

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

No. A103211, CONSOLIDATED WITH No. A105309

PEOPLE, EX REL. ROCKARD J.)	[JUDICIAL COUNCIL
DELGADILLO, AS CITY ATTORNEY,)	COORDINATED
ET. AL.,)	PROCEEDING No. 4095]
)	
)	[SAN FRANCISCO
PLAINTIFFS/APPELLANTS,)	SUPERIOR COURT
)	No. 303753]
)	
VS.)	[LOS ANGELES SUPERIOR
B & B GROUP, INC., ET. AL.,)	COURT Nos. BC210894,
)	BC214794]
)	
DEFENDANTS/RESPONDENTS.)	[HONORABLE VINCENT P.
)	DiFIGLIA, JUDGE]

RESPONDENT TRADE ASSOCIATIONS' RESPONSE BRIEF

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**ATTORNEYS FOR RESPONDENTS NATIONAL SHOOTING
SPORTS FOUNDATION, INC. AND SPORTING ARMS AND
AMMUNITION MANUFACTURERS' INSTITUTE, INC.**

**Service on Attorney General Required by
California *Business & Professions Code* Section 17200**

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INTRODUCTION

Appellants brought the instant coordinated cases against a wide array of firearms manufacturers, distributors and retailers, as well as trade associations, claiming that the activities of the defendants constitute a public nuisance and violate Sections 17200 and 17500 of the *California Business and Professions Code*. Included among the defendants were three industry trade associations: the American Shooting Sports Council, Inc. (ASSC), the National Shooting Sports Foundation, Inc. (NSSF), and the Sporting Arms and Ammunition Manufacturers' Institute, Inc. (SAAMI).

Appellants voluntarily dismissed ASSC with prejudice. (61JA 17859, Lines 15-16.) Summary judgment was granted in favor of NSSF and SAAMI on March 7, 2003. Op. at 21-30 (61 JA 17859-17863A.)

Appellants' Various Allegations and Claims

In the underlying Complaints, the only specific references to the Trade Associations are to what the Associations *did not do*, alleging that the Trade Associations “failed to adopt adequate guidelines or standards relating to the development and inclusion of [safety] features in handguns” and “failed to adopt adequate guidelines or standards for development and inclusion of personalized safety features in handguns;”¹ the Associations

¹ San Francisco Cities' First Amended Complaint (1 JA 108, Lines 23-24; 1 JA 110, Lines 17-19.) *See also*, Los Angeles Cities' First Amended

“discouraged development of such safety features”;² and the Associations “have not taken reasonable steps” to keep handguns away from minors.³ The court correctly granted summary judgment on these allegations in the Complaints on the grounds that the Associations had no duty to adopt standards for firearms design and that California has no policy against the possession of firearms by young people engaged in hunting or other shooting sports. Op. at 30 (61 JA 17863A, Lines 1-4, 21-23, 13-14.)

Appellants have chosen not to pursue on appeal the allegations that NSSF and SAAMI failed to take action with respect to firearms standards or the possession of firearms by minors. Instead, Appellants assert that they presented a triable issue on a claim, raised for the first time in their briefs in the trial court, that NSSF and SAAMI are somehow complicit in the allegedly unfair and unlawful distribution practices of the defendant manufacturers.

Complaint (1 JA 68, Lines 5-6; 1JA 69, Lines 26-28) and Los Angeles County Complaint (1 JA 153, Lines 12-14; 1 JA 155, Lines 6-8.)

² San Francisco Cities’ First Amended Complaint (1 JA 111, Lines 1-2.)
See also, Los Angeles Cities’ First Amended Complaint (1 JA 70, Lines 9-10) and Los Angeles County Complaint (1 JA 155, Lines 18-19.)

³ San Francisco Cities’ First Amended Complaint (1 JA 97, Lines 18-19.)
See also, Los Angeles Cities’ First Amended Complaint (1 JA 55, Lines 25-26) and Los Angeles County Complaint (1 JA 141, Lines 16-17.)

The court below granted summary judgment on this assertion:

The evidence would support an argument that the Trade Associations were aware of problems in the distribution of firearms. . . . Although as a matter of policy, perhaps these defendants should do more, nevertheless, before they can be liable for a business *practice or conduct* that *causes harm* there must be some evidence that *they* did something that was either unlawful, unfair or fraudulent that has some connection to some harm suffered by someone in California. Again, plaintiffs' complaint is premised on non-feasance.

(61 JA 17863, Lines 20-28; 61 JA 17863A, Line 1) (original emphasis.)

Trade Associations

NSSF and SAAMI are independently incorporated not-for-profit, tax-exempt trade associations. Neither Association designs, manufactures, markets, distributes or sells firearms. As required by law, membership in these Trade Associations is purely voluntary.

i. NSSF

NSSF has never engaged in setting standards for the design, manufacture or distribution of firearms.

Founded in 1961, NSSF's members include manufacturers of firearms and of products (such as accessories, optics, and clothing) related to the shooting sports and distributors, retailers, and publishers. NSSF owns the Shooting and Outdoor Trade (SHOT) Show at which the products of its members and others are exhibited for the trade only.

