

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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 THE CITY OF NEW YORK, : 06-CV-2233 (JBW)  
 :  
 :  
 -against- : United States Courthouse  
 : Brooklyn, New York  
 :  
 :  
 : May 21, 2008  
 A-1 JEWELRY & PAWN, INC., ET AL, : 10:45 a.m.  
 :  
 Defendant. :  
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CIVIL CAUSE FOR ORDER TO SHOW CAUSE  
BEFORE THE HONORABLE JACK WEINSTEIN  
UNITED STATES DISTRICT COURT JUDGE

Proceedings recorded by computerized stenography  
Transcript produced by Computer-aided Transcription.

1 THE COURT: Good morning, everyone. Sit down, please.  
2 Call the case, please.

3 MR. FARIDI: Civil cause for order to show cause, City  
4 of New York versus A-1 Jewelry.

5 THE COURT: Good morning, everyone. I think we have a  
6 rather extensive agenda.

7 The first item is Courtroom View Network's request to  
8 broadcast.

9 MR. SHERMAN: That's me, your Honor.

10 THE COURT: Yes. All right. I'll be happy to hear  
11 you, and then we'll hear from the parties.

12 Is the Government here?

13 MR. SCHACHNER: Yes, your Honor. Good morning.

14 MR. SHERMAN: Your Honor, thank you. I'll be brief.  
15 We -- we have a request to narrowcast this proceeding which so  
16 everybody understands is a technical term of art which means  
17 that the information, the images, and the sound go through that  
18 camera, go into a computer, and are broadcast not generally on  
19 the Internet but to subscribers of Courtroom View Network  
20 who -- on a secure feed. Each individual subscriber can be  
21 terminated separately by Courtroom View.

22 So, in the sense that sort of if you think of -- if  
23 you think of broadcast as -- as a kind of general airwave  
24 transmission and cable as limited only to those subscribers,  
25 this is narrower, just to individual subscribers with the

1 ability on the back end to turn off someone's feed if they seek  
2 to hack in or misuse it.

3 THE COURT: Excuse me. You're not taking this, are  
4 you?

5 THE VIDEOGRAPHER: I am.

6 THE COURT: Stop. The hearing is to determine whether  
7 you should take it.

8 THE VIDEOGRAPHER: Okay.

9 MR. SHERMAN: Just so we're clear, your Honor, you had  
10 said in the order to show cause that we could take -- we could  
11 take this video, I thought, this proceeding. Doesn't matter to  
12 me whether we do, but that was why he was doing it.

13 THE COURT: Well, I'm not criticizing you, but I think  
14 in view of the opposition that we have that we oughtn't to  
15 start until we hear argument.

16 MR. SHERMAN: Understood.

17 THE COURT: Does that seem sensible to everybody?

18 (All counsel agree.)

19 MR. SHERMAN: Understood. So, what we propose to do  
20 in this case which is of I think undeniably public interest is  
21 to narrowcast the proceedings and that is -- that comes up on a  
22 computer screen.

23 It's unlike anybody we're used to when we think of  
24 television. There's no commentator. It's done in a streaming  
25 way real time. There is the ability to watch a realtime

1 transcript, if that's set up, and the center focus -- the  
2 central focus of the screen is, for example, on an exhibit, not  
3 on the visual. There's a -- the default screen has the person  
4 on the upper left-hand side of screen.

5 And we are here principally to ask to do that for this  
6 trial because trials are, as I think we all --

7 THE COURT: Well, who's gonna -- who's going to get  
8 the video of this now? Who are you planning to feed it to?

9 MR. SHERMAN: Anybody who seeks it out. It is -- it  
10 is a subscription service which is advertised, for example, in  
11 the *Bar*. Journalist may know about it. Investment banks may  
12 know about it. Anyone who's interested and pays the fee is  
13 permitted to get it and not permitted to rebroadcast it, send  
14 it anyplace, or use it. It's a secure feed that is --

15 THE COURT: Can they get it later?

16 MR. SHERMAN: Uh --

17 THE COURT: Or is it only the simultaneous broadcast  
18 that they take?

19 MR. SHERMAN: The short answer is it's whatever you  
20 permit. We can do both. We can do it simulcast. We can tape  
21 it. And we have in our building a library for use by  
22 practitioners to see, you know, trial testimony and lawyers and  
23 that is something that we're working with. So, for example --

24 THE COURT: What about these little disks that they  
25 normally put videos on? Do you make those, too?

1 MR. SHERMAN: We can make those and we can distribute  
2 them to -- to subscribers and they I believe they can be  
3 encrypted. So, we can -- we are -- the scope of our services  
4 is defined as a matter of our policy by what the Court permits  
5 and what the Court wants.

6 THE COURT: I see. I take it the Court would get a  
7 transcription for appeal and other purposes.

8 MR. SHERMAN: Yes, indeed. Yes, indeed.

9 THE COURT: All right. I'll hear from the City,  
10 first.

11 MR. PROSHANSKY: Your Honor --

12 THE COURT: Unless you want to add anything.

13 MR. SHERMAN: No. I suppose I ought to just to cut to  
14 the chase on the objections which have been in writing. With  
15 respect to Mr. Renzulli's objection, Adventure Outdoors, I  
16 don't know whether he'll withdraw it but his objection was  
17 concerned Adventure Outdoor's employees and agents who worked  
18 with ATF and we've agreed that for the -- the part of that  
19 testimony by the defendant and any testimony, any  
20 cross-examination we'll simply turn off the sound which is --  
21 or anything that identifies the witness. We have no problem  
22 with that, which I understood was his main objection.

23 With respect to the City's objection, it is not our  
24 position that we are here because this is the most -- because  
25 of the high public interest in our trial. It is our position

1 that we seek to make the judicial process available in a  
2 nonsensational, dignified way to the public through our  
3 subscribers; and this is a public trial.

4 We are -- we are -- we are not interested in showing  
5 to this limited audience of subscribers anything that you deem  
6 to be not public. We are, as I said before, amenable, as you  
7 see, in my talking to Mr. Renzulli, to working with other  
8 parties, if they have concerns but our central -- our central  
9 objective is simply to make trials public.

10 We are permitted to make a profit. That equipment  
11 costs money, as you know, and we're --

12 THE COURT: I don't want to hear about the profit. I  
13 assume --

14 MR. SHERMAN: I was just responding to the objection.  
15 Thank you.

16 MR. PROSHANSKY: Eric Proshansky for the City.

17 Our principle opposition is that, in fact, that this  
18 is not being done as a public proceeding. It is a subscription  
19 process. If this were the newspapers, the traditional media  
20 who were here to cover this, that's fine. This is a  
21 subscription service. This service is here to make money. We  
22 find it generally disruptive of our process of being able to  
23 conduct a trial which is difficult enough to conduct without  
24 additional technical considerations.

25 We have several witnesses who are -- will be more

1 difficult to bring them into the courtroom if they know they're  
2 going to be recorded and be on television. There are people  
3 who have to talk about issues in their past they're probably  
4 not very proud of.

5 THE COURT: Well, as I understand it, they'll -- if  
6 you want to cut off as to any witness or witnesses or  
7 documents, they'll stop it.

8 MR. PROSHANSKY: That -- if it goes forward, we will  
9 certainly do that but we just find the process basically  
10 intrusive and disruptive. We were not consulted --

11 THE COURT: Why is it intrusive? I don't understand.  
12 We've had this before. It's never intruded or affected  
13 anything that went on in the courtroom.

14 MR. PROSHANSKY: Well, it's intrusive I think in the  
15 sense, once people realize they're on camera, they act  
16 differently. They become self-conscious. They become  
17 concerned.

18 Our concern also is that, given this type of  
19 technology, it is inevitable that this will escape. It will  
20 show up on YouTube. It will show up on web sites.

21 THE COURT: What different does that make? It's a  
22 public trial. Normally you want as many people as you can to  
23 see what's going on in the courtrooms.

24 MR. PROSHANSKY: People have been able to do that  
25 through the newspaper and by coming to the courtroom for many

1 years. In this situation where you essentially have lawyers  
2 who are subscribing to this to watch it, I don't think in fact  
3 it's making it public. I think it's making it rather  
4 restricted to a group of people who already typically have  
5 opportunities to attend plenty of trials.

6 THE COURT: Would you feel better if it were made  
7 available to the public? You could file, I suppose, the  
8 transcription. Anybody could come in and take it.

9 MR. SHERMAN: That's right.

10 THE COURT: Is that right? At no charge.

11 MR. SHERMAN: It is --

12 THE COURT: For the --

13 MR. SHERMAN: The -- the --

14 MR. RENZULLI: Almost.

15 MR. SHERMAN: If the request is to generally broadcast  
16 it, we would act as a pool camera; and we would provide the  
17 feed, if you permitted it, to for example, CNN if CNN wanted to  
18 do it.

19 THE COURT: So, you would make it available if that's  
20 what the Government -- the City wants to anybody.

21 MR. SHERMAN: That's right. And if we can't compete  
22 on price, we'll deal with that ourselves.

23 THE COURT: All right. They said they'll make it  
24 available to everybody, if that's what you want.

25 I just don't understand the reluctance of the City.



1 Normally the courts are open to everybody. We don't have the  
2 old farming community where people hung into the windows to  
3 watch what was going on, particularly since we're on the tenth  
4 floor.

5 I take it that, in addition to charging, you'll supply  
6 the Court with a CD?

7 MR. SHERMAN: Yes.

8 THE COURT: And we'll put it in the courthouse in the  
9 clerk's office, and anybody who wants it can come down and look  
10 at it on the court computer.

11 MR. SHERMAN: I have no -- yes.

12 THE COURT: Without charge.

13 MR. SHERMAN: The answer is yes.

14 THE COURT: Okay. Does that make you -- satisfy your  
15 problem? And you can cut off at any time as to any witness.

16 MR. PROSHANSKY: Yes.

17 THE COURT: Just say "stop" as to this next witness.

18 MR. PROSHANSKY: And would this deposit of a CD with  
19 the Court, is that the same as making it public as was just  
20 discussed previously -- in other words, is giving a feed as  
21 well as?

22 THE COURT: That's free.

23 MR. SHERMAN: Yeah.

24 THE COURT: That will be part of the order, free.

25 MR. PROSHANSKY: Then we under those conditions we

1 would not oppose it.

2 THE COURT: And defendant.

3 MR. RENZULLI: We have one issue, your Honor, which we  
4 raised in some correspondence with the Court. Jay and Cecilia  
5 Wallace who are here in the courtroom today --

6 THE COURT: Good morning. You can sit up here if  
7 you'd like so you can hear a little better. Just sit right  
8 here on the front bench.

9 MR. RENZULLI: -- have over the years --

10 THE COURT: Good to see you. Nice to see you.

11 MR. RENZULLI: -- who over the years have been  
12 very -- have initiated law enforcement operations to catch bad  
13 guys that may have been in their shop, these bad guys for lack  
14 of a better word are, some are still in prison and I fear for  
15 their safety, should that information become public. When they  
16 do these operations, they are in a sting type operation. So,  
17 they kept private. As to the ATF agents that may be involved  
18 or law enforcement that may be involved and obviously the  
19 employees and the principles of Adventure Outdoors, if there's  
20 a way to and it seems like there might be, to not make that  
21 public --

22 THE COURT: Well, at any time you want anything not to  
23 be recorded, just say so and just signal to the operator and it  
24 will be shut off and you're not to take the pictures at all of  
25 these owners.

1           You, too, right? Is that what you want?

2           MR. RENZULLI: That would be one of the things we  
3 would want, Judge.

4           THE COURT: Okay. That will be done. Is that set?  
5 Now --

6           MR. SCHACHNER: Your Honor --

7           THE COURT: I'll get around to the Government. Just  
8 be patient.

9           MR. RENZULLI: Your Honor, you have heard what I have  
10 to say. Thank you.

11          THE COURT: Now I'll hear from the government.

12          MR. SCHACHNER: Good morning, your Honor. As to -- as  
13 to this matter, AFF's initial main concern was some -- involved  
14 some -- oh, I'm sorry. ATF's initially involved some  
15 investigative documents that actually were initially turned  
16 over in the Beretta case and were made available to the parties  
17 in this case. I have not heard from any party that was to use  
18 those documents.

19                 As trace data, normally the only thing with trace data  
20 is that the City may be using some trace data that dates back  
21 prior to/in or around September of 2002. During that period of  
22 time ATF made trace data pursuant to requests and perhaps to  
23 other means as well, and ATF has no problem with that trace  
24 data being publicized.

25                 Our only concern has to do with the possibility that

1 some law enforcement sensitive information may come out during  
2 trial. That may depend in large part on how your Honor rules  
3 on the Rule 72(a) appeal of Magistrate judge Pollack's decision  
4 of May 13th.

5 Our concerns there are magnified by one point. ATF,  
6 the Government, generally is not a party here; and Government  
7 ATF would prefer not to have to sit through the entire trial.

8 THE COURT: Not to have what.

9 MR. SCHACHNER: Not to have to sit through the entire  
10 trial to request that, your Honor, that CVN turn off the camera  
11 at some point.

12 THE COURT: I don't understand. It's not clear with  
13 respect to your problem. Anything prior to 2002 you have no  
14 objection to it.

15 MR. SCHACHNER: Correct.

16 THE COURT: Now, what's coming in post-2002 that you  
17 have a problem with?

18 MR. SCHACHNER: It's not trace data, your Honor. It  
19 just has to do with the materials that are the subject of the  
20 Rule 72(a) appeal of Magistrate Judge Pollack's decision. We,  
21 ATF, objected to some --

22 THE COURT: Well, if I sustain the magistrate judge's  
23 ruling, there's no problem.

24 MR. SCHACHNER: Correct.

25 THE COURT: All right. So, why don't you remain here

1 until I decide that?

2 MR. SCHACHNER: Yes, your Honor.

3 THE COURT: But as of this moment, I don't see a  
4 problem.

5 MR. SCHACHNER: Correct, your Honor.

6 THE COURT: So, we'll proceed; and your motion is  
7 granted with the limitations described.

8 MR. SHERMAN: I assume your Honor --

9 THE COURT: Submit a -- an order so we can have the  
10 parties sign off on it and I'll sign it.

11 MR. SHERMAN: May I ask for one clarification?

12 THE COURT: Yes.

13 MR. SHERMAN: I assume that, although we are going to  
14 make a disk or disks published in the Court's file, we are  
15 permitted still to operate our business and charge subscribers  
16 if subscribers come.

17 THE COURT: You can still sell it.

18 MR. SHERMAN: I just wanted to --

19 MR. SCHACHNER: Can counsel provide me with a copy?

20 MR. SHERMAN: We can do that to all the parties  
21 without charge.

22 THE COURT: All parties and the United States.

23 MR. SCHACHNER: Thank you, your Honor.

24 THE COURT: Provide it to the United States without  
25 charge.

1 MR. SHERMAN: Thank you, your Honor.

2 THE COURT: All right. You can turn on your machine.

3 MR. FARIDI: Civil cause for appeal, City of New York  
4 versus Bob Moates.

5 MR. GARDINER: That's my appeal in the Moates' case.

6 THE COURT: I'll be happy to hear you.

7 MR. GARDINER: Richard Gardiner representing Bob  
8 Moates. Your Honor, we had objected to providing copies of  
9 Forms 4473 in a discovery request made by the city and the  
10 magistrate judge overruled the objection and we've appealed to  
11 you on that objection. Our position is basically that --

12 THE COURT: Excuse me. We have your letter on file.  
13 The letter of the magistrate on file?

14 MR. FARIDI: Yes.

15 THE COURT: All right. And that is the order dated  
16 April 11th.

17 MR. GARDINER: Yes, sir.

18 THE COURT: That's the one you're appealing from.

19 MR. GARDINER: Yes, sir.

20 THE COURT: Be glad to hear from you.

21 MR. GARDINER: And our position, your Honor,  
22 essentially is that 18 USC 923 sets up a comprehensive or  
23 Congress established a comprehensive scheme for the creation of  
24 records and the maintenance of records and the disclosure of  
25 records by federally licensed firearms dealers and that -- that

1 essentially go -- allowing civil discovery of those records  
2 evades Congress' comprehensive scheme for how those records  
3 should be maintained and disclosed.

