naegele Outdoor Ad. Co. of Cal.*, 38

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tenant's security deposit, and urged the court to instead find that a trust relationship is created. The court rejected this "convoluted" attempt to import trust law into landlord-tenant law. *Id.* at 1059.

Cal.3d 509 (1985), the California Supreme Court reversed the trial court's finding of summary judgment where the plaintiff had attempted to use §17200 to regulate billboard advertising on a Native American reservation. Due to the unique interplay between the federal government and tribal reservations, the Court found that "state court injunctive relief under the theory of unfair competition is inappropriate." *Id.* at 523. Similarly, in *Diaz*, 9 Cal.App.3d 588, the court refused to allow §17200 to be used to combat illegal immigration because "Congress possesses the exclusive power to regulate immigration." *Id.* at 593.

Diaz and *Naegele* are not controlling here, because in the areas of immigration and Indian affairs the federal government has *completely* occupied the field. In *Soloranzo v. Superior Court*, 10 Cal.App.4th 1135 (1992), a §17200 action involving Medicare, the appellate court rejected defendant's reliance on *Diaz* and *Naegele* because the states and the federal government were *jointly* responsible for public welfare programs. The court reasoned unless Congress has included a "specific preemption provision" that states are free to act in the area, and that a §17200 action could be sustained. *Id.* at 1149. Likewise, in *Pagarigan v. Superior Court*, 102 Cal.App.4th 1121 (2002), the court allowed a challenge to Medicare arbitration procedures to continue because it found that "the Medicare Act explicitly states [Congress's] intent to minimize federal intrusion into the area." *Id.* at 1146 (citation omitted).[55] The cases defendants cite involve areas of *exclusive* federal control, which is not present here.

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[55] *Compare Pagarigan*, 102 Cal.App.4th 1121 (declining to abstain from a challenge to Medicare arbitration procedures), *with Congress of Cal. Seniors v. Catholic Healthcare W.*, 87 Cal.App.4th 491, 508-09 (2001) (abstaining in §17200 challenge to Medicare reimbursement reporting because "Federal law governing provider cost reporting and reimbursement so thoroughly occupies the field with its pervasive and complex regulatory

With respect to firearms, not only have the state and federal legislatures not completely occupied the field, they have expressly disavowed any preemptive intent. The federal Gun Control Act of 1968 states, "*No provision of this chapter shall* be construed as indicating an intent on the part of the Congress to *occupy the field* in which such provision operates to the exclusion of the law of any State on the same subject matter" unless there is a direct and irreconcilable conflict. 18 U.S.C. §927 (emphasis added). Consistent with this approach, the U.S. Senate rejected, by a vote of 90-8, a bill to provide immunity to the gun industry from state causes of action. *See* 150 Cong.Rec. S1973-01, S1976 (Mar. 2, 2004) (rejecting S.1805). In California, the Legislature did likewise by repealing Civil Code §1714.4 and adding §1714(a), ensuring that common law and statutory claims could continue against gun sellers. As the court in *Consumer Justice Ctr.*, 99 Cal.App.4th at 1061, put it: "One can hardly 'occupy a field' while shunning vast acres of it."[56]

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system as to make reasonable the inference that Congress left no room for the states to supplement it").

[56] Defendants also raise a "dormant commerce clause" argument that has been resoundingly rejected in similar cases. *See* Mfr. Br. at 55 n.43. Interpreting California law, the Ninth Circuit in *Ileto*, 349 F.3d at 1217, called this argument "meritless" and held, "[W]hatever indirect burden an award of damages to the plaintiffs might have on the defendants, it does not approximate the public interest in protecting the health and safety of California's citizens." *See also City of Cincinnati*, 768 N.E.2d at 1150 (calling gun maker's reliance on *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), "misplaced": "the fact that appellant's claims implicate the national firearms trade does not mean that the requested relief would violate the Commerce Clause"); *City of Gary*, 801 N.E.2d at 1236-38 (rejecting dormant commerce clause defense).

V. THE TRADE ASSOCIATIONS MISCHARACTERIZE THEIR ROLE IN CAUSING OR CREATING A RISK OF HARM TO THE PUBLIC AND CONTRIBUTING TO A PUBLIC NUISANCE

The trade associations follow the manufacturers' now-familiar pattern of distorting the nature of plaintiffs' claims. *See, e.g.,* Trade Associations' Response Brief ("T.A. Br.") at 1, 7. Plaintiffs do not argue on appeal, nor did they argue below, that the trade associations are liable because they failed to take some action or are guilty of nonfeasance.[57] Rather, plaintiffs allege that the trade associations *engaged in affirmative misconduct,* including intimidating and preventing any manufacturer defendant from taking unilateral action to change its business practices of continuing to supply high-risk dealers.