NSSF's primary corporate mission is to promote a better public understanding of, and a more active participation in, the shooting sports. It

has a large array of programs to accomplish this mission. The NSSF prepares and distributes literature on the shooting sports and supports or sponsors shooting events such as the "Chevy Truck Sportsman's Team Challenge" and "Summer Biathlon." It supports programs to introduce newcomers to outdoor activities, including the shooting sports, such as "Step Outside" and "Becoming an Outdoors Woman," which have been adopted by many state wildlife agencies including the California Department of Fish and Game. The NSSF supports the adult supervised youth marksmanship programs of the Boy Scouts, 4H, and others, and sponsors competitions, such as "Scholastic Clay Target Program."

Paramount to NSSF's efforts in promoting the shooting sports is safety education. The NSSF has distributed numerous publications emphasizing the importance of safety when using a firearm. NSSF is the largest supporter of the International Hunter Education Association, whose members run state hunter education courses. NSSF partnered with the National Crime Prevention Council to produce a safety video ("McGruff the Crime Dog") for distribution to elementary schools and also produced a video for older students ("It's Your Call: Playing It Safe with Guns").

In 1999, the NSSF initiated "Project HomeSafe," now known as "Project ChildSafe," which communicates firearms safety information to non-traditional firearms owners, such as persons who inherit a firearm. Initially, NSSF partnered with mayors, police chiefs and other local

government officials to distribute Project ChildSafe firearms safety information to a large number of people using the enticement of free firearms cable locks. Later, NSSF partnered with lieutenant governors on statewide programs. Project ChildSafe had been launched in more than 12,000 communities in 48 states and with 10 million cable locks distributed along with safety information.

NSSF has taken public positions on Federal legislation and on public policy relating to firearms ownership. NSSF meets quarterly with the United States Bureau of Alcohol Tobacco and Firearms and Explosives (“ATF”).

In 2000, ATF and NSSF partnered on “Don’t Lie for the Other Guy,” a program to assist ATF to educate federally licensed firearms retailers on how to detect and deter illegal “straw purchasers” and to warn would-be straw purchasers of the severe criminal penalties for engaging in an illegal “straw purchase.” The program includes a mailing kit with posters, counter cards, written materials, and a video, along with ATF training presentations at regional NSSF/ATF Partnership for Progress Seminars for retailers and at seminars put on by ATF at the industry’s trade show (the SHOT Show).

ii. **SAAMI**

SAAMI was founded in 1926, at the request of the Federal government. Its members are manufacturers of sporting firearms and ammunition.

SAAMI has published a number of pamphlets on the safe and responsible ownership of firearms and on public policy issues. SAAMI has had a government relations function and is represented at quarterly meetings with ATF.

SAAMI is an accredited standards developer for the American National Standards Institute ("ANSI"). As an accredited standards developer, SAAMI has developed, submitted for ANSI review, published, and distributed several voluntary recommended practices for the commercial manufacturing of sporting ammunition and one for sporting firearms. These voluntary recommended practices are available to all manufacturers of sporting arms and ammunition regardless of whether they are members of SAAMI. SAAMI has no authority to or mechanism for monitoring adherence to its recommended practices. SAAMI has never established recommended practices for the distribution of firearms.

SUMMARY OF ARGUMENT

Appellants' claims against the Associations are derived from the allegations against the Associations' manufacturer members since NSSF and SAAMI do not make or sell firearms. The briefs filed on behalf of

manufacturer defendants detail the issue of whether a manufacturer's firearms distribution policies can be an unfair or unlawful business practice under California *Business & Professions Code* Section 17200. Respondent manufacturers further address the legal parameters for the elements of a cause of action in nuisance and the absence of evidence to support a triable issue of fact as to the manufacturers. (See Respondent Manufacturers' and Distributors' Response Brief at I, Pg. 17 – Part III(B)(2), Pg. 50; Brief of Respondent Beretta USA at Part I, Pg. 10 – Part IV(B), Pg. 51.)

Since Appellants' claims against the Associations are derivative of those against the manufacturers, the grant of summary judgment for NSSF and SAAMI must be affirmed if this Court affirms summary judgment for the manufacturers. The Associations therefore join in the above-referenced arguments briefed by respondent manufacturers and will not repeat them.

The Associations write separately to emphasize the additional and dispositive shortcomings of the claims against them. Part I, *infra*, addresses the legal requirements for claims against the Trade Associations. Part II, *infra*, discusses the absence of evidence to support any claim against the Associations.

Appellants' argument in the court below boiled down to a "double 'did not do' theory" -- the manufacturers did not adopt the firearms design features that the Appellants desire, the manufacturers did not conform to the distribution policies advocated by Appellants, and NSSF and SAAMI

did not make the manufacturers do what the Appellants wanted. This failure by the Associations to somehow compel the manufacturers to act in certain ways, argued Appellants, aided and abetted the alleged violation of Section 17200⁴ by the manufacturers and contributed to the alleged creation of a nuisance by the manufacturers.

As the court below ruled, nonfeasance cannot be a basis for a Section 17200 or a nuisance claim. There is no vicarious liability under Section 17200. In order to survive a motion for summary judgment, Appellants must present competent evidence that NSSF and SAAMI each separately participated in and controlled the allegedly unfair and unlawful business practices of the manufacturers. Part I-B, *infra*. Similarly, for a nuisance claim, Appellants must establish that NSSF and SAAMI each separately had substantial control over the circumstances alleged to give rise to a nuisance and were a substantial proximate cause of the alleged harm. Part I-C-2, *infra*. There can be no vicarious nuisance liability for the wrong-doing of a third party. Part I-C-1, *infra*.