4 First of all, the law -- the regulations which are  
5 promulgated pursuant to the statute require that the records  
6 have to be maintained on the business premises of the dealer  
7 for 20 years. After that, they can be destroyed.

8 On discontinuance of the business, the records have to  
9 be turned over to the ATF and then the forms are available to  
10 the attorney general in certain defined circumstances and the  
11 Statute 923(g)(1)(a), (g)(1)(b), (g)(1)(d) set out those  
12 circumstances but essentially if the Government gets a warrant,  
13 they can come in and look at the records and seize the records.

14 They can look at the records without a warrant, during  
15 a criminal investigation of either the licensee or of someone  
16 else based on if they need to look at the records for that  
17 purpose, and they can conduct annual compliance inspections but  
18 only annual.

19 And then on top of that, the statute makes clear that  
20 the attorney general can only seize forms if they're material  
21 evidence of a violation of law; and then on top of that,  
22 Congress said that the forms, that all these records, including  
23 the forms, are going to be available to law enforcement  
24 agencies including local law enforcement agencies but then only  
25 with respect to people who are prohibited from purchasing

1 firearms.

2           And then on top of that, Congress to make -- to make  
3 the point absolutely clear said that even the attorney general  
4 cannot promulgate regulations requiring that the forms or any  
5 portion of the content of the forms, not just the forms  
6 themselves but the content as well, can be -- can be  
7 transferred to any political -- to any other Federal agency,  
8 any state agency, or any political subdivision.

9           And so, Congress through this whole scheme has made  
10 very, very clear that, because Congress is maintaining the  
11 creation of the records, that they're only going to be very  
12 limited circumstances under which they are disclosable.

13           In light of that comprehensive scheme, it seems very  
14 clear that Congress didn't intend, "Well, we can just go around  
15 all this in a civil case."

16           Otherwise, the whole thing would essentially be  
17 pointless and we -- we take -- we think that because Congress  
18 did that, that Congress set up this scheme, that the Court  
19 can't, can't now order the disclosure of these documents in  
20 civil discovery. Otherwise, the whole scheme essentially  
21 becomes pointless.

22           The City in response relies on a statement made in an  
23 affidavit by an ATF agent which says that the forms are the  
24 property of the dealer but they said that in, first, all -- and  
25 it was a special agent that made it. It's a passing comment



1 almost in a lengthy affidavit, and he says it not in the  
2 context of trial to make a legal determination but rather on  
3 that it would be unduly burdensome for ATF employees to  
4 authenticate the information.

5 So, I don't think that that passing reference in an  
6 affidavit by an ATF agent really rises to the level of the kind  
7 of legal analysis that is appropriate here.

8 In addition to that, there's the privacy interest of  
9 the purchasers, and as this Court held in the *Johnson* versus  
10 *Bryco* case, information concerning purchasers of firearms is  
11 not disclosable generally unless it may have -- unless it's a  
12 firearm that may have been involved in a crime and the example  
13 that the Court used in the *Johnson* case, considering when a  
14 firearm was -- may have been used in a crime was a woman who  
15 purchases a firearm and the gun is stolen and used in a murder  
16 and the Court said that in that circumstance that that she  
17 loses her privacy interest because the gun was involved in a  
18 murder.

19 And what we've asked for here is for the City to  
20 provide some evidence that these firearms that they're looking  
21 for, the 4473s for, were involved in a crime. All they've told  
22 us so far is that the guns were traced and, as this Court also  
23 held in the *NAACP* case, traces do not necessarily equate with  
24 crime and we would like at a minimum -- we think that the deal  
25 is privacy issue -- the City should provide some evidence that

1 the particular guns that they're seeking, that they say were  
2 traced were, in fact, at least apparently involved in a crime.

3 We have nothing from them and the discovery process  
4 has essentially been put on hold for the moment because of  
5 the -- this upcoming trial, although I've been promised we're  
6 probably supposed to get the information sometime in June but I  
7 think at a minimum the Court can't decide the privacy issue  
8 until that data is -- until those data are produced.

9 So, again we would ask the Court reverse the decision  
10 of the magistrate judge and not authorize the release of the  
11 Forms 4473.

12 THE COURT: Thank you. What's the Government's -- the  
13 City's view?

14 MR. PROSHANSKY: Your Honor, the magistrate judge has  
15 heard the congressional scheme laid out by Mr. Gardiner and, in  
16 fact, rejected it. In addition, let me move to the privacy  
17 issue first.

18 These are all guns that were connected with crimes in  
19 New York. I believe we have provided Mr. Gardiner with the  
20 information on that. If we have not, we will. These are not  
21 simple traces. These are guns that have been entered into the  
22 New York City police ballistics database connected with  
23 specific crimes. It may not have been murder, but they're all  
24 crime guns.

25 THE COURT: You say you haven't gotten that?

1 MR. GARDINER: I have not gotten it.

2 THE COURT: All right. Well, they'll give you a  
3 duplicate of whatever they have and cover every one of these  
4 items.

5 MR. PROSHANSKY: And there may be --

6 THE COURT: That takes care of the privacy issue,  
7 correct?

8 MR. GARDINER: Assuming the documentation is there.

9 THE COURT: Well, assuming, of course.

10 MR. PROSHANSKY: In terms of the statutory scheme that  
11 Mr. Gardiner laid out, that's obviously a scheme to protect the  
12 documents within the Government. The Government is not  
13 permitted to move the documents around within itself without  
14 certain restrictions but if you look to that -- what  
15 Mr. Gardiner classifies as a stray comment, if you look at the  
16 practical construction of how ATF has treated 4473s, ATF views  
17 them as the property of the dealer and, although the dealer is  
18 required to keep them on site and have them available for  
19 inspection by the ATF, they are not the property of the  
20 Government.

21 The statutory scheme says nothing about civil  
22 discovery. It says this is how we're going to distribute these  
23 documents and protect these documents if they fall into  
24 Government hands. When they're in private hands, there's  
25 nothing in the statute that says that.

1           In connection with our settlements, many of the  
2 dealers have actually approached the ATF and said as part of  
3 this settlement, "There is to be an inspection of our 4473s."

4           Is that troubling to ATF? And I can provide affidavit  
5 testimony to this effect. ATF has said, "No, they're your  
6 documents. Do what you want with them. They have to be kept  
7 on your premises, but we don't deem them to be our documents."

8           So, I do not believe that they're covered by the  
9 statutory scheme.

10          THE COURT: Does the Government want to appear as a  
11 friend of the Court on this issue?

12          MR. SCHACHNER: Well, the Government is willing to in  
13 principle, your Honor. It's just that I was not aware of this  
14 whole issue coming up. I'm not on ECF as to Bob Moates. I  
15 have not read the magistrate's decision.

16          THE COURT: Why don't we do this then? This case is  
17 not coming to trial for a little while.

18          MR. PROSHANSKY: Correct.

19          MR. GARDINER: September, your Honor.

20          THE COURT: September.

21          MR. GARDINER: Yes, sir.

22          THE COURT: Right. So, why don't I invite the  
23 Government to submit a memorandum as a friend of the Court and  
24 reserve decision on the appeal until we have that from the  
25 Government; and if the Government submits anything, they don't

1 have to submit it. It doesn't have to submit it; but if it  
2 does, the parties can respond. So, I'll reserve decision.

3 MR. SCHACHNER: Just so I understand the issues,  
4 whether there's any Federal law, any impediment of the Federal  
5 law to the discovery of Forms 4437.

6 THE COURT: Which are in the hands of --

7 MS. GALENO: The dealer.

8 MR. GARDINER: The dealer.

9 THE COURT: -- the dealers which is producing them.

10 MR. SCHACHNER: Federal law to production of 4473 in  
11 the hands of the dealer.

12 MR. GARDINER: I'll send you a copy of the brief if  
13 you give my your card afterwards.

14 THE COURT: You can have a copy of the magistrate  
15 judge's decision.

16 MR. GARDINER: I'll be happy to provide it to him.

17 THE COURT: That disposes of that decision reserved.

18 MR. GARDINER: Yes, sir. May I ask is there a  
19 deadline for --

20 THE COURT: When do you think you can get that? You  
21 want to consult?

22 MR. SCHACHNER: Yeah, I would want to consult with  
23 ATF.

24 THE COURT: Two weeks?

25 MR. SCHACHNER: Could I have two weeks from tomorrow,

1 your Honor.

2 THE COURT: All right. He'll have a response.

3 MR. SCHACHNER: If I could get a copy of the  
4 magistrate judge's decision and any briefs by tomorrow, I'd  
5 really appreciate it.

6 THE COURT: Okay. We'll get you that. Okay. Thank  
7 you very much.

8 MR. FARIDI: Civil cause for appeal and motion hearing  
9 City of New York versus A-1 Jewelry and Pawn, Inc.

10 THE COURT: This is an appeal by the defendant? I'll  
11 hear you. And this is an appeal from the order of the  
12 magistrate dated May 13th, 2008.

13 MR. ALLAN: Judge, Scott Allan on behalf of  
14 defendants. We are appealing from the magistrate judge's  
15 decision affirming, granting the motion for a protective order  
16 by both the ATF and the City in regard to depositions upon  
17 written questions that defendant had served upon two ATF  
18 special agents -- William Haskell and Ben Southall and an ATF  
19 Lorna Petty -- for both -- all of whom are from the Atlanta  
20 field division of the ATF.

21 We had originally sought to take these depositions  
22 upon oral examination of these witnesses. However, after  
23 objection by the ATF and in consultation with them, we agreed  
24 to proceed with depositions upon written questions.

25 After we served our depositions upon written questions

1 which has been -- sorry -- which had actually been suggested by  
2 the ATF, we received a motion for a protective order from the  
3 City claiming that there was no time left to complete them  
4 based on the upcoming trial date. The City thereafter joined  
5 in and filed its own motion for a protective order primarily on  
6 the basis of the law enforcement privilege and the burden that  
7 would be created to the ATF if they had to respond to  
8 depositions upon written questions.

9 The main reason we had agreed to the deposition upon  
10 written questions was that it resolved most of those issues.  
11 Any issues regarding possible law enforcement privilege could  
12 be addressed by objecting to a specific question to which the  
13 counsel for the ATF would have before the witnesses sat for  
14 their deposition.

15 In regards to the burden, since these were simply  
16 going to be done upon depositions upon written questions, the  
17 availability of counsel did not need to be taken into account.  
18 We simply would be an attorney for the ATF with the witnesses  
19 and a court reporter sitting down at a time that was convenient  
20 for these witnesses.

21 The magistrate judge granted the motion to quash  
22 primarily on the basis that she said we had never raised it  
23 with the Court beforehand. We had raised this issue before and  
24 had been proceeding with this and all the parties had been on  
25 notice since January or February and we believe that it is --

1 this is probably the most important evidence in the case 'cause  
2 these are the special agents that were discussed earlier that  
3 go hand in hand with the Wallaces and the other employees of  
4 Adventure Outdoors and did detection and prosecution of various  
5 persons attempting to illegally purchase firearms.

6 And in regard to the inspector, she recently completed  
7 an inspection of Adventure Outdoors' records which covered a  
8 period of just over one year which was the period from July --  
9 I'm sorry -- October, 2006, to October, 2007, for all records  
10 and in regard to certain other records went back as far as a  
11 five-year period.

12 We believe that even with the upcoming trial, because  
13 this will be a deposition upon written questions, there still  
14 is time for this to be completed and we would request that this  
15 Court overrule the -- reverse the order of the magistrate  
16 judge.

17 THE COURT: Well, I don't understand why you need  
18 this. The magistrate judge, Russell Vineyard, V-i-n-e-y-a-r-d,  
19 of the Northern District of Georgia issued a full report and  
20 recommendation analyzing the ATF's objections -- that was to  
21 the oral deposition, correct? -- and quashed your notice of  
22 oral depositions. What is it that you seek in the written  
23 answers that's different from what you sought in the oral  
24 deposition?

25 MR. ALLAN: The subject matter of the written



1 depositions is primarily the same as the oral depositions. In  
2 regard to Magistrate Judge Vineyard's report and  
3 recommendation, the ATF had filed a motion on the same day that  
4 we had a discussion about possibly proceeding on written  
5 questions; and they advised us that they may file a motion to  
6 quash to preserve their position while negotiations were  
7 pending. They did file such a motion; and they specifically  
8 put a footnote in their motion, saying that it was only being  
9 filed to preserve their position while negotiations were  
10 pending.

11 We were subsequently engaging in discussions with the  
12 ATF and Magistrate Judge Vineyard apparently issued a report  
13 and recommendation granting their motion to quash, although  
14 defendant had not appeared on there because it was allegedly  
15 only filed to preserve the position and this same day also the  
16 ATF withdrew its motion to quash.

17 As a result, that motion, that report and  
18 recommendation of the magistrate judge was never adopted as an  
19 order by the district judge. Rather, the motion to quash was  
20 withdrawn; and the case down there was closed.

21 THE COURT: Well, I -- you can -- I don't understand  
22 what you want.

23 MR. ALLAN: What we --

24 THE COURT: That wasn't already ruled on by the  
25 magistrate judge. What information do you want to get from

1 these questions?

2 MR. ALLAN: The information that we want to get is  
3 specifically regarding the cooperation between Adventure  
4 Outdoors' employees and the ATF. We have several instances in  
5 which Adventure Outdoors contacted the ATF regarding what they  
6 considered to be a suspicious purchase, and ATF affirmatively  
7 directed them to sell the firearms to this person. Some of  
8 these are the prosecutions that the City has claimed that  
9 demonstrate that Adventure Outdoors sells firearms in a  
10 negligent manner such as, for example, the Kwame Walker  
11 prosecution which the City used in reliance upon the motion  
12 to --

13 MR. RENZULLI: (Shakes head negatively.)

14 THE COURT: Stop.

15 MR. RENZULLI: No.

16 THE COURT: Cut the reference to this case off,  
17 please.

18 Go ahead. Cut back five minutes.

19 Proceed.

20 MR. ALLAN: For example, the Wallaces provided  
21 information to the ATF relative to an attempted purchase of 15  
22 Highpoint firearms by an individual named Kwame Walker. One of  
23 the ATF agents we are seeking to depose, he described the  
24 circumstances of it and was instructed to sell the firearms.  
25 Later that same day he sent a facsimile cover sheet enclosing

1 the multiple cell form, the 4437s, as well as information on  
2 the vehicle that Mr. Walker was driving correctly to  
3 Mr. Haskell.

4 Now, it is our position that this was -- this is  
5 evidence of cooperation between Adventure Outdoors and the ATF.  
6 In contrast, the City is seeking to use this as evidence that  
7 Adventure Outdoors sells firearms in an improper manner because  
8 it sold 15 Hi-Points to a man who was later prosecuted; and for  
9 those reasons we believe that the testimony of the ATF is of  
10 vital importance.

11 THE COURT: How many of these types of cases do you  
12 have?

13 MR. ALLAN: I believe we discussed specifically four  
14 of them in our depositions upon written questions and there  
15 are -- there are several others in which they had provided  
16 assistance.

17 THE COURT: Have you indicated to the City those  
18 cases?

19 MR. ALLAN: We have, your Honor.

20 THE COURT: What's your view?

21 MR. PROSHANSKY: Your Honor, two magistrates have now  
22 looked at this and decided that on the merits -- I'm not  
23 referring now to the delays involved but there was an affidavit  
24 put in by the ATF indicating that the agents in question didn't  
25 have any recollection of the prosecutions that were proposed to

1 them; that they were not competent, qualified to testify on  
2 many of the issues in the depositions; and that the whole  
3 process would be burdensome to ATF.