The trade associations also follow the manufacturers' lead by attempting to rewrite the record evidence. NSSF attempts to portray itself as purely an educational group, with public safety as its ultimate goal and SAAMI as a separately-run, standard-setting group, having no role in setting or influencing industry practices. However, in reality these two groups have worked in tandem, through the same board members and the same defendant industry members, to ensure that defendants' distribution practices would continue unchanged, guns would continue to be sold to high-risk dealers, profits from sales to the illegal market would be preserved, and those who disagreed would be ruthlessly shoved aside.

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[57] Contrary to the trade associations' characterizations, plaintiffs have not changed their theory of liability as to the trade associations on appeal. Plaintiffs have consistently alleged that the trade associations' affirmative conduct violates §17200 and California's public nuisance statute. *See, e.g.*, Pls.' Opp. to Trade Ass'ns' Mot. Sum. J. at 21-22 (25JA7168-209) (arguing that "the Trade Associations have acted to suppress such reforms and offered assurances to each member of the industry that no other members would unilaterally implement reforms.")).

Contrary to the trade associations' characterizations, the issue before this court is not whether the trade associations are "vicariously liable" for the manufacturers' conduct. *See* T.A. Br. at 11, 14. The issue is the trade associations own affirmative misconduct in ensuring that defendants "stand united" in continuing gun sales through high-risk dealers.

The trade associations also blatantly mischaracterize California public nuisance and §17200 law. For example, they claim it is plaintiffs' burden to show that the trade associations "controlled" the business practices of the manufacturer defendants. *See* T.A. Br. at 8. This is not California law, which only requires trade associations to contribute to unfair practices and a public nuisance to be liable. The trade associations' actions facilitating a united front against any reform of industry practices that feed the illegal market for firearms more than satisfies this liability standard.

A. Plaintiffs Have Presented Sufficient Evidence Of The Trade Associations' Affirmative Misconduct To Sustain §17200 And Public Nuisance Claims

The record shows that NSSF and SAAMI speak for, and act on behalf of, multiple gun manufacturers. *See* 46JA13531-13533; 49JA14252-14254; *Ricker* ¶16(26JA7561). In this role, the trade associations exert unique pressure, both direct and indirect, on each individual company to discourage reform of the industry's distribution practices and create a "united front" against reform. *See Bridgewater* ¶¶2-5 (26JA7543-7544), ¶7(26JA7545); *Ricker* ¶17 (26JA7562); *Delfay* 103:10-19(50JA14620A), 162:4-12 (50JA14627); 56JA16295-16296.

NSSF and SAAMI were able to exert this pressure because they had established themselves as the industry-wide forum for the consideration of distribution reform measures and then consistently squelched those proposals. The trade associations' consistent rejection of reform proposals

communicated a strong message to individual companies that to implement reforms would be to risk isolation from the rest of the firearms "family." *See Scott* 85:6-86:4 (54JA15672-15673), 110:2-12 (54JA15686), 115:17-118:15 (54JA15688-15691).[58] The trade associations also were the vehicle by which each defendant received implicit assurances that other companies would not defect from the united front. *See* 49JA14366-14368; 47JA13592-13593. As Robert Ricker testified, the trade associations role in rejecting reforms contributed to the "culture of evasion" that took hold in individual companies. *Ricker* ¶9 (26JA7555).

For example, an NSSF board member, Doug Painter, recommended potential reforms in a memo to Robert Delfay, NSSF's Executive Director. Painter called for a "*proactive industry strategy*" to: (1) address the serious "potential for illegal firearms transactions through ostensibly 'legal' FFL channels," and (2) "minimiz[e] the possibility of illegal transactions through unscrupulous FFL holders." 47JA13555-13556 (emphasis in original). But both Delfay and Arlen Chaney, the Chairman of the Board of Governors of NSSF, responded that nothing would be done. *See* 47JA13555, *Bridgewater* ¶12 (26JA7546). SAAMI also discussed possible reforms and then discarded them: drafting a "Responsible Firearms Retailer Code of Practice," and a SAAMI "pledge" "to sell our products to only legitimate retail firearms dealers," and then deciding not to implement either. *See* 48JA13938-13939; 48JA14041; 47JA13558-59; *Sanetti* 298:7-15 (53JA15610); *Delfay* 98:12-99:5 (50JA14616-14617), 101:9-102:17 (50JA14619-14620); 48JA14122-14128; 47JA13807-13816; *Delfay* 76:13-85:22 (50JA14604-14613). These specific trade association decisions

[58] *See also* Pl. Br. at 20-22 (summarizing evidence of Smith & Wesson's isolation from, and readmittance into, the "family").

reflected an industry-wide understanding that companies would not take action to reform their distribution practices.