On appeal, Appellants apparently have discovered the legal infirmities of the “double ‘did not do’ theory.” They now assert that NSSF and SAAMI have “actively coordinated and disciplined the industry to

⁴ Unless otherwise specified, all statutory references are to California *Business & Professions Code*.

maintain the its [*sic*] unfair and unlawful business practices.” Appellants’ Opening Brief at 48.

What is lacking is any evidence of any act at any time by NSSF or SAAMI that either "coordinated" the distribution policies of individual manufacturers or “disciplined” any manufacturer with respect to its distribution practices. Part II-B, *infra*. Instead of presenting evidence of a triable issue that NSSF or SAAMI participated in and controlled the distribution practices of their members, Appellants rely on mischaracterization, supposition and innuendo from largely inadmissible and irrelevant evidence. Part II-C, *infra*. Ultimately, their claim rests, as the court below concluded, on non-feasance -- their untenable “double ‘did not do’ theory.”

I. **LEGAL ARGUMENT: APPELANTS MUST ESTABLISH THAT NSSF AND SAAMI EACH SEPARATELY PARTICIPATED IN AND HAD CONTROL OVER THE THIRD-PARTY CONDUCT WHICH ALLEGEDLY VIOLATED SECTION 17200 AND CREATED A NUISANCE**

A. **Standard of Review**

Only questions of law are addressed on summary judgment, which are reviewed independently on appeal. *Century Indemnity Co. v. Hearrean* (2002) 98 Cal.App.4th 734, 737. Review of summary judgment provides

for the identification of issues presented by the pleadings and the determination of whether the facts shown in the supporting and opposing declarations at time of summary judgment provide a dispute of fact as a matter of law. *Buss v. Superior Court* (1997) 16 Cal.4th 35, 60, 65; *Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1511-1515.

Speculative theories of liability that are not fully developed or factually presented to the trial court cannot create a triable issue on appeal. *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 842.

The assessment of a motion for summary judgment invokes a tripartite analysis. *Pensinger v. Bowsmith, Inc.* (1998) 60 Cal. App. 4th 709, 717-718. To begin with, the Court of Appeal must identify the issues framed by the pleadings. *Pensinger v. Bowsmith, Inc.* (1998) 60 Cal. App. 4th 709, 717-718. Next, the Court of Appeal must decide whether the moving party met their burden of proof by reliance on competent evidence underlying the summary judgment. *Sangster v. Paetkau* (1998) 68 Cal. App. 4th 151, 162. Finally, the Court of Appeal must determine whether the opposition “demonstrates the existence of a triable issue of fact.” *Saldana v. Globe - Weis Systems Co.* (1991) 233 Cal. App. 3d 1505.

B. A Claim of Aiding and Abetting a Violation of Section 17200 Requires Active Participation in and Unbridled Control Over the Unfair Business Practice

Appellants do not contend that NSSF or SAAMI distribute firearms in California or anywhere else. Their appeal rests solely on the argument that the Trade Associations have aided and abetted the other defendants' alleged violations of Section 17200. Appellants' Opening Brief at 48.

The degree of actual participation and control required for Section 17200 liability is emphasized in *Emery v. Visa International Service Assoc.* (2002) 95 Cal. App. 4th 952. In *Emery*, plaintiff brought an action under the UCL against VISA for the use of VISA bankcards and services in a scheme to sell overseas lottery tickets in California. *Id.* at 954. The plaintiff alleged that VISA had knowledge that there was a serious problem with VISA cards and VISA payment services being used to facilitate illegal and fraudulent schemes. *Id.* at 956-57. According to the plaintiff, VISA should have done more to police those using its services and the VISA trademark. *Id.* In granting summary judgment to defendant VISA, the Court held:

The concept of vicarious liability has no application to actions brought under the unfair business practices act. A defendant's liability must be based on his *personal participation in the unlawful practices and unbridled control over the practices* that are found to violate section 17200 or 17500.

Id. at 956-57 (citations and quotation marks omitted) (emphasis supplied.)

As such, Appellants have to demonstrate an exacting level of NSSF or SAAMI control over and involvement in the alleged unfair business

practices of the individual manufacturers to establish liability for aiding and abetting. The leading case on aiding and abetting a violation of Section 17200 is *People v. Toomey* (1984) 157 Cal. App. 3d 1, 22. Toomey, the president of Holiday Funshine, was found personally liable for violation of Sections 17200 and 17500 resulting from the sale of discount coupon books by the company's employees and distributors. The court noted that Toomey's position as president was not a sufficient basis for personal liability. *Id.* at 14. Personal liability was imposed because he controlled the company practices which were found to violate Sections 17200 and 17500:

He *orchestrated all aspects of the business*. Overwhelming evidence shows that he prepared the solicitation scripts, determined the content of coupon packages to be sold, and directed the refund policy which the company followed.

Id. at 15 (emphasis added.)

The court also ruled that Toomey aided and abetted the unfair sales practices of Holiday's distributors:

Toomey also participated in the unlawful practices of Holiday and its distributors. He shared coupons with the distributors, and according to the evidence discussed with them the content of the solicitations to be used. Holiday often received complaints from distributors and determined the responsive action to be taken. Appellant collected receipts from sales made by the distributors; and consumers' checks made out to another distributor were often endorsed by Holiday. The record depicts Toomey as the moving force behind the entire coupon sales program and a joint participant with the other distributors in their business operations.