4           Magistrate Vineyard accepted that determination by ATF  
5 and Magistrate Pollack essentially accepted that same  
6 determination and I think that what motivated both of them  
7 was -- and it's difficult to understand how this can be viewed  
8 as the most important evidence in the case when ATF has come  
9 back and said the agent in question -- and by the way, of the  
10 two agents, one of them is offer in the army in Iraq. So, he's  
11 unavailable. The other agent doesn't recall the events of  
12 these so-called cooperations.

13           THE COURT: Well, if the questions are posed, then  
14 that's the answer.

15           MR. PROSHANSKY: The --

16           THE COURT: What's the objection to posing the  
17 questions?

18           MR. PROSHANSKY: Well, if it's limited to those but  
19 there are a host of questions, your Honor. This is what's  
20 being focused on now. There are 75 --

21           THE COURT: Why can't you limit it to those cases  
22 where you say you were in cooperation and gave them  
23 information?

24           MR. RENZULLI: Can I just jump in here for a minute,  
25 your Honor? There are other questions posed to the agents and

1 inspectors.

2 THE COURT: Like what?

3 MR. RENZULLI: Like this. The experts from the City's  
4 side have testified that Adventure Outdoors is a bad dealer, a  
5 dealer that is on the brink of revocation, et cetera.

6 We posed specific questions to Inspector Lorna Petty  
7 who was just in the shop, who had done a full inspection of  
8 these folks. We don't have a full record of what Ms. Petty saw  
9 or didn't see.

10 THE COURT: Is that what it comes down to, one witness  
11 now, Ms. Petty?

12 MR. RENZULLI: One would be Ms. Petty, and that would  
13 be on the inspection issues and the paperwork and whether what  
14 their appraisal was of Adventure Outdoors as a retail dealer.

15 The second one would be that one agent, one agent  
16 is -- Mr. Proshansky is absolutely correct. One of the other  
17 agents is in Iraq but there's Ben Southall who was involved in  
18 the initiation of prosecutions of individuals by Adventure  
19 Outdoors.

20 It's two witnesses, Judge. It would probably take a  
21 couple of hours; to complete and if they don't have a  
22 recollection, what we did was we gave them documents that might  
23 help them, like our facsimiles to them.

24 THE COURT: Well, I'll allow it. I'll allow it,  
25 subject to hearing from the Government.

1 MR. SCHACHNER: Thank you, your Honor. Your Honor  
2 seems to be focusing particularly on -- we're not being  
3 recorded, correct?

4 THE VIDEOGRAPHER: We're not.

5 MR. SCHACHNER: The law enforcement investigation that  
6 counsel has been referring to is an ongoing investigation.

7 THE COURT: I see.

8 MR. SCHACHNER: I cannot say anything more in open  
9 court.

10 THE COURT: Well, as to that you can't question.

11 MR. ALLAN: Our understanding of ATF after the ATF put  
12 in their papers stating that was an ongoing investigation, the  
13 last defendant in that case took a plea.

14 MR. SCHACHNER: With all --

15 THE COURT: I'm going to accept the Government's view.  
16 However, you're going to put on evidence of your own that you  
17 cooperated, correct?

18 MR. ALLAN: We also have other situations other than  
19 the one that Mr. Schachner is discussing.

20 MR. RENZULLI: That are closed, not current  
21 investigations, your Honor.

22 THE COURT: You can put the questions and if the  
23 answer is there are ongoing investigations, you don't have to  
24 answer to those and if you have an agent who doesn't have any  
25 recollection, that's the answer.

1 MR. SCHACHNER: Your Honor, we're talking here, if I  
2 may be heard just more generally, we're talking about literally  
3 hundreds of questions that they've asked. I -- and we have  
4 only three --

5 THE COURT: Why do you have hundreds of questions?

6 MR. ALLAN: Judge, there's not hundreds of questions.  
7 There is less than 100 questions to the inspector.

8 THE COURT: Why do you have to ask so many questions?

9 MR. ALLAN: For example, one of the questions would  
10 be: What is your name? Where are you employed?

11 These are a lot of very short questions. The  
12 depositions we anticipate will take no more than two hours.

13 THE COURT: Well, get together with the Government and  
14 cut the questions down to the bare minimum. The Government is  
15 right here. I mean, don't burden these people unnecessarily;  
16 but if you need it and if it's relevant, you can have it.

17 MR. RENZULLI: We'll be happy to work with the  
18 Government, Judge.

19 MR. PROSHANSKY: Your Honor, if we could be heard as  
20 well.

21 THE COURT: Have the -- while you're here in town,  
22 have the Government sit down with you today and do it.

23 MR. ALLAN: (Nods head affirmatively.)

24 MR. RENZULLI: Yes, your Honor.

25 MR. ALLAN: Yes, your Honor.

1 THE COURT: You can have no more than 20 questions as  
2 to each event.

3 MR. RENZULLI: Does that include -- as to each event.  
4 Okay.

5 THE COURT: And those names are -- you can have ten  
6 general questions.

7 MR. SCHACHNER: What do you mean "as to each event,"  
8 your Honor?

9 THE COURT: They're claiming they cooperated as to  
10 certain events.

11 MR. SCHACHNER: I don't know how many events,  
12 different events they're claiming.

13 MR. RENZULLI: There are at least, at least four, at  
14 least.

15 MR. SCHACHNER: That gets us --

16 THE COURT: They can have those -- that number of  
17 questions as to five events, plus ten general questions.

18 MR. SCHACHNER: I mean, I'm happy to sit down with  
19 counsel, your Honor. I don't know how we're going to get this  
20 done in three business days before trial.

21 THE COURT: What you can do is get the questions done.  
22 The trial will last approximately a month. So, the answers to  
23 the questions can come in in ten days because it will be at  
24 least two weeks before the defendant's case goes in. So,  
25 you're not under any pressure.



1 MR. TABER: Your Honor, are we allowed to  
2 cross-examination based on responses? Ordinarily in written  
3 questions we'll be able to. Our case will be closed by the  
4 time the response --

5 THE COURT: If it's necessary for rebuttal, we'll give  
6 it to you.

7 MR. SCHACHNER: In all due respect, your Honor, we  
8 have five events. We can have 20 questions on direct, 20 on  
9 rebuttal. That's actually more questions than have been served  
10 already. That gets us up to 200 questions or just about as  
11 many questions --

12 MR. RENZULLI: Your Honor, we'll make this as easy as  
13 we can for the Government.

14 THE COURT: Cut it down.

15 MR. RENZULLI: Sure. We will.

16 THE COURT: Just get to the number of it. Most of  
17 them will be answered by, "No recollection."

18 MR. SCHACHNER: And I'll be happy to sit down with  
19 counsel.

20 THE COURT: Sit down today and get it straightened  
21 out.

22 MR. TABER: Your Honor, many of the questions that  
23 were posed previously I take it from the Court's rule would no  
24 longer be proper. Our broad questions that go to things like,  
25 "Adventure Outdoors is a good deal" --

1 THE COURT: I don't want that.

2 MR. PROSHANSKY: -- as well as asking the agents for  
3 their opinion of this lawsuit, their opinion of why --

4 THE COURT: I don't want that.

5 MR. SCHACHNER: And if the investigation is ongoing or  
6 some other reason for --

7 THE COURT: If the investigation is ongoing or there's  
8 any reason that this kind of question would interfere with the  
9 enforcement, then it doesn't have to be answered.

10 MR. RENZULLI: Your Honor, all we -- and we'll keep  
11 this very simple because we have given them documents. If they  
12 can just say they received a certain facsimile --

13 THE COURT: If they know.

14 MR. RENZULLI: Right, if they know, and we're going to  
15 keep it simple.

16 THE COURT: Try to keep it simple.

17 MR. RENZULLI: Yes, your Honor.

18 MR. SCHACHNER: Just as to certain events of alleged  
19 cooperation; is that correct?

20 THE COURT: Yes, up to five.

21 MR. SCHACHNER: Up to five.

22 THE COURT: Okay. You get together today while  
23 everybody's here.

24 MR. SCHACHNER: I will -- if there's a problem, we'll  
25 come back to the Court.

1 THE COURT: Correct. All right. With that  
2 limitation, the magistrate judge's order is affirmed.

3 MR. SCHACHNER: And, again, your Honor, this may be  
4 jumping the gun -- no pun intended -- but to the extent any of  
5 this evidence comes out, is produced and comes out in open  
6 court, ATF would of course have a concern in terms of that  
7 portion of the trial being televised.

8 THE COURT: Correct.

9 MR. RENZULLI: There was exactly our concern. So, I  
10 think your Honor has ruled on that.

11 THE COURT: Okay.

12 MR. SCHACHNER: Fine. Thank you, your Honor.

13 THE COURT: Why don't you stick around for a little  
14 while?

15 MR. SCHACHNER: Okay.

16 THE COURT: All right. Turn on the cameras again.

17 We have a motion for summary judgment by A-1, correct?

18 MR. RENZULLI: Uh -- by Adventure Outdoors, yes, your  
19 Honor, and I'll be brief.

20 We believe that Adventure Outdoors is entitled to a  
21 summary judgment as a matter of law on the very extensive and  
22 robust record that the Court has before it. The first issue is  
23 on the issue of the personal jurisdiction or lack thereof of  
24 this Court over Adventure Outdoors. When one looks through and  
25 studies the traditional cases under the 302(a)(3) CPL law

1 provision which is controlling in this Court, we find that  
2 based upon those cases that this Court does not have  
3 jurisdiction over Adventure Outdoors.

4           The Court in conjunction with the City has created a  
5 seven-factor test which relates to such things as traces,  
6 multiple sales, and things -- and aspects thereto to create a  
7 situation where a new test now has been announced for members  
8 of the firearms industry. This test has not been adopted by  
9 any New York state court. This test has been adopted by no  
10 court in New York, in fact.

11           So, we believe that and we ask the Court to certify  
12 this issue that, based upon the unique circumstances involved  
13 here, in announcing the test that applies only to one industry,  
14 that this is something that should be brought to the attention  
15 of the Second Circuit immediately rather than after the case  
16 has been concluded here at trial.

17           The second issue that we raise is an issue that we  
18 raised previously but comes to fore relative to the recent  
19 Second Circuit opinion in the Beretta case which I'm sure your  
20 Honor is familiar with.

21           In that case the Second Circuit was clear that the  
22 PLCAA does not apply to public nuisance cases where injunctive  
23 relief or abatement has been requested. That's No. One.

24           No. Two, if we look at the amended complaint filed by  
25 the City, not the original complaint which had counts of

1 negligence, negligence per se, and requested compensatory and  
2 punitive damages, but we focus on the amended complaint, we  
3 have two statutes that the City is suing on -- 240.45 which is  
4 as this Court knows was specifically addressed by the Second  
5 Circuit in the Beretta decision as not being a statute that  
6 applies to the manufacturer and distribution or marketing of  
7 firearms.

8           The second statute is 400.05 which I don't think is  
9 even in play. It's an administrative provision governing the  
10 acts of police officers.

11           With that having been said, we need some understanding  
12 as to what cause-of-action defense Adventure Outdoors is  
13 depending in this case, since we are proceeding to trial on  
14 Tuesday. If, in fact, the City were to argue that 18 USC 922  
15 and a violation thereof is the basis for their case, then we  
16 would argue and have argued in the past that there's no private  
17 cause of action associated with 18 USC 922. Congress did not  
18 intend to create a private cause of action based upon that  
19 particular statute.

20           If, in fact, the Court disagrees with that position,  
21 we come back to the fundamental principles in this case and the  
22 discovery and what we have learned in this case. There is not  
23 one instance that the City was able to draw from the very  
24 robust discovery in this case that any one of the guns that  
25 made its way to New York City was knowingly straw sold or

1 knowingly sold improperly by Adventure Outdoors, thereby  
2 creating harm in New York City.

3 Now, there's a lot of smoke; but there's no fire. We  
4 have testimony by convicted felons who have submitted  
5 affidavits who later recant the central portions of those  
6 affidavits.

7 We have trace data which will be discussed later, your  
8 Honor. I don't want to go into a long protracted discussion  
9 about what trace data tells us and doesn't tell us but,  
10 obviously, it doesn't tell us -- and this is very central to  
11 our argument -- how a gun got from Point A to Point B. That  
12 proof is essential to the City's claims in this particular  
13 case.

14 I said it would be short. That is short.

15 THE COURT: Thank you. City?

16 MR. BIERNOFF: Thank you, your Honor. Ari Biernoff  
17 for the City. The court of appeals decision in the Beretta  
18 action does not impair the City's ability to take this case to  
19 trial. While it is true that like the Beretta action this  
20 action seeks to mitigate a public nuisance and it's also true  
21 that both actions deal with the hazards posed by illegal guns,  
22 the two lawsuits are significantly different and in this case,  
23 unlike the bar ra that case, the City has alleged and through  
24 discovery has shown that there are violations of Federal  
25 firearms laws on the part of Adventure Outdoors and that is all

1 that is needed for the Commerce In Arms Act not to block this  
2 suit from going to trial.

3 The finding in the Beretta case that the Public  
4 Nuisance Statute 245 didn't count for purposes of the predicate  
5 exception, Commerce In Arms Act simply doesn't apply here  
6 because, unlike that action, the City here in this -- in this  
7 lawsuit is alleging and will show that Adventure Outdoors'  
8 sales practice violate the law.

9 Adventure Outdoors is attempting to import extra  
10 requirements that the statute, the Commerce In Arms Act, does  
11 not contain. The Commerce In Arms Act does not require that,  
12 for example, that the action be a criminal action. It's just  
13 that the action involve a violation of Federal firearms laws,  
14 and so Adventure Outdoors' attempts to bootstrap the finding in  
15 Beretta into this case is completely inapplicable.

16 On the facts, Adventure Outdoors' motion for summary  
17 judgment should also be denied. Contrary to Adventure  
18 Outdoors' claim that there are no disputed issues of fact,  
19 there are written submissions to the Court to indicate quite  
20 the contrary, that there are numerous disputed issues of fact.  
21 The central issue is whether Adventure Outdoors' sales  
22 practices contribute to the public nuisance in New York and,  
23 understandably, Adventure Outdoors claims that its sales  
24 practices don't contribute to the nuisance and that those  
25 practices are in compliance with the law and the City has

1 evidence obtained through discovery that, quite to the  
2 contrary, Adventure Outdoors' practices do contribute to the  
3 nuisance and that is the quintessential disputed issue of fact  
4 that requires adjudication at trial.

5 For instance, discovery has shown that numerous  
6 firearms sold by Adventure Outdoors, scores of firearms sold by  
7 Adventure Outdoors have been recovered in connection with  
8 crimes in New York City. Adventure Outdoors has made numerous  
9 sales, not only to individuals who were later convicted of  
10 straw purchasing but also to individuals who bought two, three,  
11 four, five, or even more of the same identical brands of  
12 handgun. Some of those handguns were later recovered in New  
13 York City.

14 Adventure Outdoors also has sold guns to individuals  
15 who themselves brought the guns to New York City where they  
16 were recovered in connection with crimes.

17 We have deposition testimony not only from the City's  
18 investigators who participated in simulated straw purchases at  
19 Adventure Outdoors but also from Shanika Davis who testified  
20 and will testify about Adventure Outdoors' willingness to enter  
21 into a straw sale with her and, rather than disputing  
22 Mr. Renzulli's characterization of this witness' credibility,  
23 that's really a job for the jury and this is exactly why a  
24 trial is appropriate and why summary judgment is inappropriate.

25 And, finally, on the personal jurisdiction issues,



1 there's really nothing that the summary judgment submissions of  
2 the parties adds to the discussion that's already taken place  
3 before your Honor; and this your Honor has already ruled on  
4 extensively regarding the propriety of taking personal  
5 jurisdiction over a defendant who has contributed to the public  
6 nuisance in New York.

7 THE COURT: Thank you.

8 You want to respond?

9 MR. RENZULLI: Just respond to the comment that scores  
10 of guns that were sold at Adventure Outdoors somehow wound up  
11 in New York City.