Defendants also specifically addressed, and rejected, industry reforms at trade association gatherings. Defendant manufacturers openly discussed how their distribution practices of supplying high-risk dealers was dangerous and harmed the public and then decided to continue supplying those high-risk dealers during private meetings at NSSF's SHOT Show. *See Ricker* ¶16 (26JA7561). The defendants discussed the importance of keeping a united front as any decision to stop supplying the high-risk dealers would be seen outside the industry as an admission both that they could and that they should. *See id.*[59]

The trade associations exerted pressure by ensuring that advocates of reform, whether individuals or companies, were isolated and dealt with severely. For instance, Bob Delfay worked on behalf of both SAAMI and NSSF to ensure that individuals within the competing trade association, ASSC, suffered retaliation. *See* 47JA13656-13657; 47JA13665-13667; *Ricker* ¶¶18-21(26JA7562-66). The evidence indicates that Delfay, acting for the trade associations themselves, put pressure on the ASSC Board to terminate Richard Feldman because he advocated reform. *See Ricker* ¶20 (26JA7564); 45JA13208. There evidence also strongly suggests that Delfay brought about the demise of ASSC, first by inducing member companies to leave ASSC, and then by causing ASSC members to merge the association into NSSF, to eliminate the primary organization supporting industry reforms. *See Ricker* ¶21 (26JA7565-66); 45JA13184-13190;

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[59] Defendants challenge this evidence on the grounds that their activities were not conducted at "official" trade association meetings, *see* T.A. Br. at 23-24, but it is clear that key trade association members and their lawyers were in attendance, and the meetings were held at NSSF's major annual trade show. This, along with other evidence discussed herein, raises a material fact as to the trade associations' role in suppressing reform.

47JA13656-13664; 55JA16152-16154. Indeed, Paul Jannuzzo, Vice President of defendant manufacturer Glock, Inc. and an ASSC board member, described the "lynch mob mentality" among defendants out to silence and eliminate ASSC. 45JA13208.

The fact that the ASSC Board may have voted to terminate Feldman, and end ASSC's separate existence, is beside the point. The issue is the role of Delfay, as a representative of both NSSF and SAAMI, in those decisions. Delfay was clearly acting for both NSSF and SAAMI when he engaged in his campaign to eliminate ASSC as an independent voice for industry changes. *Id.*[60] Likewise, SAAMI members acted to force Bill Bridgewater, president of NASGD, off the ASSC board in 1995 for expressing his view that the industry needed to address the problem of distributing through bad dealers. *Ricker* ¶¶11-12 (26JA7555-7558); *Bridgewater* ¶¶7-14 (26JA7545-7548); *Jannuzzo* 661:24-662:24 (51JA14828-14829); 43JA12403.

The trade associations also acted to isolate and discipline Smith & Wesson when it left the firearms "family" and agreed to settle lawsuits against it by requiring everyone within its distribution system to adhere to a strict Code of Conduct. The evidence indicates that the trade associations, through their representatives Bob Delfay and Don Gobel, facilitated a concerted refusal by other manufacturers to join Smith & Wesson's new distribution practices. *See* 56JA16295-96; 56JA16298; 49JA14366-68; 47JA13592-93. The trade associations mischaracterize the evidence by asserting that NSSF simply "made public observations" of the fact that no other company entered into the agreement that Smith & Wesson signed.

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[60] ASSC's dismissal from this lawsuit hardly means that the facts surrounding its demise are irrelevant. *See* T.A. Br. at 25. As the record shows, *see* Pl. Br. at 20, its demise had an intimidating effect on individual companies who may otherwise have changed their practices.

See T.A. Br. at 26. The evidence instead shows that Delfay actually predicted that no other manufacturer would "desert" the industry's united stand, and later said he talked to each manufacturer to ensure this. *See* 56JA16295-96, 56JA16298-99. The trade associations also ignore one of the most probative pieces of evidence of their actions to squelch reform: a memo of NSSF "action items" from Gobel, the Chair of the NSSF Board, to Delfay, where one of the action items was "Why We Stand United Not to Sign the S&W Agreement." See 49JA14366-8; 47JA13592-3. This evidence is sufficient to create a material issue as to the trade associations role in ensuring that no other manufacturer would join Smith & Wesson in agreeing to reforms.