Id. at 15-16.

In a similar case, the control which defendant Arthur Murray, Inc. exercised over its licensee dance studios that violated the California Dance Act was no less extensive:

In the instant case the evidence presented to the trial court showed that Arthur Murray, Inc., set up studios in California, gave them financial assistance, provided national advertising and publicity, supplied dance instruction procedures, and generally retained tight control on the studio's operations. Arthur Murray, Inc., received from its studios in California gross receipts amounting to three quarters of a million dollars in 1960. . . . [T]he corporation fixed hourly rates, established a system of student refunds, set up a system of behavior, set up an agreement whereby unused portions of courses at one studio must be honored at another, inspected books and directed the type of bookkeeping to be employed, approved any independent authorizing of the operators, along with engaging in other aspects of control

People v. Arthur Murray, Inc. (1965) 238 Cal. App. 2d 333, 341-42.

In *People v. Best Line Products, Inc.* (1976) 61 Cal. App. 3d 879, 917, the personal liability of individual corporate employees of Best Line for violations of Sections 17200 and 17500 from the operation of an “endless chain” scheme was based on a fact finding that “each of the defendants . . . directly participated in the making of such representations in that ‘each did disseminate or cause to be disseminated’ said misrepresentations.” Similarly, in *People v. Witzerman* (1972) 29 Cal. App. 3d 169, 180-81, the court found that the partners in a sales agency all actively participated in the sale of “cattle care contracts” based on misrepresentations. Unlike these cases, Appellants have no evidence of active participation or control by the Associations.

C. **Appellants Have Ignored the Control and Causation Required to Establish a Claim of Nuisance Against the Associations**

Appellants' argument that the Trade Associations are liable for nuisance is limited to a citation of cases for the unremarkable proposition that more than one person can be the cause of a nuisance. Appellants' Opening Brief at 48. Appellants totally ignore the fact that, in order to survive summary judgment on their nuisance claim, Appellants had to establish by specific facts *as to each Association* that there were triable issues that the Association had control over the circumstances that created the nuisance and the Association's conduct caused the harm claimed by Appellants.

1. **NSSF and SAAMI Cannot be Held Vicariously Liable for the Alleged Misconduct of Third Parties**

Appellants seek to impose liability on NSSF and SAAMI for the conduct of retailers and others who allegedly sold firearms to criminals, for the conduct of the criminals who illegally acquired and misused the firearms, and for the conduct of individual manufactures who allegedly wrongfully failed to adopt distribution policies to prevent the illegal sale and acquisition of firearms. Such a claim cannot stand under California nuisance law.

As the court in *Martinez v. Pacific Bell* (1991) 225 Cal.App.3d 1557, held, venerable nuisance concepts cannot be manipulated so as to create a

duty to control the actions of independent third parties or to impose vicarious liability for failure to do so. *Id.* at 1569; *see also, Medina v. Hillshore Partners* (1995) 40 Cal. App. 4th 477, 484; *Zelig v. County of Los Angeles* (2002) 27 Cal. 4th 1112, 1128; *Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1241.

2. Appellants must Establish that the Associations had Substantial Control over the Alleged Nuisance and were a Substantial Cause of the Resulting Harm

To be held liable for contributing to a nuisance, a party must have substantial control over the circumstances giving rise to the nuisance and must be a substantial cause of the resulting harm. The cases cited by Appellants demonstrate this point.

In *Newhall Land & Farming Co. v Super. Ct.* (2001) 19 Cal. App. 4th 334, Mobil Oil and Amerada Hess were owners and operators of the land at the time hazardous substances were deposited. Similarly, *Selma Pressure Treating Company v. Osmose Wood Preserving Company of America* (1990) 221 Cal. App. 3rd 1601, involved pollution of land by the owner and operator of a wood treating facility. Defendants Osmose and Koppers were chemical suppliers to the plant operator. They were found to have substantially contributed to the nuisance caused by the plant because they were intimately involved in its operation:

Between 1964 and 1966 Osmose and appellants entered into an agreement whereby the wood treatment technique of Osmose was used at the Selma facility. Osmose

installed equipment and provided technical advice, including advice concerning the disposal of the chemical waste products of its process. Osmose recommended an unlined dirt pond be created for the receipt of such waste products. . . . The allegations concerning Koppers are similar to those relating to Osmose, basically alleging that Koppers installed equipment and made recommendations of operating practices, including the construction of dry wells and unlined dirt ponds to receive wastes, which resulted in wood treating chemicals being deposited in the soil overlying the aquifer.

Id. at 1609.⁵

As with a cause of action for negligence, nuisance liability extends only to a party whose conduct is a proximate cause in creating the nuisance. *Martinez v. Pac Bell*, 225 Cal.App.3d at 1565 Although the Associations dispute the holding of *Ileto v. Glock, Inc.* (9th Cir. 2003) 349 F.3d 1191, respecting attribution of liability for criminal acts of third parties as inconsistent with California nuisance law, the Ninth Circuit correctly noted that there can be no nuisance liability absent substantial proximate causation: “Proximate causation requires simply that the act or omission of the defendant be a ‘substantial factor to the harm suffered.’” *Id.* at 1212, citing *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, quoting *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041.