12 The essential question here is: How did they get  
13 here?

14 And No. Two is, although the numbers are a moving  
15 target, your Honor, over almost a 30-year period we're talking  
16 about 69 guns that came to New York City in some fashion or  
17 means that were sold in -- at Adventure Outdoors. So, the  
18 essential issue here is: What evidence does the City have that  
19 says that there was a knowing, inappropriate sale that rendered  
20 the gun here to New York City that created some kind of a  
21 public nuisance in New York City?

22 It's not a matter of credibility, your Honor, about  
23 Shanika Davis which appears to be the focus of the City's case.  
24 She submitted an affidavit to the City. By the way, she was a  
25 convicted felon who has not been sentenced yet, who completely

1 took that affidavit and at deposition under oath recanted the  
2 major parts of that affidavit which are central to whether she  
3 was a willing -- we were a willing participant in a straw  
4 purchase.

5 So, I take offense to that. I think that's clear.  
6 Other than that, your Honor ...

7 THE COURT: All right. I'll issue a memorandum and  
8 order subsequently, but I'm going to orally deny the motion for  
9 summary judgment since the case is going to trial Tuesday. The  
10 matter has been substantially disposed of in extensive opinion  
11 on the jurisdictional issue and with respect to the central  
12 question of the application, the recent court of appeals Second  
13 Circuit decision in City of New York v. Beretta, B-e-r-e-t-t-a,  
14 USA Corp.

15 That case involved a state statute. This case  
16 involves a Federal statute. So, Beretta has no application.

17 The application for certification is denied for the  
18 reasons already stated in the extensive written submissions of  
19 the Court.

20 MR. RENZULLI: Judge, are we proceeding under a  
21 violation of 922 in this case?

22 THE COURT: I'll issue an opinion as soon as I can.

23 MR. RENZULLI: 'Cause I don't think it's alleged in  
24 the complaint but ...

25 THE COURT: We're going to have to break, I think,

1 before we finish because we have a very extensive agenda but  
2 there is one issue we ought to take up before we break and  
3 that's the jury issue. Under Federal Rule of Civil Practice  
4 39(c), an equity case which under the Constitution would not  
5 require a constitutional jury may be tried by either a  
6 constitutional jury on consent of both parties and the Court or  
7 without the consent of both parties by an advisory jury on the  
8 Government's -- on the Court's own motion.

9           Since the City objects to a jury, as I understand your  
10 position, a constitutional jury is not authorized by the  
11 Constitution or the Federal rules of procedure, subject to  
12 hearing from you on that point; and, therefore, the Court will  
13 elect, again subject to hearing from the parties, to try the  
14 case with an advisory jury.

15           An advisory jury in this case will be selected in the  
16 same way that a constitutional jury is selected, and we'll get  
17 to the problem of how we're going to select that jury. I've  
18 authorized the clerk of the court to provide a hundred jurors,  
19 prospective jurors, for this Tuesday; and I think we probably  
20 ought to proceed by written questions. I'll deal with that  
21 problem in a moment.

22           So, we'll select the jury. The jury will not be  
23 informed that it's an advisory jury. We'll receive the  
24 verdict, if necessary, in the same way that we did in the NAACP  
25 case by a ten to two majority, if that's what we're faced with;

1 and the Court then, since it will be an advisory jury, will  
2 have to make findings of fact and law in the same way that it  
3 would make them were the case tried without a jury.

4 So, I'll hear the parties on that tentative decision  
5 of the Court.

6 MR. RENZULLI: May I, your Honor?

7 THE COURT: I'll hear from the defendant first.

8 MR. RENZULLI: I'd rather go through a quick  
9 recitation as to why I think a constitutional jury is merited  
10 in this case and then --

11 THE COURT: Now, I should point out --

12 MR. RENZULLI: Yeah.

13 THE COURT: -- if I may interrupt --

14 MR. RENZULLI: Sure.

15 THE COURT: -- that the original complaint provided  
16 for a negligence cause of action and a cause of action based  
17 strictly on equity. The City withdrew its negligence cause of  
18 action. So, we now have a case which, as I understand it, is  
19 based solely on an equitable cause of action; is that correct?

20 MR. PROSHANSKY: That's correct, your Honor.

21 THE COURT: All right.

22 MR. RENZULLI: That's incorrect, your Honor; and let  
23 me tell you why.

24 No. One, in the amended complaint, as we saw in the  
25 original complaint, the original complaint did ask for

1 compensatory and punitive damages. In the amended complaint,  
2 we have a prayer for fines and penalties. Fines and penalties  
3 would entitle Adventure Outdoors to a constitutional jury in  
4 its case on its own and the actual case and various cases.

5 THE COURT: Well, there's not going to be any fines or  
6 penalties. The only thing that the defendant will be subject  
7 to will be, if the City succeeds, an injunction which will  
8 probably follow the same lines as those that the other  
9 defendants agreed to and costs and disbursements as provided by  
10 the Federal rules. Costs and disbursements do not, so far as I  
11 know -- but you can brief it --

12 MR. RENZULLI: Uh-huh.

13 THE COURT: -- convert an equitable cause of action  
14 into a legal cause of action warranting a constitutional jury.

15 MR. RENZULLI: May I, your Honor?

16 THE COURT: Now I'll hear you.

17 MR. RENZULLI: Thank you, sir.

18 Two issues. One is we have the complaint, the amended  
19 complaint, that we now have. In that complaint it clearly  
20 requests fines, the imposition of fines and penalties as such.

21 THE COURT: Excuse me. I have already told you that  
22 is rejected. They are not going to try the case on that basis.

23 MR. RENZULLI: You -- you -- your Honor --

24 THE COURT: And I -- the -- pursuant to my power  
25 under -- get me the Rules of Civil Procedure -- Rule 15, the

1 case will be tried as an equitable case.

2 MR. RENZULLI: Your Honor, there's something  
3 strikingly wrong here. It is not the Court's case. It is the  
4 City's case. The City chose --

5 THE COURT: Rule 15.

6 MR. RENZULLI: -- to impose fines and penalties on  
7 Adventure Outdoors if, in fact, within this Court's discretion  
8 as the ultimate arbiter, if Adventure Outdoors was to some way  
9 violate the master's rules. I agree with your Honor  
10 wholeheartedly that when you are talking about an injunction,  
11 the costs and expenses associated with implementing that  
12 injunction are not damages, clearly. However, the fines and  
13 penalties associated and in the complaint -- and I would add  
14 that under the construct of the settling defendants, those  
15 fines and penalties are called for.

16 Voluntarily, the defendants that have settled can  
17 agree to whatever they want to agree to but here I think the  
18 actual decision is very clear in the Supreme Court that when  
19 you -- there's an imposition or the potential for the  
20 imposition of fines and penalties, a Seventh Amendment right to  
21 a jury, a constitutional jury, is clear.

22 There is another issue -- and that's what  
23 distinguishes this case, your Honor, from the NAACP case and  
24 puts it more in line with your Honor's decision in Beretta.

25 The fact of the matter is an advisory jury, your

1 Honor, with all due respects, allows this Court to completely  
2 disregard what those jurors say and you can have your factual  
3 findings and conclusions of law and, quite frankly, your Honor,  
4 in looking at the history, there is at least an appearance of  
5 impropriety. One only has to look with an objective eye to  
6 your Honor's rulings in NAACP. Some of the same evidence that  
7 was drawn in that case will be drawn in this case. Your Honor  
8 has already made the decision.

9 I may not be the sharpest knife in the drawer, but I  
10 understand where your Honor's coming from. You believe without  
11 a jury being empaneled that Adventure Outdoors has created a  
12 nuisance in New York City. One only has to look at your order  
13 and what you said on our motion to dismiss for personal  
14 jurisdiction. It's absolutely clear.

15 How can we get a fair trial here? How can we avoid a  
16 situation where all the parties will have to do this again if  
17 the Second Circuit finds that we were entitled to a  
18 constitutional jury? Doesn't it make sense, doesn't it seem  
19 fair and appropriate that a constitutional jury is impaneled so  
20 we don't have to do it again possibly?

21 Your Honor is very aware of judicial economy and costs  
22 to parties in cases and for that reason alone I would ask your  
23 Honor to reconsider your tentative decision but, beyond that,  
24 the tentativeness that you wrote about in NAACP, I'd like to  
25 address now, your Honor, and that is when we look to the

1 historical British cases and the historical cases in New York  
2 City, those cases have been cited in our brief that I apologize  
3 getting it to you at midnight last night, that clearly show in  
4 a case of public nuisance where equitable relief is requested,  
5 that a constitutional jury should be impaneled and that's the  
6 first issue.

7           The second issue is the fines and penalties. If your  
8 Honor is telling us that you're taking that complaint and on  
9 your own excising the penalties or the imposition of penalties  
10 and fines, if that's what I'm hearing, I'd like to know; but it  
11 would appear to me that that would be Jerry picking the relief  
12 that the City has requested in this case in this courtroom. I  
13 can produce to you and will a memorandum of law that was  
14 produced by the City in the *Beretta* case where they clearly  
15 state that where fines and penalties are requested, a Seventh  
16 Amendment jury follows. Clearly, the rules of engagement are  
17 changing now.

18           Another point. We have been in discovery. We have  
19 had multiple motions to this Court. We have addressed your  
20 Honor on these issues and on other issues, and let me back up.  
21 We've never had a conversation about what jury would be  
22 impaneled, whether it be constitutional or not.

23           Twelve days before we're supposed to open in this  
24 case, your Honor gives us an order and says, "I'd like you to  
25 consider these issues."



1 Both parties, not just Adventure Outdoors, has been  
2 proceeding in this case with at least the understanding that  
3 both parties would get a constitutional jury. As your Honor is  
4 well aware, practitioners chart discovery in their cases based  
5 upon these important issues.

6 And now at the eleventh hour your Honor is telling  
7 Adventure Outdoors, "You have no constitutional jury."

8 I find that to be somewhat unfair and troublesome and  
9 anything else that I've argued, your Honor, is in our papers  
10 but I think the critical issue here -- thank you very much for  
11 listening.

12 THE COURT: Thank you.

13 What's your position? Do you want a constitutional  
14 jury?

15 MR. TABER: Our position, your Honor -- on behalf of  
16 the City, Kenneth Tabor -- is we think there should be no jury,  
17 neither advisory jury nor constitutional jury but surely no  
18 constitutional jury for the reasons that your Honor articulated  
19 because this is an equitable action.

20 With respect to the points emphasized by Mr. Renzulli,  
21 the relief that is sought in respect to fines is the imposition  
22 of fines only upon the violation of the Court's injunction.  
23 That's classic contempt remedy. That's what the settlements  
24 that your Honor has approved are for. There are no fines until  
25 and unless there is a violation of the injunction. Here in

1 this court we seek only the imposition of the injunction.

2 THE COURT: Do you have a copy of your amended  
3 complaint?

4 MR. TABER: I don't have it with me, your Honor.

5 THE COURT: Do we have a copy?

6 MR. TABER: Let me say for point of clarification,  
7 your Honor, I believe that what I've said is consistent with  
8 the amended complaint; but insofar as it is not, if that were  
9 to be the case, we have no problem with amending the complaints  
10 to conform it to what I've just articulated because, as the  
11 Court is well aware from the settlements that we've entered now  
12 with some 20 of the defendants, all of them provide for no  
13 payment of fines at the time of settlement. The fines are only  
14 triggered if the monitor should in violation of the injunction  
15 discover that the particular defendant or settlement defendant  
16 has, in fact, violated the law. That's when the fines are  
17 triggered.

18 So, that is a classic remedy for contempt of an  
19 injunction. It is not the basis for converting an otherwise  
20 equitable claim into a legal claim; and I think the Court is  
21 absolutely correct that this is an equitable claim for which  
22 there is no constitutional right to a jury.

23 We also believe, your Honor, that there ought not be  
24 an advisory jury either because we think this case is  
25 distinguishable from the precedents set in cases in which we

1 were talking about the entire firearms industry and the Court  
2 thought that advisory jury made sense.

3 This is not a case with the same status. This is a  
4 case involving a single dealer. It is undoubtedly a case that  
5 is being closely watched -- no one can deny that -- but as a  
6 case that involves the practices of a single dealer and is in  
7 our view much more akin to the traditional nuisance case in  
8 which there is neither a constitutional nor an advisory jury.

9 And on the last point, your Honor, I beg to differ  
10 with Mr. Renzulli when he claims that the parties certainly  
11 anticipated from the outset that this would be a case with a  
12 constitutional jury. We certainly did not anticipate that. We  
13 realize from your Honor's prior rulings that there would be an  
14 issue that would be addressed presumably when we got closer to  
15 trial as to whether there would be a jury at all and, if so,  
16 what the nature of that jury was; and we were, frankly, not  
17 surprised to receive your Honor's inquiry that we address that  
18 issue at today's conference.

19 MR. RENZULLI: Surprise is -- is the word of the day,  
20 your Honor, because the City, as they have done in other cases,  
21 have filed motions to strike the jury and which they did not do  
22 in this case. We cannot reward them for lying in wait 'til 14  
23 days before this case is to be tried.

24 Secondly, your Honor has asked for the complaint and  
25 I -- I'm quoting from page 74 of the amended complaint of the

1 City and it states in the "wherefore" clause in Section 4:

2           Ordering each defendant to post a bond in an amount to  
3 be determined by the Court which in the event of future  
4 violations by a defendant shall be for fitted to the City as a  
5 penalty.

6           They clearly are requesting penalties and fines; but  
7 in order to make it clearer, an interrogatory was served on the  
8 City.

9           And we asked them, "What is the relief that you're  
10 requesting in this case?"

11           In that interrogatory they state:

12           "After the date of this injunction, if defendant sells  
13 a firearm to a straw purchaser, as that term is defined below,  
14 or to an individual posing as a straw purchaser or otherwise in  
15 violation of Federal, state, or local law or regulation, as  
16 determined by the special master, \$10,000 shall be forfeited to  
17 the City. As a penalty for the second violation, the amount to  
18 be forfeited shall be \$15,000; and the third violation, 20,000.

19           Said amount shall become immediately payable to the  
20 City, and the bond shall be promptly restored to its full  
21 amount or account after any violation."

22           But what was clear here is that the City is now saying  
23 this is akin to a contempt ruling by the Court; but in their  
24 interrogatory, in addition to asking for penalties and fines as  
25 elucidated in this interrogatory, the City goes on to state in

1 paragraph 11:

2 "This court shall retain continuing jurisdiction over  
3 the parties and the subject matter of the injunction to enforce  
4 the terms of the injunction as against defendant, including  
5 enforcement through the imposition of sanctions for contempt of  
6 court with respect to any knowing or willful failure to comply  
7 with the injunction."

8 It is clear that the City was asking for multiple  
9 forms of relief in their amended complaint in this case. The  
10 cases are clear. There are Supreme Court cases on point fines  
11 and penalties. You're -- you can and should and shall receive  
12 a constitutional jury. There is no harm in this, Judge. As I  
13 said, there might be appeal issues. We don't want to do this  
14 again. I don't think the Court does, and I don't think the  
15 City does.

16 What harm is there to giving us a constitutional jury,  
17 a fair jury? This is of great importance to the City, this  
18 case. They have stated that in their complaint. They have  
19 stated that in motions. This is a groundbreaking case. This  
20 is a case that is going to affect every dealer in this country.  
21 Let's not forget what the City alleged. Let's not forget what  
22 the City has been arguing. When it's good for them, they argue  
23 that. In their papers they argue, oh, this is just one little  
24 defendant. Really doesn't have much to do with the nuisance in  
25 New York City.

1 I don't think the Court based upon the facts and the  
2 history here should again try to save the City's complaint and  
3 amended complaint. They know what they want. They said it in  
4 *Beretta*. They said it to you, your Honor, in their -- in their  
5 filings that if we're talking about penalties and fines and we  
6 are not in *Beretta*, Judge, then we're asking only for equitable  
7 relief in that case but if we were asking for fines and  
8 penalties, with their eyes full open, then we would be, the  
9 defendants in that case, would be entitled to a Seventh  
10 Amendment jury.