In an effort to avoid the implications of the actions they took to prevent changes to any manufacturers' distribution policies, the trade associations further mischaracterize the record. NSSF and SAAMI allege the record is void of "any evidence that NSSF or SAAMI ever received or reviewed, much less expressed a NSSF or SAAMI view on, any document which reflected a manufacturer's distribution policies." *See* T.A. Br. at 21. However, Delfay, as head of NSSF and SAAMI, specifically denounced the distribution policy reforms agreed to by Smith & Wesson. *See* 56JA16295. The trade associations also allege that the record is void of "any communication . . . by any person acting on behalf of NSSF or SAAMI with any manufacturer on its distribution policies or proposed changes to such policies." *See* T.A. Br. at 21. But again, Delfay, as head of NSSF and SAAMI, specifically called "the majority" of other manufacturers about Smith & Wesson's intended changes to its distribution policies. *See* 56JA16298. It is absurd to suggest that the Smith & Wesson agreement is irrelevant. *See* T.A. Br. at 26. The agreement was the greatest threat to the defendants' uniform stance to maintain their unfair distribution practices.

NSSF's and SAAMI's actions in coordinating the industry's response to Smith & Wesson's decision to reform its distribution practices, and its isolation of Smith & Wesson for trying to make those reforms, is evidence of the trade associations' participation in unfair business practices and the creation of a public nuisance, notwithstanding the associations' protestations to the contrary. They depict their active suppression of industry reform as simply a "failure to act." *See* T.A. Br. at 20, 26-8. However, plaintiffs have shown that NSSF and SAAMI stifled each proposal for industry reform by intimidating members and coordinating the industry's stance of "hear no evil, see no evil, speak no evil." *See Ricker* ¶9 (26JA7555).

B. California Law Does Not Require That Plaintiffs Prove The Trade Associations Controlled The Business Practices Of The Manufacturers, Only That They Contributed To Unfair Practices And The Public Nuisance

The trade associations have misstated California law as requiring a finding that the trade associations "controlled" the unfair business practices or the circumstances that caused the public nuisance. *See* T.A. Br. at 11, 14. As the Ninth Circuit recently affirmed, "California's law of proximate or legal cause does not contain a control requirement." *Ileto*, 349 F.3d at 1212; *see also Newhall Land & Farming Co.*, 19 Cal.App.4th at 343.

An even more recent case further exposes the flaws in the trade associations' argument. In *City of Modesto*, this Court dealt with a Health and Safety Code violation, but applied principles of nuisance in its decision. *See id.*, 119 Cal.App.4th at 37. This Court found that "those who create or assist in creating a system that causes hazardous wastes to be disposed of improperly, or who instruct users to dispose of wastes improperly, can be liable under the law of nuisance." *Id.* at 40-41 (discussing *Selma Pressure Treating Co.*). This Court specifically "disagree[d] with defendants' contention that only those who are physically

engaged in a discharge or have the ability to control waste disposal activities are liable . . . ." *Id.* at 41-42. Defendants who "instruct" others on actions that create the nuisance or "create or assist in creating a system" that constitutes a nuisance can be found liable. *Id.* at 40. Thus, it matters not whether the trade associations themselves sold firearms. Affirmative acts by the trade associations, even just verbal instructions to others, "could support a finding that those defendants assisted in creating a nuisance, and therefore would defeat a summary adjudication motion . . . ." *Id.* at 41. Through coordination of the industry's position on distribution policies and suppression of reforms, the trade associations played a key role in maintaining a system that contributed to the public nuisance.