⁵ On a demurrer in *Sharpin v. Elmhurst* (1983) 148 Cal.App. 3d 94, the court ruled that the plaintiff had stated a nuisance cause of action against a company that had recommended soil stabilization techniques to an adjoining property owner, but expressed serious reservations about whether the plaintiff could present proof that survived summary judgment. *Id.* at 100, n.2.

II. **FACTUAL ARGUMENT: THE EVIDENCE DOES NOT
SUPPORT A TRIABLE ISSUE THAT NSSF OR SAAMI
AIDED AND ABETTED A VIOLATION OF SECTION
17200 OR CONTRIBUTED TO THE CREATION OF A
NUISANCE**

A. **Appellants Must Separately Establish Triable Issues as to
NSSF and SAAMI based on each Association's Relevant
Acts**

Appellants' claims against NSSF and SAAMI are patently derivative of their claims against the manufacturing defendants since NSSF and SAAMI do not distribute or sell firearms. As discussed above, vicarious liability has no role in Section 17200 or nuisance law. Appellants' evidence must be of *conduct by NSSF's Board of Governors or SAAMI's Executive Committee or persons acting upon behalf of NSSF or SAAMI*. That some manufacturer defendants are members of NSSF or SAAMI has no relevance. Evidence of acts of "members" of NSSF or SAAMI or of NSSF or SAAMI "leaders" not acting on behalf of either Association is irrelevant.

Nor do Appellants' vague references to the "industry" have any probative value. The "industry" is not a party, and, in fact and law, there is no such entity as the "industry" that could be a party to this litigation.

Appellants must present competent evidence that each Association separately participated in and had control over the business practices of individual manufacturers. The only material evidence is that which relates to a manufacturer's allegedly unfair or unlawful distribution practices. Events related to other matters -- such as disagreements as to positions on legislation or political or policy matters -- are immaterial.

Thus, Appellants first must establish that there is a triable issue as to whether the manufacturers' distribution policies are unfair business practices under Section 17200. Then they must present competent evidence raising a triable issue that NSSF aided and abetted the manufacturers' alleged violation of Section 17200 -- that is, as required by *Toomey* and *Emery*, that NSSF participated in and had control over the allegedly unfair firearms distribution practices of the manufacturers. They must separately make that same showing for SAAMI.

For their nuisance claim, they must establish that there are triable issues that each Association had substantial control over the circumstances that created the alleged nuisance and that each was a substantial proximate cause of the alleged resulting harm.

B There is No Evidence NSSF or SAAMI Participated in or Controlled Any Manufacturer's Distribution Policies

1. Despite Extensive Discovery, Appellants Have No Evidence Supporting their Allegations Against NSSF and SAAMI

During the four years this litigation has been pending, Appellants had every opportunity to develop the facts establishing a triable issue as to the Associations in the court below -- more than 50,000 pages of documents were produced by the Associations in discovery, depositions of seven Association executives and employees were taken as well as documentary and deposition discovery from numerous Association members and member employees. During the same period, NSSF and SAAMI endeavored to discover the nature of and basis for Appellants' claims that the Associations caused or contributed to a public nuisance in California and violated the *Business & Professions Code*.

Unable to produce any evidence of relevant affirmative wrong-doing by NSSF or SAAMI, Appellants, in the court below, argued that the Associations should have "done more" and unabashedly relied on the "double 'did not do' theory" -- the manufacturers *did not* conform to the distribution policies advocated by Appellants and the Associations *did not* make the manufacturers do what the Appellants wanted. According to Appellants, this failure to control the distribution policies of manufacturing members aided and abetted the alleged violation of Section 17200 by the

manufacturers and contributed to the alleged creation of a nuisance by the manufacturers. Appellants' Opening Brief at 48. However, California courts have declined to impose on trade associations a duty to adopt particular standards to control their members' conduct. *N.N.V. v. American Association of Blood Banks* (1999) 75 Cal.App.4th 1358; *FNS Mortgage Service Corp. v. Pacific General Group, Inc.* (1994) 24 Cal. App.4th 1564.⁶

On appeal, Appellants apparently discovered the legal infirmities of the "double 'did not do' theory." They now have upped the level of their rhetoric but without the evidence to back it up. They now assert that NSSF and SAAMI have "actively coordinated and disciplined the industry to maintain the its [*sic*] unfair and unlawful business practices." Appellants' Opening Brief at 48.

What is lacking is a scintilla of evidence of a single act at any time by either NSSF or SAAMI that either "coordinated" the distribution policies of individual manufacturers or "disciplined" any manufacturer with respect to its distribution practices. (58 JA 16956-957, Facts 6, 7; 58 JA 16971-973, Facts 7, 9.) It is undisputed that NSSF and SAAMI do not

⁶ Such an exercise of control over the business and distribution practices would likely violate California and Federal law. Any such standards, particularly if they sought to restrict the dealers or distributors to whom manufacturers could sell their products, would likely implicate antitrust issues and subject the Associations to Federal and State antitrust and tort claims. *Wilk v. American Medical Association* (7th Cir. 1990) 895 F.2d 352; *see also, Alvord-Polk Inc. v. F. Schumacher & Co.* (3rd Cir. 1994) 37 F.3d 996.

design, manufacture, distribute, market or sell firearms. (58 JA 16952, Fact 1; 58 JA 16966, Fact 1.) It is undisputed that NSSF and SAAMI did not have the authority or practical ability to control the distribution of firearms. (15 JA 16957, Fact 7; 58 JA 16973, Fact 9.) It is undisputed that there was no evidence that any incident of the criminal acquisition of a firearm, the criminal misuse of a firearm or the accidental misuse of a firearm was caused by any act of NSSF or SAAMI. (58 JA 16957-958, Fact 8; 58 JA 16974, Fact 10.)