11 The surprise, the unfairness, the appearance of  
12 impropriety, an issue on appeal, a likely issue, doing this  
13 case over again, clear-cut precedent whether we go to English  
14 commonlaw and we forget about fines and penalties but just go  
15 to the nuisance allegation itself, the actual case, Supreme  
16 Court, on-point fines and penalties, I request that this Court  
17 reconsider its tentative ruling and grant Adventure Outdoors  
18 the right to a constitutional jury in this very important case.

19 THE COURT: Thank you.

20 The Court interprets the amended complaint as not  
21 requesting fines and penalties. It requests injunctive relief.  
22 A court of equity when it grants injunctive relief may enforce  
23 its orders through a variety of techniques including the  
24 imposition of penalties for violation of a decree. We have saw  
25 here only a decree. I think the complaint is very clear on

1 that.

2 The Court has no discretion, since this is an equity  
3 case. The rule that's applicable, Rule of Civil Procedure  
4 39(c), is quite clear. The Court can empanel and must empanel  
5 an advisory jury only in deciding the case where both sides do  
6 not consent to the constitutional jury provided by the Seventh  
7 Amendment or in Rule 39(c).

8 Now, the jury will be selected in exactly the same way  
9 as a constitutional jury would be selected. The defendants  
10 will get or the defendant will get exactly the same jury, the  
11 same number of challenges provided in the rules, the jury  
12 selected from the district at large, a panel of 100 brought in,  
13 a jury questionnaire utilized, so that should the matter go up  
14 on appeal, the jury's decision, if the appellate court decides  
15 it was a constitutional jury, will be binding according to the  
16 method of selection.

17 So, I don't see any basis for objecting to the  
18 procedure that is required now under the Constitution and the  
19 Federal rules. The defendant is in exactly the same position  
20 that it would be in with a constitutional jury.

21 Should the jury fail to agree unanimously as required  
22 under the Federal rules, the jury verdict, if it is a  
23 constitutional verdict, under the Second Circuit prospective  
24 ruling will be binding. Should the jury unanimously agree no  
25 liability, that will be the ruling that will apply, if the

1 court of appeals says it will be a constitutional jury.

2 So, I don't see any downside myself; and I don't  
3 understand why the defendant feels that it is put at a  
4 disadvantage. I see no basis for the objection. We'll proceed  
5 therefore as I've outlined.

6 MR. RENZULLI: May I just, your Honor --

7 THE COURT: Yes.

8 MR. RENZULLI: -- ask you a question? You just stated  
9 that the Court has no discretion in this case to provide this  
10 defendant with a constitutional jury. Yet, you did that in the  
11 *Beretta* case and my question to you is: If the Court has no  
12 authority to give a constitutional jury, how did you do so in  
13 *Beretta*? You did that on your discretion. You absolutely did.

14 THE COURT: I really don't want to review *Beretta*.

15 MR. RENZULLI: Okay. Okay.

16 THE COURT: I have made many errors and I will make  
17 many errors in the future and I'm not going to hear reargument  
18 of *Beretta*. I'm telling you that in this case my decision is  
19 what it is for the reasons I've said.

20 MR. RENZULLI: Okay. Okay. And I understand what  
21 your Honor is saying, and I don't mean to be disrespectful.  
22 I'm a little confused. In *Beretta* you had no authority to  
23 grant a constitutional jury, and you based it upon the  
24 discretion of the Court because of the importance of that case.  
25 There's no difference here. That's not one.



1           No. Two is I don't see how we cannot call a penalty --

2           THE COURT: Did either side object to a constitutional  
3 jury in that case? I don't recall.

4           MR. RENZULLI: Yes. The City objected vehemently.  
5 They filed --

6           THE COURT: I really don't want to hear reargument --

7           MR. RENZULLI: I'm not.

8           THE COURT: -- on *Beretta*.

9           MR. RENZULLI: I'm not.

10          THE COURT: I'm telling you -- excuse me. I don't  
11 want to hear any further argument on the matter. I am telling  
12 you the kind of jury you're getting here, and I'm now  
13 proceeding to the issue of how we select that jury.

14          Now, I want a jury questionnaire. I've provided  
15 copies of the questionnaire that was used in the National  
16 Association case. I want the parties to get together today or  
17 tomorrow and amend this as needed. It will clearly need  
18 amendment on page 2, describing the case and on pages 31, 33,  
19 and 40 and related pages; but I will need a list of all the  
20 people and entities that will be mentioned or that will be  
21 witnesses and other relevant materials.

22          So, since you provided each other with these lists,  
23 there's no reason why you shouldn't be able to promptly to get  
24 this questionnaire together.

25          We'll meet Friday, what time?

1 MR. TABER: I'm sorry. Did your Honor say on Friday?

2 THE COURT: On Friday to get this questionnaire final  
3 because I want to distribute it on Tuesday.

4 Friday at 12:00 o'clock. I'll be available tomorrow,  
5 should you want to see me, or early Friday morning but I want  
6 to proceed by questionnaire since this is an important case and  
7 both parties are entitled to a full voir dire that does not  
8 unduly burden the prospective juries or jurors.

9 Now, it's going to be necessary to substitute at page  
10 2 what amounts to a preliminary very general -- excuse me --  
11 statement of the state. I dictated this morning a rough  
12 substitute for that first paragraph and it's just designed to  
13 permit the parties to go forward and agree on something that I  
14 think should be relatively simple. What I dictated was the  
15 following:

16 "The City of New York charges the defendant, Adventure  
17 Outdoors, Inc., in this civil suite with helping to create a  
18 public nuisance in the City by its method and practice of  
19 selling guns in Smyrna, Georgia. The defendant denies any  
20 liability. This is a civil suite, not a criminal case."

21 Now, I'm not sure about the burden of proof. I think  
22 the burden of proof on establishing a nuisance is clear and  
23 convincing evidence. That's what I held in NAACP. I'm not  
24 sure, however, that that burden applies with respect to  
25 specific sales or whether it makes any difference. I would

1 prefer to use a single burden across the board throughout the  
2 case. I think it will be less confusing to the jury if I  
3 define it. I think the definition will not create a problem  
4 because I've defined it in a variety of cases; but assuming  
5 that is the burden and that I'll hear argument on that, if it's  
6 needed, I've proposed this as a basis for beginning discussion.

7 "In order to prevail, the City will have to prove by  
8 clear and convincing evidence, one, that the gun sales  
9 practices of defendants substantial departed from those  
10 required by law and safe practice;

11 Two. That this led to a substantial number of guns  
12 from defendant's store being available illegally in New York  
13 City;

14 Three. That this availability substantially increased  
15 risks of harm to people in New York City;

16 Four. That defendant knew that other retailers were  
17 also supplying guns in a like manner that were likely to be  
18 used in criminal conduct in the City;

19 And, Five, that, the safety of those in the City was  
20 substantial impaired by the defendant's conduct when considered  
21 with the conduct of other sellers and that the defendant was or  
22 should have been aware of the activity," I think, "of  
23 undersellers" but I'm not sure how that should be phrased.

24 "The defendant denies all liability.

25 The burden of proof is on the City. Trial will take

1 about one month. It will be an interesting trial since it will  
2 involve experts and other technical evidence.

3 You will be able to take notes. You will each have a  
4 notebook containing some of the evidence, witness lists, and  
5 exhibit lists we've" -- I think we did that in the NAACP case  
6 but I'm not sure. We've done it in other cases and creates no  
7 problem. We have very good jurors.

8 In any event, that will provide you with some kind of  
9 start, indicating how my mind is going on this subject; but we  
10 do have to, I think, give this jury some preliminary statement  
11 so that they can approach the written questionnaires in an  
12 intelligent way and decide whether they could fairly decide the  
13 case. Many of them will have views one way or the other.

14 I'm told that 10:00 a.m. on Friday is better. Is that  
15 suitable?

16 MR. TABER: Shouldn't be a problem, your Honor.

17 THE COURT: Now, it's 20 to 1:00. We have further --  
18 we don't want to burden the jury with too big a notebook. It  
19 gets burdensome, but they can have two notebooks with dividers  
20 and things like that. So, try to get together and not put in  
21 too many documents but names. If there're going to be quite a  
22 few witnesses, I've found it very helpful in the asbestos cases  
23 where I tried 40 cases at once for the jurors to have a picture  
24 of the witness and a brief statement of the witness' background  
25 so they have a page for each witness and they can take notes in

1 the margins. So, think of that.

2 Now, it's my intention to explain to the jury how we  
3 proceed in general. I think that if we submit the written  
4 questionnaire on Tuesday, we'll run off copies for the parties  
5 and for the Court. The parties will then have Wednesday to go  
6 through the questionnaires. The parties will then get together  
7 on Thursday and decide based on questionnaires who they would  
8 like to exclude for cause on consent and what kind of  
9 questions -- kinds of questions need further elucidation.

10 Friday then -- that's Thursday. Friday then you'll  
11 meet with the Court without the jury and I'll go over all of  
12 these proposed disqualifications and the jury will then call in  
13 on Friday in the afternoon to determine who has to come in on  
14 Monday when we'll conduct the individual voir dires.

15 MS. GALENO: The following Monday, June --

16 THE COURT: The following Monday. That will give  
17 everybody time to get together. I don't like jurors sitting  
18 around unnecessarily. Then Monday we'll go through the panel.

19 Now, since it's a civil case, we don't have -- doesn't  
20 make any difference whether it's advisory or non-advisory. We  
21 don't have alternates, right, under the Federal rules, correct?

22 MR. RENZULLI: That might be the case. I was going to  
23 ask your Honor if he would consider having a unanimous decision  
24 by the jury.

25 THE COURT: Yes. We have a unanimous decision, if

1 they can reach unanimity. If they can't, I'll consider doing  
2 what I did in the NAACP case -- that is, take an advisory  
3 verdict.

4 MR. RENZULLI: Okay.

5 THE COURT: But if the court of appeals ultimately  
6 says it should have been constitutional, then it has to be  
7 unanimous. A decision of less than unanimous will not be  
8 dispositive.

9 MR. RENZULLI: Right. That's why if we get that  
10 unanimous decision, if there is --

11 THE COURT: We'll ask the jury. I'll pose to the  
12 jury --

13 MR. RENZULLI: Okay.

14 THE COURT: -- unanimity the way I did in NAACP. Then  
15 if they come in and say, "We can't agree on a unanimous  
16 verdicts," I'll say, "Okay. Tell me what you want to do. If  
17 you can agree by ten, at least ten," and then it will be  
18 strictly advisory jury.

19 If the court of appeals says it should have been a  
20 constitutional jury, that advisory verdict is of no effect.

21 MR. RENZULLI: We do it again.

22 THE COURT: You'll have to do it again.

23 MR. RENZULLI: Okay.

24 THE COURT: Correct.

25 MR. RENZULLI: Can I just remind of just one thing?

1 We may need some alternates. I think we lost two in NAACP.

2 THE COURT: You can't have alternates under the  
3 Federal rule.

4 MR. RENZULLI: But --

5 THE COURT: Let me have the jury rule. Unfortunately,  
6 the rules were amended. I think they were ill-advised.

7 MR. RENZULLI: Is that post-NAACP, Judge?

8 THE COURT: No, pre-NAACP.

9 MR. TABER: And, your Honor, I'm not understanding.  
10 Why is it a twelve-person jury as opposed to six?

11 THE COURT: Because this is a Federal, not a state  
12 court.

13 MR. TABER: No, I thought we got -- I'm sorry.

14 THE COURT: No. I'll read you the rule.

15 MR. TABER: Sorry. That's a good reason.

16 THE COURT: No, the chief justice -- I was a member of  
17 the United States Judicial Conference at the time. The chief  
18 justice at the time didn't like jurors, and so he wanted to  
19 discourage. So, the provision that previously existed provided  
20 for alternates was abolished.

21 A jury must initially have at least six and no more  
22 than twelve members and each juror must participate and the  
23 verdict must be unanimous and be returned by a jury of at least  
24 six members.

25 So, that means --

1 MR. TABER: And, your Honor.

2 THE COURT: -- that as a twelve-member, there's no  
3 alternates.

4 MR. RENZULLI: I read that the same way.

5 THE COURT: But if a juror gets sick and there's 11,  
6 10, it still has to be unanimous of those present but if it  
7 gets to below six, then you have to have a new jury and that  
8 was at the 1991 amendment. I thought it was very ill-advised  
9 this amendment. Should have been twelve with alternates --

10 MR. RENZULLI: I agree.

11 THE COURT: -- which was the constitutional jury. I  
12 thought that was an unconstitutional amendment. I told the  
13 chief justice that, but he wasn't listening to me at that time.

14 MR. TABER: If we get down to as low as six, we can  
15 still have a verdict.

16 THE COURT: We'll follow whatever the rules call for,  
17 but we are going to select twelve.

18 MR. TABER: Uh-huh.

19 THE COURT: Now, what I will do will be to select the  
20 twelve, get a jury; and as I usually do, I'll keep a few in  
21 reserve so if somebody gets sick before we swear them in  
22 beginning the case on Tuesday, probably, then I can relays  
23 them. Until I swear in the jury, I can replace; but that's the  
24 way we'll proceed.

25 MR. TABER: Okay.



1 THE COURT: I think we've probably done enough this  
2 morning. What I want to do this afternoon is go through the  
3 opposition to designations of the defendant, Adventure's  
4 opposition to depositions, and the City's trial exhibits and  
5 the City's opposition to Adventure's designations.

6 MR. TABER: Your Honor, I apologize. We did not  
7 anticipate that the Court was going to be reviewing individual  
8 designations and objections today.

9 THE COURT: Why not?

10 MR. TABER: We thought you'd be ruling on the in  
11 limine motions but not the individual items on a line-by-line  
12 kind of basis.

13 THE COURT: Well, don't you think we have to do it, it  
14 would be better to do that before we start the trial?

15 MR. TABER: I would have --

16 THE COURT: When do you want to do it?

17 MS. GALENO: Perhaps we could do that on Friday.

18 MR. TABER: We can do it on Friday.

19 THE COURT: It's going to be time consuming because  
20 the defendant has made hundreds of objections and I have  
21 to -- I think I have to go through them line by line.

22 MR. RENZULLI: Okay.

23 MR. TABER: Well, your Honor, we --

24 THE COURT: We can do it tomorrow, I guess.

25 MR. TABER: I suppose but we had also anticipated,

1 your Honor, that we would perhaps do that on a witness by  
2 witness basis as we saw the witnesses approaching, rather  
3 than -- because at the moment there are a number --

4 THE COURT: Friday I have heavy motions in Zyprexa,  
5 the pharmaceutical case. So, I can't do it Friday. I  
6 could -- tomorrow -- tomorrow we could do it or this afternoon.  
7 We can do whatever we can do -- you have some motions we can do  
8 this afternoon.

9 MR. TABER: Certainly the in limine, we're prepared to  
10 address the in limine. There are 16 in limine motions they've  
11 made and --

12 THE COURT: Why don't you think about it, discuss it?  
13 I don't see how I can avoid deciding all these matters. If we  
14 do it on a witness-by-witness basis, we have to keep the jury  
15 waiting. I don't like to keep jurors waiting. So, I prefer to  
16 get it done in advance; and that has the advantage, too, of  
17 permitting you to decide whether you want to bring in a witness  
18 or how you want to handle it because, you know, in advance what  
19 your tactics are going to be.

20 MS. GALENO: It will also affect opening statements,  
21 your Honor.

22 THE COURT: And opening statements. I think it ought  
23 to be done this week.

24 MR. TABER: Well, we can do it tomorrow, your Honor,  
25 perhaps tomorrow morning.

1 THE COURT: Why don't we take a break until 2:00  
2 o'clock for lunch and then at 2:00 o'clock take care of the in  
3 limine? All right. We'll know -- we'll sit with you tomorrow  
4 and go over the individual objections.