A party need not wield the exacting measure of control suggested by the trade associations and the cases they cite do not prove otherwise. These cases, *Martinez*, 225 Cal.App.3d 1557; *Medina v. Hillshore Partners*, 40 Cal.App.4th at 484; *Zelig v. County of Los Angeles*, 27 Cal.4th 1112, 1128 (2002); and *Cody F. v. Falletti*, 92 Cal.App.4th 1232, 1241 (2001), are wholly inapplicable here as the property owners in those cases did not act affirmatively to create a foreseeable risk of harm.[61] The trade associations here acted to ensure that the industry's distribution system remained uniform in order to enable all industry members to reap the profits from distributing guns into the illegal market. Such a system creates a foreseeable risk of harm to the public regardless of a defendant's degree of control. *See Pamela L.*, 112 Cal.App.3d at 209. Nor does *Selma Pressure Treating Co.*, 221 Cal.App.3d 1601, hold that defendants must control the nuisance in order to be held liable. The critical question to the court in *Selma Pressure Treating Co.* was whether the nuisance was foreseeable to defendants. *See id.* at 1621. The court found foreseeability because

[61] *See also* discussion *supra* p. 44.

defendants had "knowledge of the danger involved in such practices [of using unsafe disposal systems]." *Id.* at 1620. Here, again, it was foreseeable to the trade associations that their acts in preserving defendants' gun distribution systems would fuel the illegal market.

The trade associations also misstate the "degree of control" required under California law on §17200. To show a violation of §17200, a defendant must only participate, or aid and abet those participating, in unfair or unlawful behavior. *See, e.g., People v. Toomey*, 157 Cal.App.3d 1, 15 (1984).[62] This standard is easily met by the trade associations' conduct here.

The trade associations primary reliance on *Emery*, 95 Cal.App.4th 952, is utterly misplaced.[63] VISA certainly was not intimidating the planners of the lottery scam into continuing it. In fact, VISA took the opposite approach once it heard of the scam. *See supra* p. 42 n.39. Here, the trade associations actively discouraged reforms and offered assurance to others in the industry that their competitors would not change their high-risk distribution practices.

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

VI. ELLETT BROTHERS

Ellett Brothers' brief merely adopts the arguments of the manufacturers' and distributors' brief, which have been addressed above.

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[62] Although the defendant in *Toomey* was found to have "orchestrated all aspects of the business," the court did not find that it was necessary for a defendant to have this level of control to make out a §17200 claim. *Id.* at 3.

[63] *See also supra* §II(B) (discussing *Emery* in more depth).

CONCLUSION

For the foregoing reasons, Plaintiffs/Appellants request that this Court reverse the lower court's grant of summary judgment and remand this case for trial.

Dated: August 12, 2004

Respectfully submitted,

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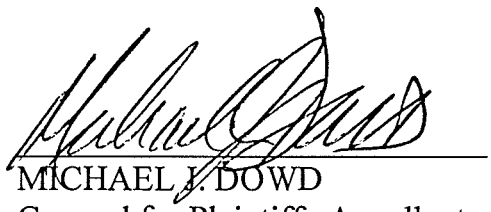
RULE 14 CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that **[CORRECTED] APPELLANTS' REPLY BRIEF** uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this brief comprises 23,208 words according to the word count provided by Microsoft Word word-processing software.



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TENNILLE JEFFERSON, Administratrix of the Estate of NAFIS JEFFERSON, Deceased and, TENNILLE JEFFERSON, In Her Own Right,	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
v.	:	APRIL TERM, 2001
AMADEO ROSSI, S.A, et al.	:	NO. 002218 CIVIL ACTION

ORDER

AND NOW, this 26TH day of January, 2004, upon consideration of International Armament Corp. d/b/a Interarms' Motion for Partial Summary Judgment on Plaintiffs' Negligent Distribution Claims and the response thereto, it is hereby ORDERED and DECREED that said Motion is [redacted] DENIED.

BY THE COURT:

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JAN 27 2004
First Judicial District of Pa.
User I.D.: CMW

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v.	:	APRIL TERM, 2001 NO. 002218
AMADEO ROSSI, S.A, et al.	:	CIVIL ACTION

ORDER

AND NOW, this 26 day of January, 2004, upon consideration of Defendant International Armament Corp. d/b/a Interarms' Motion for Summary Judgment, and the response thereto, it is hereby ORDERED and DECREED that said Motion is GRANTED, in part, and by agreement, Plaintiff's ~~claim~~ product liability and negligent design claims only, are dismissed. The remaining portion of the motion for summary judgment is DENIED.

_____ J.

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User I.D.:

By the Court:

HON. NITZA I. QUIÑONES ALEJANDRO

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on August 12, 2004, declarant served the **[CORRECTED] APPELLANT'S REPLY BRIEF** by depositing one true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. On the same date, declarant filed one original and five copies of the **[CORRECTED] APPELLANT'S REPLY BRIEF** with the Clerk of the Court by Federal Express, next day delivery in a sealed package.

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

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of August, 2004, at San Diego, California.

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KATHY SCOVILLE

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