Indeed, the record is totally devoid:

- of any evidence of any NSSF or SAAMI meeting at which the distribution policies of individual manufacturer members were discussed;
- of any evidence that NSSF or SAAMI set guidelines, standards or practices for firearms distribution;
- 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;
- of any evidence of any communication, written or verbal, by any person acting on behalf of NSSF or SAAMI with any manufacturer on its distribution policies or proposed changes to such policies; or

- of any evidence that NSSF or SAAMI expelled or disciplined a member for any reason.

2. **The Evidence Cited by Appellants Does Not Support their Allegation that NSSF and SAAMI “Actively Coordinated and Disciplined the Industry”**

Instead of presenting evidence of a triable issue that NSSF or SAAMI actively participated in and controlled the distribution practices of their members, Appellants rely on mischaracterization, supposition and innuendo from largely inadmissible and irrelevant evidence. Appellants’ Opening Brief at 16-22. Ultimately, their claim rests, as the court below concluded, on non-feasance -- their untenable “double ‘did not do’ theory.”

a. **Appellants have Flagrantly Mischaracterized Evidence**

Some of Appellants’ assertions are grossly, and perhaps intentionally, misleading. For example, Appellants refer to a “dealer certification” program allegedly developed by ASSC’s Robert Ricker.⁷

⁷ Appellants rely extensively on the Declaration of Mr. Ricker. (26 JA 7550.) Respondents objected to this declaration at summary judgment because it failed to evidence any wrongdoing by NSSF or SAAMI, was conclusionary, improper opinion testimony (*Evidence Code* §§ 800, 801, 803), hearsay (*Evidence Code* §1200), lacked foundation (*Evidence Code* §720), and was speculative and irrelevant (*Evidence Code* §350). (59 JA 17169 ¶6.) In addition, most of Mr. Ricker’s Declaration discusses matters unrelated to this litigation – controversial political, legislative and litigation strategy decisions that faced the ASSC, NSSF, SAAMI and their members, including whether to meet with President Clinton to announce a “voluntary” locking device program to “stave off an effort to pass legislation requiring a ‘one-sized-fits-all’ trigger lock approach” (26 JA 7562-564, ¶¶18-19), whether to negotiate with Philadelphia Mayor Ed

This is immediately followed by a statement that NSSF's Robert Delfay wrote: "Someone in a position of authority needs to direct Mr. Ricker to become silent." Appellants' Opening Brief at 20. The Delfay memorandum, to four ASSC officers, had nothing to do with any "dealer certification" program. It criticized Mr. Ricker for taking unauthorized positions on pending Federal legislation, a matter totally irrelevant to this litigation. (43 JA 12573.)

Similarly, Appellants refer to the controversy over a 1997 public appearance with President Clinton to announce individual manufacturer's continuing commitment to provide locking devices with their firearms. Appellants' Opening Brief at 19. Apart from the irrelevance to any issue of firearms distribution policies, the evidence cited by Appellants (47 JA 13656-657; 47 JA 13665-667) has nothing to do with this 1997 event.

Perhaps the most flagrant misstatement in Appellants' brief is the sweeping assertion that "[d]uring *trade association meetings* throughout the 1990's, members of the industry deliberated whether to change the way firearms were distributed" Appellants' Opening Brief at 16 (emphasis added). Of course, Appellants cite no minutes of any NSSF or SAAMI meeting at which such deliberations supposedly took place. They cite no

Rendell a "compromise with cities seeking changes in industry business practices" in order to resolve existing and threatened litigation against firearms manufacturers (26 JA 7564-565, ¶ 20) and whether to attend a "summit" convened by President Clinton to discuss youth violence. (26 JA 7565, ¶ 21.)

testimony of any employee or officer of NSSF or SAAMI supporting their allegation. They cite no evidence that NSSF or SAAMI or any person acting on behalf of NSSF or SAAMI ever took any action regarding any manufacturer's distribution policies.

All Appellants have is the assertion of ASSC former employee Mr. Ricker that there were informal meetings of counsel during the SHOT Show. Appellants' Opening Brief at 18. Even assuming the admissibility and veracity of the Ricker Declaration, these were not NSSF or SAAMI meetings. The fact that they allegedly occurred during NSSF's SHOT Show does not make them an NSSF meeting. The Ricker Declaration does not identify by name, title or otherwise any NSSF or SAAMI employee, officer or counsel as having been present at any such meeting. (Ricker Decl. at 26 JA 7561, ¶16.)

As the court observed in *Toomey*, while an appellant "is entitled to make arguments from the record, we find this close to the line of misrepresentation, rather than argument" *People v. Toomey*, 157 Cal. App. 3d at 15, n5.

b. Evidence Cited by Appellants is Irrelevant to NSSF or SAAMI and to Appellants' Claim

Appellants devote a considerable portion of their brief to the activities of the National Association of Stocking Gun Dealers (NASGD). Appellants' Opening Brief at 17. There is no evidence of any affiliation

between NASGD and NSSF or SAAMI. What NASGD or its President, Mr. Bridgewater, did or did not do is irrelevant to NSSF or SAAMI, as is the assertion that NASGD's Mr. Bridgewater was "forced" off the ASSC board by ASSC members -- some of whom may also have coincidentally been members of SAAMI.