5 MR. RENZULLI: One of the things that we might  
6 consider, your Honor, it looks like we have some downtime that  
7 first week that we're here to do certain things with the jury.

8 THE COURT: Like what?

9 MR. RENZULLI: Well, we start up on Tuesday; but we  
10 have Tuesday, Wednesday, Thursday, Friday --

11 THE COURT: You're going to be busy.

12 MR. RENZULLI: -- Monday. I understand that. I  
13 understand that.

14 THE COURT: You're going to be busy going through a  
15 hundred -- there won't be a hundred questionnaires because a  
16 lot of the jurors will ask to be excused. So, we'll probably  
17 be faced with about -- a panel of about 60 and you'll have to  
18 go through 60 questionnaires and each questionnaire will be  
19 about a hundred or more questions.

20 So, you'll be very busy Tuesday and Wednesday and  
21 Thursday working with me and Friday.

22 MS. GALENO: Your Honor, if I may, on Tuesday when the  
23 questionnaires are submitted to the jurors, might we have some  
24 time to meet with the Court at that time to go over the  
25 objections to the exhibits?

1 THE COURT: While the jury is --

2 MS. GALENO: Filling out the questionnaires.

3 THE COURT: But they'll fill them out almost  
4 immediately. They'll fill them out within an hour or two and  
5 then it will be reproduced and you're going to start working  
6 right away on the questionnaires. We'll run them off as  
7 quickly as we can.

8 Can you run them off? You probably have a couple of  
9 machines that can do it more quickly.

10 MR. TABER: If you give them to us, we'll have a  
11 messenger waiting.

12 THE COURT: Well, you'll probably have them available.  
13 You'll have to do, what, four questions, four copies; or you'll  
14 probably want a few for each side.

15 MR. TABER: A half dozen copies.

16 MS. GALENO: Based on the schedule your Honor has set  
17 forth, we'll have Tuesday and Wednesday to go through the  
18 questionnaires. So, if we need maybe --

19 THE COURT: And Thursday.

20 MS. GALENO: We'll be meeting with each other. So,  
21 perhaps we can work out --

22 THE COURT: And Friday with me. So, you got full  
23 days; but I'll do whatever you want to I'm available all the  
24 time. I have my regular motion calendars and I have these  
25 other criminal and civil cases which I -- but I'll work out

1 whatever you want.

2 MR. TABER: I think, your Honor, it would be prudent  
3 to start tomorrow morning with the objections to the  
4 designations; and I don't know that we'll finish them because  
5 there are a very large number.

6 THE COURT: We'll do what we can.

7 MS. GALENO: May I suggest we confer over lunch with  
8 Mr. Renzulli?

9 MR. RENZULLI: I'll have to cancel some things I had  
10 working tomorrow. I didn't anticipate on being here. We'll  
11 work with the City.

12 THE COURT: We're free after 11:00 o'clock. I have a  
13 number of motions beginning, a bail application at 11:00. That  
14 should be over at 11:10. So, tomorrow I can give you from  
15 11:15 on.

16 MR. TABER: Your Honor, if I heard the Court's  
17 schedules or anticipated schedule correctly, you're  
18 anticipating that we would have openings on June the 3rd which  
19 is a week from Tuesday?

20 MS. GALENO: That's correct.

21 THE COURT: That would be right. That's right?

22 MR. FARIDI: Yes.

23 MR. TABER: And then would the Court intend to go  
24 straight from openings to the first witness or --

25 THE COURT: Yes.

1 MR. TABER: Okay. So, we'll arrange to have our first  
2 witness available on the afternoon of June 3rd.

3 THE COURT: We do have facilities for a screen here.

4 MR. TABER: Yes, sir.

5 THE COURT: So, if you want to throw material up on  
6 the screen, do so. If you're going to use non-evidentiary  
7 exhibits like charts to -- for the witness to help explain what  
8 they're talking about, show them to your opponent and mark them  
9 so we don't have any problem. I want everything premarked; and  
10 unless there's new objection, I don't want to hear about  
11 objections at the last minute.

12 They're serious, if you have a serious objection,  
13 brief it. I don't like bench conferences. So, forget about  
14 them. You have a problem, come in with it. You'll come in it  
15 with it at 8:30 or 9:00 in the morning, and I'll decide it. I  
16 don't like to keep jurors waiting.

17 MR. TABER: Is it your Honor's practice to sit five  
18 days a week for trial?

19 THE COURT: That depends on the parties and how  
20 burdensome. Most attorneys like to have Fridays off so they  
21 can do their other matters. I'll conform to the attorneys'  
22 desires in that respect. I can sit either five or four days.

23 MR. TABER: Okay.

24 THE COURT: I can put my motions on early in the  
25 morning or on Friday. So, I don't care.

1 MR. TABER: And what time does your Honor normally  
2 bring the jury in?

3 THE COURT: We bring the jury in normally for 9:30 or  
4 10:00 and sit until 4:30 or 5:00, depending on how the  
5 witnesses go. The jury gets lunch free so that it's a one-hour  
6 lunch hour. Get the lunch hour.

7 MR. TABER: Does your Honor normally follow a practice  
8 of requiring the parties to give notice about upcoming  
9 witnesses?

10 THE COURT: Yes, you should give each other notice a  
11 day in advance so that the other side can prepare  
12 cross-examination.

13 MR. RENZULLI: We can agree to a 48-hour rule.

14 MR. TABER: Yeah, that would be preferable actually.

15 THE COURT: Anything further?

16 So, we'll meet at 2:00 o'clock and go over in limine  
17 motions.

18 MR. TABER: Okay. Thank you, your Honor.

19 MS. GALENO: Thank you.

20 MR. ALLAN: Thank you.

21 (Off the record.)

22 (On the record.)

23 MR. RENZULLI: I apologize, your Honor.

24 MR. TABER: Your Honor, may I ask? We had some  
25 confusion over the over lunch whether the Court was looking for

1 us to come in on Friday morning or merely submit our proposed  
2 jury questionnaires on Friday morning.

3 THE COURT: I think you better come in.

4 MR. TABER: Okay. At 10:00 a.m.?

5 MS. EMERSON: On Friday at noon.

6 MS. GALENO: I think we moved it to 10:00 a.m.

7 MS. EMERSON: We had. We had. 10:00, yes.

8 MR. TABER: 10:00 a.m. on Friday?

9 THE COURT: We have the motion in limine with respect  
10 to Ms. Griffin, G-r-i-f-f-i-n, Daza, D-a-z-a.

11 Do you have a motion on Ms. Griffin-Daza?

12 MR. RENZULLI: Yes, we do, your Honor.

13 MR. ALLAN: Yes.

14 THE COURT: I'll hear it.

15 MR. ALLAN: Judge, we're moving to -- defendant is  
16 moving to exclude the testimony at trial of Deborah  
17 Griffin-Daza on the basis that it is irrelevant and  
18 prejudicial. Ms. Griffin-Daza is a former gang leader who is  
19 now a community activist involved with the Damon Allen  
20 Foundation. She has several family members, including a  
21 cousin, Damon Allen, who was shot. None of the people, either  
22 her family or her friends who were shot, were shot with  
23 firearms that were sold by Adventure Outdoors.

24 She intends to testify regarding the nature of the  
25 alleged public nuisance within her specific community in Crown



1 Heights, Brooklyn, three specific vignettes regarding the  
2 shootings of her friends and family members. The City is not  
3 offering her as an expert witness, and she has no relevant  
4 knowledge outside of this one neighborhood.

5 Based on the facts that none of the firearms used to  
6 shoot her friends or family members were sold by Adventure  
7 Outdoors, we believe there's a danger of unfair prejudice to  
8 the defendant in that the jury may become confused that  
9 firearms used in the commission of those crimes are somehow  
10 related to defendant, particularly given the fact that the City  
11 is calling another witness who was actually pistol whipped with  
12 a firearm sold by defendant.

13 We do not believe that her testimony is a proper  
14 method through which the City should prove its alleged public  
15 nuisance at trial. It's very similar to the witness your Honor  
16 excluded in the NAACP trial, Geoffrey Canada, the author of  
17 "Fist Stick Knife Gun" who was also going to testify about his  
18 personal experiences with firearms and violence.

19 MS. ASH: Your Honor, Melanie Ash on behalf of the  
20 City.

21 The City seeks to offer Ms. Griffin-Daza as  
22 a -- pardon me -- as an expert -- I'm sorry, as a fact witness  
23 to public nuisance caused by illegal handguns in the City of  
24 New York. She has -- she lives personally in Crown Heights and  
25 has a lot of experience with Crown Heights but she also works

1 on the issues of antigun violence citywide and through her  
2 foundation that she's involved with. We intend to offer her,  
3 her evidence to go to the general public nuisance that the City  
4 must prove as part of its lawsuit.

5 Counsel for Adventure Outdoors says that your Honor  
6 had excluded a witness in the NAACP trial. We would  
7 distinguish that case simply because that case was largely  
8 based on statistical evidence; and I believe your Honor felt  
9 that any additional nuisance witnesses beyond the first  
10 nuisance witness who was permitted to testimony testify in that  
11 case would be cumulative and unnecessary, given the way the  
12 case was to be presented largely statistically.

13 In this case the City is not presenting its case in a  
14 statistical manner but intends to offer evidence of public  
15 nuisance, and we believe we should be permitted to offer that  
16 through Ms. Griffin-Daza who has considerable firsthand  
17 knowledge over the course of 30-plus years of living in New  
18 York City and being exposed to as a witness to numerous  
19 shootings as having experienced the loss of many family members  
20 and friends through handgun violence and through her work in  
21 actively working to combat the nuisance of illegal guns on the  
22 streets of New York.

23 For those reasons we would ask that her testimony be  
24 permitted -- pardon me -- and the defendant's motion in limine  
25 be denied.

1 THE COURT: Motion denied.

2 Mr. Ali's testimony, A-l-i.

3 MR. BURRUANO: Yes, your Honor. Joseph Burruano for  
4 Adventure Outdoors.

5 Some of the same arguments that Mr. Allan just made  
6 with Deborah Griffin-Daza would apply to Mr. Ali as well, but  
7 there's additional reasons to exclude his testimony.

8 The City is offering this witness to show that public  
9 nuisance exists in New York. However, the issue occurred more  
10 than twelve years ago which is nine years outside the statute  
11 of limitations applicable to public nuisance suits and four  
12 years -- four years outside the discovery period in this case.

13 Furthermore, there's absolutely no evidence that  
14 Adventure Outdoors illegally sold this gun or otherwise acted  
15 improperly in selling the gun more than twelve years ago.

16 The City has also failed to show how this particular  
17 firearm was transported into New York. Therefore, we don't  
18 know how many hands this gun may have passed through before it  
19 finally wound up in New York.

20 Therefore, we do not believe that this testimony is  
21 relevant. It would also unfairly prejudice Adventure Outdoors.  
22 The jury may punish the defendant just because a firearm that  
23 was sold by them, you know, twelve-plus years ago was used in a  
24 crime. Therefore, we believe that the issue should be  
25 excluded.

1 MR. NEWBY: My name is Kenneth Newby on behalf of the  
2 City.

3 Adventure Outdoors has taken an extremely limited view  
4 of the evidence when evaluating the value of Mr. Ali's  
5 testimony. As we've stated in our papers, Mr. Ali's testimony  
6 is a critical element to show the existence of a nuisance in  
7 New York. Indeed, the fact that he was pistol whipped with an  
8 Adventure Outdoors handgun demonstrates that the guns that are  
9 sold by Adventure Outdoors not only end up in New York but end  
10 up used in crimes in New York which is the precise type of  
11 nuisance that we've described in our complaint is at issue in  
12 this litigation that the jury is entitled to hear.

13 Now, as you've heard, Adventure Outdoors wants to  
14 argue that the timing of this incident makes it irrelevant.  
15 However, this is incorrect. The statute of limitations does  
16 not provide any type of test on the relevance of admissible or  
17 admissibility of evidence in this case, and the four-year  
18 discovery period which was enacted by Magistrate Pollack was  
19 not intended to limit the presentation of evidence. Rather, it  
20 was intended to enact a reasonable limit upon the evidence that  
21 Adventure Outdoors has to produce in this litigation. It was  
22 never meant, never, while it was stated, as a bar to the  
23 evidence that the City could introduce to show the nuisance  
24 that exists in this case; and, indeed, as your Honor has  
25 recognized already on the City's personal jurisdiction motion,

1 in this case at issue is whether or not Adventure Outdoors has  
2 engaged in a continuous and longstanding course of conduct that  
3 has resulted in harm.

4 So, the fact that this incident occurred in 1996 only  
5 goes to show that this is a long and continuous practice by  
6 Adventure Outdoors. Mr. Ali is not the only witness that we're  
7 going to have that is going to talk about the real, very real  
8 and appreciable harm that's caused in New York City from  
9 Adventure Outdoors' sales practices.

10 Finally, they note that there is some type of  
11 prejudice may result and that the jury may attempt to punish  
12 Adventure Outdoors because a weapon sold by them was used in a  
13 crime; but what they failed to identify is any unfair prejudice  
14 which is what Rule 403 prescribes.

15 Moreover, in light of the probative value of this  
16 testimony, any prejudice that will result will certainly be  
17 outweighed by the probative value of the relevance of this  
18 testimony.

19 So, therefore, for these reasons we submit, that  
20 Mr. Ali's testimony being very relevant to the critical issues  
21 in this case and showing that the harm experienced by New  
22 Yorkers is real and appreciable from Adventure Outdoors through  
23 their sale of handguns, we believe that this motion should be  
24 denied; and just one last point, your Honor.

25 In the soup to nuts sort of evidence, the fact that

1 Mr. Ali can't testify as to how the gun made its way from  
2 800 miles away in Georgia all the way to New York is irrelevant  
3 to whether Mr. Ali's testimony is relevant. What's critical  
4 is: "Is there a legal issue to which or a factual issue to  
5 which his testimony is relevant? We submit that the nuisance  
6 issue it is. Thank you.

7 THE COURT: What was the illegality that caused the  
8 weapon to be in New York?

9 MR. NEWBY: From our trace evidence, we're not able to  
10 determine what the -- how the gun made its way from Georgia so  
11 New York but the weapon was used illegally in New York because  
12 it was used to pistol-whip Mr. Ali.

13 The City will -- it's important to note, your Honor,  
14 the City will offer other witnesses, some of whom the -- you're  
15 going to hear about today who Adventure Outdoors has objected  
16 to who will discuss Adventure Outdoors' sales practices. So,  
17 we will certainly offer into evidence witnesses who will  
18 testify such as Shanika Davis, such as Bob Hurley, who will  
19 discuss Adventure Outdoors's sales practices and how those  
20 sales practices result in illegal hand guns or straw purchases  
21 and those guns being trafficked to New York.

22 So, we believe that it's the combination of the two  
23 facts, the fact that you can establish the nature of the sales  
24 practices and how they permit straw sales and the impact and  
25 the effect of those sales, which would give a jury the ability

1 to infer that liability should be found in this case.

2 THE COURT: Well, is there any evidence that this  
3 particular weapon was sold illegally?

4 MR. NEWBY: Again, you know, that type of -- that type  
5 of evidence we weren't able to deduce. I mean, in part, we're  
6 sort of hamstrung also in this case by the fact that they  
7 produced their 4473s after the time of the deposition occurred  
8 of Adventure Outdoors.

9 THE COURT: Well, I don't care about the hamstringing.  
10 Do you have any evidence that this particular weapon was sold  
11 illegally?