Whether or not Taurus threatened to withdraw advertising or drop sponsorships because of Smith & Wesson is a matter wholly within the discretion of that company. Appellants' Opening Brief at 21. It has nothing to do with NSSF or SAAMI.

The alleged "firing" of ASSC's Richard Feldman and "ouster" of Mr. Ricker, which Appellants vaguely attribute to "NSSF and SAAMI leaders" (Appellants' Opening Brief at 20), is equally irrelevant to the claims against NSSF and SAAMI in this litigation. According to Mr. Ricker's Declaration, in March of 1999, the ASSC Board voted to terminate Mr. Feldman's employment. (Ricker Decl. at 26 JA 7564-565, ¶20.) The ASSC Board decided to cease operations later in 1999 after "several major manufacturers and distributors . . . resigned from ASSC." (*Id.*, 26 JA 7565, ¶21.) The evidence proves that these were decisions of ASSC members and the ASSC Board, not the NSSF Board or the SAAMI Executive Committee. Appellants have voluntarily dismissed ASSC with prejudice, so all of these issues are completely irrelevant to this litigation.

Appellants' reference to the so-called Smith & Wesson settlement agreement, even if it were admissible, is also irrelevant.⁸ Appellants' Opening Brief at 20-22. It is odd that Appellants, who were not signatories to this agreement and did not dismiss Smith & Wesson from this litigation, would rely on this agreement as a model of reform. Whatever the motivation, the settlement agreement is irrelevant to Appellants' claims against NSSF and SAAMI. That NSSF made public observations of the indisputable fact that no other company chose to enter into such an agreement lends no credence to Appellants' claims. Nor is it significant that, under new ownership, Smith & Wesson chose to participate more fully in the many and varied activities of the Associations. Certainly, there is no evidence that the NSSF Board or the SAAMI Executive Committee took any action to expel or discipline Smith & Wesson.

c. The Remainder of Appellants' Allegations are about what NSSF or SAAMI did *Not* Do

The evidence cited by Appellants which does relate to NSSF or SAAMI repeatedly refers to actions allegedly not taken.

⁸ NSSF and SAAMI objected at time of summary judgment to the Smith & Wesson settlement on grounds that it was inadmissible hearsay (*Evidence Code* §1200), irrelevant (*Evidence Code* §350), failed to evidence any wrong-doing by NSSF or SAAMI and lacked foundation. (59 JA 17159, ¶14.)

For NSSF,

- NSSF employee Painter wrote a memorandum reflecting ATF's concerns expressed in *Operation Snapshot*, and NSSF head Delfay told him to "file for future reference." Appellants' Opening Brief at 16-17.
- NSSF told ATF it would "look for ways to identify problem dealers"; "NSSF never followed through." Appellants' Opening Brief at 19.
- NSSF drafted a joint NSSF/ATF letter to dealers on background checks; "NSSF never sent these letters." Appellants' Opening Brief at 19.
- NSSF discussed with ATF "NSSF playing a role in urging retailers to do regular inventories"; "NSSF failed to follow through." Appellants' Opening Brief at 19.
- A proposed "dealer certification" program allegedly developed by ASSC employee Ricker was not implemented because "the ASSC . . . lacked the necessary funding for the program" (Ricker Decl. at 26 JA 7562, ¶17); NSSF did not fund the program. Appellants' Opening Brief at 20.

For SAAMI,

- SAAMI drafted a retailer “Code of Ethics”; the “code was never implemented.” Appellants’ Opening Brief at 17-18. SAAMI’s Executive Committee concluded that it was inappropriate for an association of manufacturers to address retailer conduct. (Trade Associations’ Response to Separate Statement at 58 JA 17013-014, ¶80.) The matter was referred to the National Association of Stocking Gun Dealers (NASGD), then the largest association of retailers, at the request of William Bridgewater. *Id.*
- SAAMI published a brochure with a members’ pledge; the “pledge was never implemented.” Appellants’ Opening Brief at 18.

Appellants’ allegations as to what the Trade Associations *should have done* and *did not do* are irrelevant to their claims or any assertion of liability.

**III THE COURT BELOW CORRECTLY CONCLUDED
THAT THE EVIDENCE, AT BEST, RAISES ONLY AN
ISSUE AS TO NSSF’S AND SAAMI’S KNOWLEDGE
OF FIREARMS DISTRIBUTION ISSUES**

Appellants cite *Cincinnati v. Beretta USA Corp.* (Ohio 2002) 768 N.E.2nd 1136, for the proposition that “industry trade associations have sufficient control over the source of the nuisance to allow liability.” Appellants’ Opening Brief at 48-49. The Ohio Supreme Court, of course, made no such ruling. The case was before that court on appeal from

dismissal for failure to state a cause of action. The court made no evidentiary rulings of any kind. Indeed, the only references to the Trade Associations are in its discussions of the general allegations of the complaint against all defendants. The Associations were later dismissed for want of personal jurisdiction, and the City of Cincinnati did not appeal.⁹