12 MR. NEWBY: We don't have any specific evidence that  
13 this particular gun was sold illegally.

14 THE COURT: Motion granted. The jury may --

15 MS. GALENO: Your Honor, if I may --

16 THE COURT: -- conclude that this was an illegally  
17 sold weapon. I don't see that it's of any significant --

18 MS. GALENO: Your Honor, may I --

19 THE COURT: -- weight that he was pistol struck by a  
20 weapon sold by this company.

21 MR. TABER: Your Honor.

22 MS. GALENO: If I may be heard, we on this particular  
23 issue, your Honor, it's easily resolved with a curative  
24 instruction by the Court that the City has no evidence that  
25 this particular gun was sold as a result of illegal sales

1 practices but there's other evidence in the case that the jury  
2 is going see of illegal sales practices but Mr. Ali is a crime  
3 victim and so it comes in under the nuisance and it also  
4 happens to be an Adventure Outdoors gun. So, it shows that the  
5 guns are making their way to New York and are being used in  
6 crimes.

7 MR. TABER: And, indeed, if I may, your Honor, also on  
8 the point of jurisdiction, personal jurisdiction which the  
9 Court has held we must establish at trial, this proves  
10 conclusively that guns travel from Adventure Outdoors in  
11 Georgia to New York where they are -- is harm caused to the  
12 defendant. Whether or not the particular gun was illegally  
13 sold, this is still probative on the point of personal  
14 jurisdiction.

15 THE COURT: Is this the only gun you have that was  
16 there that was used --

17 MR. TABER: We have a number of guns, your Honor,  
18 without specific victims. We have guns that were trafficked  
19 and the result of prosecutions that we can demonstrate came  
20 into New York. This gun takes it a further step in that we can  
21 show individualized harm to a crime victim from the gun in that  
22 he was pistol-whipped with this gun.

23 MR. BURRUANO: Your Honor, if I could just be heard  
24 briefly, the City is not looking to address past wrongs. Their  
25 relief is prospective. The event at issue occurred more than



1 twelve years ago. There's no evidence that Adventure Outdoors'  
2 sales' practices 12 or 15 years ago are the same as their sales  
3 practices today. So, any probative value is diminimus at best.

4 MR. NEWBY: Well --

5 MR. RENZULLI: I think the important issue here is:  
6 Did that gun come here through some illegal conduct by  
7 Adventure Outdoors? And there's no evidence of that. Your  
8 Honor, there will be evidence that the City will submit that  
9 guns did get to New York City. This is not the only evidence  
10 that they're going to proffer, but to have this jury just  
11 assume that this gun was illegally sold and then used to  
12 pistol-whip somebody is prejudicial to say the least.

13 MS. GALENO: But the assumption can be avoided with a  
14 curative instruction with the Court. As the evidence comes in,  
15 your Honor can say that there the City has not offered any  
16 evidence with respect to how this particular gun was sold; and  
17 it will be for the jury to infer from all of the evidence  
18 whether the elements are met. This is one piece of evidence  
19 which shows that an A.O. gun did make its way into New York and  
20 was used in a crime, and it's one piece of the puzzle that the  
21 jury will get.

22 MR. NEWBY: And just to close, your Honor, in your  
23 decision on the motion to dismiss, you noted evidence of  
24 defendant's, quote, 'continuous longstanding course of conduct  
25 having an adverse effect here,' end quote, as being relevant to

1 the determination as to whether personal jurisdiction existed  
2 over Adventure Outdoors. Here at trial we have to, the City  
3 has to prove that personal jurisdiction indeed does exist from  
4 the factual evidence. You relied on evidence going back to  
5 1990 in that decision. So, we think clearly we're entitled to  
6 put on evidence at trial that shows that conduct has an adverse  
7 effect here; and, clearly, Mr. Ali's testimony will do that.

8 MR. RENZULLI: The important facet of that sentence is  
9 "conduct," Judge. Conduct means that A.O. did something wrong  
10 or illegally to have that gun get here. That gun could very  
11 well have been stolen, could have been sold in the secondary  
12 market, could have gotten here a lot of different ways.

13 It's highly prejudicial even with a curative  
14 instruction under these circumstances to have the jury even  
15 speculate that this gun came from Adventure Outdoors through  
16 some misconduct by that company.

17 MR. TABER: On the jurisdiction point, your Honor,  
18 it's not misconduct we need to show. On jurisdiction, let's  
19 remember where we started. The motion to dismiss for lack of  
20 jurisdiction asserted by Adventure Outdoors contended that they  
21 sold only to citizens in Georgia, never outside of their store,  
22 and that they weren't doing anything in the interest of  
23 commerce. We proffered evidence in the form of affidavits and  
24 the like for purposes of motion to dismiss in order to counter  
25 that and say that their guns did indeed come into New York and

1 indeed caused harm in New York. That's the jurisdictional  
2 standard.

3 We're not talking about whether with this particular  
4 gun we can prove contradiction to the nuisance. That's a  
5 separate issue and requires a jury inference as to how this gun  
6 may or may not have been sold. That should be addressed by a  
7 curative instruction but we -- we do need to demonstrate that  
8 the actions taken by Adventure Outdoors with respect to sales  
9 in Georgia have an impact in New York and that that impact is  
10 detrimental to New Yorkers.

11 Indeed, that was part of your own earlier articulated  
12 summary of the case.

13 THE COURT: Well, a great many of their guns must have  
14 come into New York legally and illegally.

15 MR. TABER: There are roughly 69 that did, your Honor;  
16 but the difference with Mr. Ali is that he adds the element of  
17 personal physical harm from the gun. We don't have other crime  
18 victims in New York who are victims who can testify about a  
19 gun, and it's that added harm in New York which I think is also  
20 relevant to the jurisdictional point under your Honor's prior  
21 decisions.

22 THE COURT: You have no other gun that caused harm in  
23 New York?

24 MR. TABER: We have other guns that were traced in  
25 connection with crimes. We have some guns that were traced in

1 connection with illegal possession as the crime, others that  
2 were traced in connection with violent crimes. We don't have  
3 the crime victims. That's the difference with respect to  
4 Mr. Ali.

5 THE COURT: I don't see what the victim has to do,  
6 what it adds.

7 MR. TABER: We have to show, your Honor, that there's  
8 harm in New York to New Yorkers as part of the jurisdiction.

9 THE COURT: Well, the first witness is going to show  
10 that and --

11 MR. TABER: Well, she's going to show -- the first  
12 witness is going to show that there's a nuisance in New York  
13 from illegal guns. She actually doesn't speak to Adventure  
14 Outdoors guns in particular.

15 THE COURT: Well, you can prove that -- why can't you  
16 prove this gun with all the other guns that you're going to  
17 prove where you don't have the victim testifying that came from  
18 Adventure?

19 MR. TABER: Your Honor, we can. We can prove that;  
20 but then we will be lacking the element of the injury, the  
21 concrete injury in new York.

22 THE COURT: I don't understand. If you -- if  
23 some -- if you have an Adventure gun which you can link to a  
24 crime of murder or whatever, isn't that exactly what you have  
25 here? But you're doing without a victim. I don't understand

1 what the victim adds.

2 MS. GALENO: So, is your Honor suggesting we need  
3 separate evidence other than Mr. Ali obviously to establish  
4 that the gun used in the assault was an Adventure Outdoors gun?  
5 Is your Honor suggesting using that piece without having  
6 Mr. Ali also testify?

7 THE COURT: Yeah, you use it the same way you're going  
8 to prove all these other guns. You're not going to have  
9 victims with respect to all the other guns.

10 MS. GALENO: No, but it is qualitatively evident that  
11 the jury should be able to see; and this is tangible. Yes, we  
12 can prove through other evidence, other than Mr. Ali; and we  
13 hope we'll be able to because this is actually a crime.  
14 Mr. Renzulli's going to argue they were just possession  
15 charges, and we can't link any Adventure Outdoors gun to a  
16 murder or any other crime of violence. This was an Adventure  
17 Outdoors' gun.

18 THE COURT: Is that the only crime of violence you  
19 have linking Adventure to a particular gun?

20 MS. GALENO: Yes, your Honor.

21 MR. TABER: No, no, no, we have a handful of crimes of  
22 violence without victims who will testify to them. He is the  
23 only live witness who would testify.

24 THE COURT: Well, why can't you prove this the same  
25 way without the victim? The victim lends an air of prejudice.

1 It doesn't seem to be necessary.

2 MS. GALENO: Well, it's not unfair prejudice, your  
3 Honor. It's prejudice in that it's the reality of the  
4 harshness of what the conduct, what's going on. I mean, in the  
5 same way --

6 THE COURT: Well, if you show gun X came from  
7 Adventure and was used in the murder, I mean --

8 MR. TABER: But that's an abstract.

9 THE COURT: -- a reasonable juror could understand  
10 that a murder has a victim.

11 MR. TABER: But, your Honor, I would submit to the  
12 Court that the impact of an abstract on a piece of paper there  
13 was a gun that came here that resulted in a ballistics trace or  
14 whatever and that the word "murder" appears on a piece of paper  
15 is nowhere near the impact to a juror of the seriousness of the  
16 situation as hearing from a live victim.

17 We're not pretending to give the Court an army of live  
18 victims. He is the only live victim we bring to the Court but  
19 it would seem appropriate to underscore to the jury the  
20 seriousness of what we're dealing with here, that the jury hear  
21 from a live victim whose flesh and blood was spilled because he  
22 was struck with this gun and other than -- and absent that, it  
23 becomes an antiseptic kind of offense and without the power to  
24 result in a finding of a serious nuisance in New York. We  
25 don't want the jury wrongfully concluding that this is just a

1 lot of paper violations.

2 MR. RENZULLI: Your Honor, the prejudice here is so  
3 great, why do we need to hear from the victim? They have other  
4 evidence that guns have come -- came here and allegedly were  
5 involved in crime. Why do we need to hear from the victim,  
6 other than to in some way persuade this jury that through this  
7 victim's testimony that Adventure Outdoors has done something  
8 wrong?

9 But the essential issue here is the conduct. There is  
10 no evidence here that this gun was sold illegally or  
11 inappropriately. It could have gotten to New York in a number  
12 of different ways, and I think that's the critical issue.

13 MR. TABER: Your Honor, I'm looking at the -- what you  
14 read to us earlier this morning as to your intended  
15 introductory remarks to the jury and among the things that you  
16 spoke about advising the jury was that there be proof that the  
17 safety of New Yorkers was substantial impaired and victim  
18 testimony from someone who's physically injured as a  
19 consequence of an Adventure Outdoors' gun is precisely that.

20 THE COURT: Well, are you willing to stipulate that a  
21 particular gun was used which was sold without stipulating that  
22 it was sold illegally in -- what was this, was it an assault?

23 MR. TABER: It would be an assault, your Honor. He  
24 was pistol-whipped.

25 THE COURT: At a certain date without having a victim.

1 That's the only prejudice I see is the victim coming in.

2 MS. GALENO: But, your Honor, this is tantamount --

3 MR. RENZULLI: Your Honor, can I answer your  
4 question --

5 MS. GALENO: Oh, I'm sorry, Mr. Renzulli. I didn't  
6 mean to interrupt you.

7 MR. RENZULLI: Yes.

8 THE COURT: All right. Then the stipulation should  
9 suffice.

10 MS. GALENO: This is tantamount to in a criminal case  
11 telling the Government that they couldn't put on the victim of  
12 a robbery. The Government has to prove up the robbery. They  
13 should be able to have the victim on the stand. A defendant  
14 shouldn't be able in a civil or a criminal case to avoid the  
15 harsh consequences of the conduct.

16 That happens to be what the result of illegal guns  
17 getting into New York is. That's the result of it and the jury  
18 should be able to see that and they should be able to feel  
19 that. That's part of what we have to do the proof on. We're  
20 asking them to at the end of the day render a verdict in favor  
21 of the City, and we have to let them feel the results of the  
22 conduct. That's what --

23 THE COURT: Well, your first witness is doing that.

24 MR. RENZULLI: (Nods head affirmatively.)

25 MR. TABER: Well, then --



1 THE COURT: Then you have experts in addition.

2 MR. TABER: But first witness, your Honor, will be met  
3 with cross-examination, to be sure, that says that, "None of  
4 the guns that injured the people you know were from Adventure  
5 Outdoors, were they?"

6 And she will have to say that's correct, and so they  
7 will try to minimize the impact of the that testimony by  
8 disconnecting it from Adventure Outdoors.

9 THE COURT: Well, you have this case where there was  
10 an assault. What other crimes do you have with Adventure  
11 weapons?

12 MS. GALENO: This would be the only victim.

13 MR. COSTA: The only victims but there were other  
14 violent crimes that are --

15 MR. TABER: Among the 67 guns.

16 MR. COSTA: Among the 67 guns there are a number of  
17 violent crimes. I don't have the number exactly.

18 THE COURT: So, this is just one of the other. I know  
19 we don't have stupid jurors.

20 MR. NEWBY: The other thing, your Honor, this is an  
21 illustration. It is only one example, but it's our only victim  
22 illustration. And so if you bar this evidence, then what  
23 you're really saying is that the jury should not hear any  
24 illustrations of the impact of the guns coming into New York  
25 City.

1 MR. RENZULLI: I thought that was the first witness,  
2 the impact of the guns coming into New York City, your Honor;  
3 and it's cumulative on that issue, to say the least.

4 MR. NEWBY: It'd be different if the City intended to  
5 introduce, say, you know, 50 examples of violent crimes and 50  
6 victims. We seek to put in one, just one witness that will  
7 discuss the impact to him from an Adventure Outdoors gun. For  
8 that reason it's not cumulative. For that reason any potential  
9 prejudice is thereby minimized. It's just one.

10 MR. RENZULLI: Your Honor --

11 THE COURT: I think I'm going to -- I had a lot of  
12 difficulty with this this morning thinking about it. I think  
13 I'm going to reserve on this. You'll have to put this witness  
14 in late in the case when I see how the case goes.

15 MS. GALENO: And but --

16 MR. NEWBY: Thank you, your Honor.

17 MS. GALENO: Just so we're clear, the Court is not in  
18 any way precluding our offering evidence that a gun from  
19 Adventure Outdoors was used in --

20 THE COURT: No, they're stipulating to that.

21 MS. GALENO: It's just the question of whether the  
22 witness will take the -- thank you.

23 MR. RENZULLI: As long as the stipulation also states  
24 there's absolutely no evidence as to how this gun got to --

25 THE COURT: The stip, yes.

1 MR. RENZULLI: If he testifies, your Honor, then why  
2 do I need to stipulate? I would stipulate if he wasn't going  
3 to testify. Now I'm stipulating, and he's going testify?

4 THE COURT: Well, if you don't stipulate, I'm going to  
5 allow the evidence in. So, we'll wait until late in the case,  
6 until most of the case is on before you have to stipulate or I  
7 decide to let it in; but I'm reserving at the moment. I find  
8 it a troublesome matter under Rule 403.

9 Third. To preclude reference to firearms for which  
10 the City has failed to produce N.Y.P.D. complaint reports.

11 I'm not sure I understand that.

12 MR. RENZULLI: I think I can try to help with you  
13 that, Judge. The City is using a combination of trace data as  
14 well as some New York City/New York State trace data concerning  
15 guns that may have been recovered here in New York that were  
16 A.O., sold by Adventure Outdoors. We know that that data has  
17 absolutely no information as to how the guns get or guns got  
18 from Adventure Outdoors to New York City.

19 We requested not once but several times of the  
20 magistrate judge to order the City to produce evidence to us in  
21 the form of complaint reports or any other evidence that could  
22 shine some light on how the gun got from Georgia to New York  
23 City. We received some of those complaint reports concerning  
24 the guns that were sold with Adventure Outdoors and came to New  
25 York City. There were others, at least 13 or 14 particular

1 instances, where we received no complaint records whatsoever.

2 So, we were left with the trace database or the  
3 ballistics database which is woefully inadequate to advise us  
4 not only how the gun got here, the circumstances of how it got  
5 here, and the circumstances of what happened when the gun got  
6 here.

7 As your Honor is fully familiar, when you're coding in  
8 in the trace database, the NCIC codes are often not correct.  
9 We needed this background information that is in the -- the  
10 City has it. The police departments have it, and we did not  
11 receive that information concerning at least 12 or 13 of the  
12 guns that were allegedly sold at Adventure Outdoors and brought  
13 to New York City.