The only court to address the merits of a claim against NSSF or SAAMI is the court below. That court correctly concluded that the only possible factual basis for such a claim against NSSF and SAAMI was for “non-feasance” and that “before they can be liable for a business *practice or conduct that causes harm* there must be some evidence that *they* did something that was either unlawful, unfair or fraudulent that has some connection to some harm suffered by someone in California.” Op. at 29 (61 JA 17863, Lines 26-28; 61 JA 17863A, Line 1) (original emphasis.) The court did state that a plausible argument could be made that the Associations were aware of firearms distribution issues. *Id.* However, evidence of some level of knowledge does not raise a triable issue of fact. Appellants must establish a triable issue that NSSF and SAAMI actively participated in and had unbridled control over the allegedly unfair and harmful practices of the manufacturers. They have not, and *Toomey*,

⁹ For the convenience of the Court, a copy of the Judgment Entry in *Cincinnati v. Beretta USA Corp.* dismissing the Associations is attached hereto at Exhibit A. In June, 2003, Cincinnati voluntarily dismissed its case against the remaining defendants.

Emery, and *Selma Pressure Treating* require the affirmance of summary judgment.


CONCLUSION

For the reasons stated above, National Shooting Sports Foundation, Inc. and Sporting Arms and Ammunition Manufacturers' Institute, Inc. respectfully request that the Order granting summary judgment as to these Respondents be affirmed.

Respectfully submitted,

DATE: May 6, 2004

KOLETSKY, MANCINI, FELDMAN & MORROW

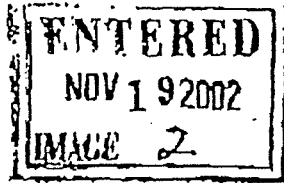
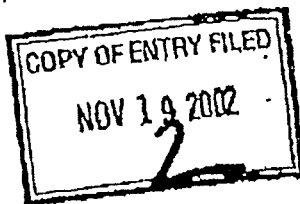
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Exhibit A



JUDGE ROBERT P. RUEHLMAN
Court of Common Pleas
Hamilton County, Ohio

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF CINCINNATI

Plaintiff,

vs.

BERETTA U.S.A. CORP., et al.

Defendants.

CASE NO. A9902369

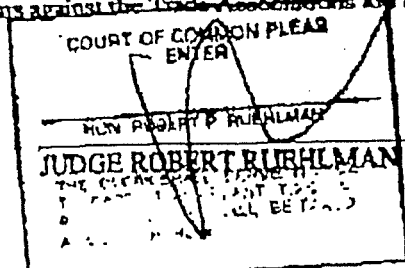
JUDGE ROBERT P. RUEHLMAN

JUDGMENT ENTRY

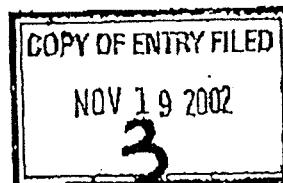
This cause came to be heard on Defendants American Shooting Sports Council, Inc., National Shooting Sports Foundation, Inc. and Sporting Arms and Ammunition Manufacturers' Institute, Inc. ("Trade Associations") Motion to Dismiss for Lack of Personal Jurisdiction. The Trade Associations filed affidavits in support of their motion. Plaintiff filed briefs and exhibits in opposition to the motion. This Court reviewed the briefs, affidavits, and exhibits and the testimony of Trade Association executives Robert Delfay and Robert Rieker in depositions taken by Plaintiff.

An oral hearing was held on October 7, 2002. An evidentiary hearing was not held and, therefore, Plaintiff's burden of proof is *prima facie*. Upon review of the briefs, affidavits, exhibits, depositions and applicable law, this Court finds that Plaintiff has not made a *prima facie* case that the Trade Associations have sufficient contacts with the State of Ohio to satisfy the requirements of general personal jurisdiction or that their contacts with Ohio have the relationship to their claims against the Trade Associations necessary for specific personal jurisdiction.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Trade Associations' Motion to Dismiss for Lack of Personal Jurisdiction is granted. Plaintiff's claims against the Trade Associations are dismissed with prejudice at Plaintiff's cost.



PL000103508



CERTIFICATE OF COMPLAINT

Counsel for Respondent Trade Associations used a proportionately spaced Times New Roman 13-point typeface and certifies that the text of these Respondents' Brief consists of 6,946 words as counted by Microsoft Word 2002 Version word-processing program used to generate this brief.

DATE: May 6, 2004

KOLETSKY, MANCINI, FELDMAN & MORROW

BY: _____



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Sports Foundation, Inc. and Sporting Arms
and Ammunition Manufacturers' Institute, Inc.

DECLARATION OF SERVICE BY MAIL

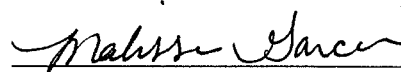
I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the county of Los Angeles, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 3460 Wilshire Boulevard, 8th Floor, Los Angeles California 90010.

2. That on May 7, 2004, declarant served the **RESPONDENT TRADE ASSOCIATIONS' RESPONSE BRIEF** by depositing a true copy thereof in a United States mailbox at Los Angeles, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

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

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of May, 2004, at Los Angeles, California.


MALISSA GARCIA

FIREARMS CASES

Judicial Council Coordination Proceeding No. 4095

People et al. v. Arcadia Machine & Tool, Inc. et al.

California Appellate Courts, First Appellate District, Case Number A103211

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