14 We would move that those 12 or 13 guns not be  
15 considered in terms of -- in this particular case because  
16 there's a failure to produce documents which could fill in some  
17 of the important aspects that we need in this case.

18 THE COURT: Why don't you give them the documents you  
19 have on these cases?

20 MR. TABER: We have, your Honor.

21 MR. BIERNOFF: Your Honor, we've produced this. The  
22 City has produced complaint reports for approximately 60 out of  
23 the 70 or 59 out of the --

24 THE COURT: Excuse me. Do you have any information  
25 that bears on these incidents that you haven't given them?

1 MR. BIERNOFF: The only documents that we have  
2 possession of or that we have been able to locate have been  
3 produced to the defendants. After a diligent search, N.Y.P.D.  
4 has --

5 THE COURT: Okay. Well, they've given you everything  
6 the have.

7 MR. RENZULLI: Your Honor, as we point out when you  
8 get a complaint report and you match it up to the ballistics  
9 report or the trace database, the information is totally  
10 different. You know, we had a homicide coded for a trace that  
11 turned out to be a suicide. The information as those complaint  
12 reports and any other information that the City may have will  
13 shine light on how that gun got here, what crime it was  
14 allegedly involved in. I mean, we found --

15 THE COURT: I don't understand what the dispute is  
16 about. They say they've given you all the information they  
17 have about these events.

18 MR. RENZULLI: They haven't. They just said as to 10  
19 guns, and I have 12 or 13. We don't have that information.

20 THE COURT: They -- do they -- do you have it?

21 MR. BIERNOFF: We don't, your Honor.

22 THE COURT: Well, they don't it have. So, they can't  
23 give it to you.

24 MR. RENZULLI: So, the fair thing to do would be to  
25 take those twelve guns and not have them as part of this case.

1 THE COURT: No. You'll have to get along with what  
2 they have. There's nothing else that they failed to produce.

3 Item Four. To exclude the testimony of Robert Hurley.

4 MR. BURRUANO: Yes, your Honor. This once again  
5 involves an event that occurred more than 15 years ago back in  
6 1992. Rob Hurley's co-defendant, Timothy Southerland,  
7 purchased firearms at Adventure Outdoors and Mr. Hurley was  
8 subsequently -- and Mr. Southerland subsequently indicted for  
9 that straw purchase.

10 More importantly, there is no evidence whatsoever that  
11 that Adventure Outdoors acted illegally, improperly, or in  
12 selling these firearms. They were never implicated in any  
13 wrongdoing in selling these firearms. The case against Tim  
14 Southerland, the actual purchaser of the firearms, was  
15 subsequently dismissed presumably for a lack of evidence.

16 Mr. Hurley was deposed in this case over the  
17 defendant's objections because the events occurred outside the  
18 discovery period and Magistrate Judge Pollack specifically  
19 noted that while she would permit the deposition to proceed,  
20 which actually occurred after a deadline that she imposed upon  
21 the City of deposing these types of witnesses, but that whether  
22 this evidence would be admissible at trial would be left up to  
23 the discretion of this Court.

24 None of the firearms purchased by Mr. Southerland ever  
25 came to New York. In fact, none of the firearms purchased by

1 or straw purchased to Robert Hurley ever came to New York.  
2 Mr. Hurley never sold a firearm to a New Yorker. He had never  
3 been to New York. In fact, he testified that all of the  
4 firearms were sold in Chicago.

5 He also testified that he didn't have any recollection  
6 of what occurred more than 15 years ago at Adventure Outdoors.  
7 There's also, to add another issue, it should just be noted  
8 that Mr. Hurley was testifying on behalf of the City as part of  
9 an agreement that the City would intervene on a pending  
10 criminal case that he has out in Illinois for narcotics  
11 charges. So, there is definitely an issue whether his  
12 testimony at all was credible; but it's important to stress  
13 that he had no specific recollection of what happened more than  
14 15 years ago at Adventure Outdoors' store.

15 This testimony is irrelevant, it's highly prejudicial,  
16 and it should be excluded.

17 MR. TABER: Your Honor, Mr. Hurley and his straw  
18 purchased five identical handguns from Adventure Outdoors.  
19 They did so in a fashion that we submit should have alerted  
20 Adventure Outdoors to the fact that a -- an improper  
21 transaction was taking place. Mr. Hurley paid for the guns  
22 while his straw completed the paperwork. That is a classic  
23 straw purchase. We believe that the proof will be more than  
24 sufficient to satisfy the conscious disregard standard, and we  
25 believe that it will be a key element of the case to

1 demonstrate that on numerous occasions Adventure Outdoors has  
2 indeed engaged in straw transactions. That is the construction  
3 of the case. Whether these particular guns came to New York or  
4 not would be icing on the cake, but it's not essential to  
5 render the proof relevant.

6 THE COURT: What do they mean in your understanding of  
7 the case when they say he had no recollection of what was going  
8 on 15 years ago?

9 MR. TABER: He doesn't remember the specific details  
10 of this particular transaction at Adventure Outdoors. From the  
11 facts of the criminal indictment and the like, we can glean  
12 quite a bit of information as to what he was charged with and  
13 prosecuted for; and it's that kind of prosecution evidence,  
14 your Honor, which is at the core of the City's proof of straw  
15 purchased transactions.

16 In this particular instance, we have the added benefit  
17 of having been able to locate Mr. Hurley and have him discuss  
18 the fact that what he did recall was engaging in hundreds of  
19 thousands of dollars worth of transactions in gun trafficking.  
20 That's what he did.

21 THE COURT: With Adventure?

22 MR. TABER: No, not with Adventure; with a number of  
23 other stores but the fact is he describes his normal course of  
24 business. That he might not remember 15 years after the fact,  
25 the specifics of what he did in Adventure Outdoors ought not be



1 dispositive. What is clear --

2 THE COURT: Well, is it clear -- does he remember that  
3 he participated in a purchase from Adventure?

4 MR. TABER: Yes.

5 THE COURT: And that --

6 MR. TABER: He was prosecuted for it.

7 THE COURT: Was it a straw purchase?

8 MR. TABER: It was a straw purchase. He was  
9 prosecuted for it.

10 THE COURT: Well, what does he remember?

11 MR. TABER: I can't go to the details. It's exactly  
12 what happened when you went to the --

13 THE COURT: But he'll describe it in sufficient terms  
14 to make it clear that it was a straw purchase?

15 MR. TABER: He will, your Honor.

16 MR. BURRUANO: No, your Honor, that's incorrect.

17 MR. TABER: He will describe his method --

18 THE COURT: I don't see how the indictment helps. How  
19 does that come in?

20 MR. TABER: The prosecution documents as to what he  
21 was prosecuted for.

22 THE COURT: That's all hearsay.

23 MR. TABER: Well, they're governmental records, your  
24 Honor. I think they would be -- they could come in as an  
25 exception. We haven't briefed that point yet.

1 MS. GALENO: Not the indictment but a Judgment and  
2 Commitment Order, we should be able to get a Judgment and  
3 Commitment Order in, your Honor.

4 THE COURT: He pleaded guilty or was tried?

5 MS. GALENO: He was convicted.

6 THE COURT: Of these particular weapons.

7 MR. TABER: And others.

8 MS. GALENO: That's my understanding.

9 MR. COSTA: There's also authority that the charge he  
10 pled to was also admissible. Doesn't have that --

11 THE COURT: That what?

12 MR. COSTA: That the charge, in other words the  
13 charging indictment, the indictment is also admissible is what  
14 he pled --

15 THE COURT: The charging indictment is just hearsay.

16 MS. GALENO: The -- what we propose to do with the  
17 prosecution would be to try to put in authenticated certified  
18 copies of the Judgment and Commitment Orders and that's what  
19 we're trying to get for some of the prosecution evidence that  
20 we have. Those are court records. We can get a certified  
21 copy. They're authentic and that -- there shouldn't be a  
22 hearsay problem with those. They're business record of the  
23 courts.

24 MR. TABER: And what he does testify to, your Honor,  
25 is a course of conduct in which he engaged in a large number of

1 these kinds of straw purchase transactions.

2 THE COURT: Well, does he recollect that he was doing,  
3 making straw purchases from Adventure? That's what I want to  
4 know. That's the direct information we have.

5 MR. COSTA: Absolutely.

6 MR. TABER: Yes, your Honor.

7 THE COURT: He will say, "I remember going in into  
8 Adventure"?

9 MR. TABER: I remember --

10 THE COURT: Refreshed or not, however you want to  
11 refresh him, "And this is the way I conducted a transaction,"  
12 and describe the straw transaction? Is that what he's going to  
13 do?

14 MR. RENZULLI: Your Honor, if I could --

15 THE COURT: Excuse me.

16 MR. RENZULLI: Okay. I'm --

17 THE COURT: Let me find out what they're going do.

18 MR. BIERNOFF: At his deposition Mr. Hurley testified  
19 that he remembered going to Adventure Outdoors, that he bought  
20 guns at Adventure Outdoors, that he paid for the guns himself  
21 while his straw did the paperwork.

22 It is true that Mr. Hurley did not remember a lot of  
23 other things about the transaction. He doesn't remember if he  
24 asked any questions of the sales clerk or if the sales clerk  
25 engaged him in conversation. He doesn't remember everything

1 and has been pointed out this was a long time ago but he does  
2 remember that it was a sale.

3 THE COURT: If he can testify to that, it comes in;  
4 but I don't see how the prosecution helps you.

5 MS. GALENO: He can certainly testify he was  
6 convicted.

7 THE COURT: Of what? Of the gun --

8 MR. TABER: Gun trafficking.

9 THE COURT: Not of gun trafficking; of the gun that he  
10 took from them. That's what counts, not that he was a general  
11 gun trafficker.

12 MR. BURRUANO: Your Honor, if I --

13 THE COURT: Excuse me. May I find out what we have  
14 here please?

15 MR. BURRUANO: Yes. I'm sorry.

16 MS. GALENO: Your Honor, what I'm hearing he pled,  
17 there was a multiple-count indictment and we have to determine  
18 whether he pled guilty to the Adventure Outdoors gun and that's  
19 unclear right now.

20 THE COURT: Well, that -- that would generally be  
21 hearsay. However, he -- what he said, if he said at the time  
22 of the plea, "I got this gun from Adventure," I suppose it  
23 would come in as nonhearsay because he's -- get me the rule.

24 He's testifying as a witness who made the prior  
25 statement under the Federal rule. You better brief it.

1 MS. GALENO: We'll check it, your Honor. It seems to  
2 me if we can connect the gun, if the gun he pled to was the  
3 Adventure Outdoors gun and that's what we have to verify, seems  
4 to me he should be able to say on the stand that he was  
5 convicted on that count. I don't think that that should pose a  
6 hearsay problem.

7 THE COURT: Not that he was convicted. He's going to  
8 have to say -- well, he may be able to do it. You better brief  
9 it. It's a very touchy problem. If he can say, having looked  
10 at the records, "I'm refreshed. I obtained this gun in this  
11 and this way," describing an illegal method --

12 MR. TABER: That I think, your Honor, we have from  
13 what's been described in the deposition.

14 THE COURT: -- "and that I used this gun in a crime,"  
15 well, then that's okay.

16 MR. RENZULLI: The issue, Judge, just so you have the  
17 full spectrum here, he's not coming to trial. He can't leave  
18 Bloomington, Illinois. He's got a drug situation there. We're  
19 left with the transcript at this point.

20 THE COURT: Well, he'd unavailable as a witness.

21 MR. RENZULLI: Right. So, we're left with the  
22 testimony --

23 THE COURT: Deposition.

24 MR. RENZULLI: -- that we have in the deposition.

25 THE COURT: Okay.

1 MR. RENZULLI: So, it's not what can he say. It's  
2 what did he say.

3 MS. GALENO: We're trying to locate him through his  
4 counsel. If we are unable to do so, he will be unavailable;  
5 but we do have deposition testimony.

6 THE COURT: I think you better brief it. This is a  
7 sticky hearsay problem for me.

8 MR. TABER: You're referring to the prosecution  
9 records at this point?

10 THE COURT: I haven't seen his testimony. I don't  
11 know what he's -- he remembers. If he said on the deposition,  
12 "I bought weapons from the defendant," and describes the mode  
13 of purchase and it's an illegal mode, that would seem to me to  
14 come in. Whether it was used in a crime or not, what  
15 difference does it make?

16 MR. TABER: I don't think it makes any difference.

17 THE COURT: So, it seems to me in addition to  
18 providing hearsay problems, it just complicates it. He is  
19 describing an event that he participated in.

20 MR. TABER: Your Honor, it's --

21 THE COURT: I haven't seen his deposition.

22 MR. TABER: It's not, frankly, quite so relevant for  
23 Mr. Hurley as it is for a number of other prosecutions where we  
24 don't have the live individual who can describe the testimony  
25 and we are using the prosecution documents. So, for that

1 purpose I think the Court's correct. We ought to brief the  
2 admissibility of the prosecution-related documents because they  
3 will be important.

4 THE COURT: Well, it doesn't seem to me -- I don't  
5 understand the issue. If the deposition, in the deposition he  
6 says he remembers conducting an illegal straw sale on or about  
7 a certain occasion in this place, that comes in.

8 MR. TABER: Agreed.

9 THE COURT: That's all.

10 MR. RENZULLI: Okay. Your Honor, we would just note  
11 that it would appear to us that you would have to establish  
12 illegal conduct at the store.

13 THE COURT: Right.

14 MR. RENZULLI: The gun would have had to travel to New  
15 York City and create harm.

16 THE COURT: No.

17 MR. RENZULLI: And create harm in New York City.

18 THE COURT: No, just the illegal conduct as a course  
19 of conduct.

20 MR. RENZULLI: And if the course of conduct is in '92  
21 and the business practices of Adventure Outdoors have changed  
22 and are changing daily, okay.

23 THE COURT: That's another problem.

24 MR. RENZULLI: Well that, is -- that's what the record  
25 shows here and your Honor was very specific at a hearing that

1 if their conduct is the same, then we can reach back but here  
2 we have a situation in 1992 in a different store in a different  
3 shop with different employees, different policies and  
4 procedures.

5 THE COURT: Is this a different shop?

6 MR. TABER: Same owner, your Honor. It's all owned by  
7 Wallace & Wallace and they were -- and they were at one point  
8 in time under a common FFL and it's many of the same cast of  
9 characters including, in particular, Jay Wallace as the owner.

10 MR. RENZULLI: Your Honor, it's not the same cast of  
11 characters in terms of the ownership. That may be the case but  
12 practices, policies, and procedures in Adventure Outdoors -- I  
13 didn't want to mislead the Court. It's a different shop  
14 location and different employees and different policies and  
15 procedures.

16 How can we go back to '92 and say that's relevant to  
17 this case? If their conduct has changed over time, they've  
18 instituted new policies and procedures over time. We don't  
19 have the same employee that was involved in that transaction.  
20 It's not even employed.

21 MR. TABER: Your Honor, that's the 4437 from the  
22 transaction which says right on it Smyrna Pawn/Adventure  
23 Outdoors. Of course it's not the same employee as in 1992.

24 THE COURT: But this is the same place.

25 MR. TABER: It's the same -- it's the same. At that



1 time they had a common location separate -- they had separate  
2 locations at a different point in time.

3 THE COURT: I see.

4 MR. TABER: Subsequent.

5 THE COURT: All right. I'll allow it.

6 To preclude, five, to preclude the City and its  
7 witnesses from referring to *Adventure Outdoors, Inc., v*  
8 *Bloomberg*.

9 Why do you have to do that?

10 MR. TABER: Your Honor, what we intend to refer to is  
11 extraordinarily abbreviated. It goes to the credibility and  
12 bias of Jay Wallace who, in fact, has his own  
13 100 million-dollar suit against the mayor, against other City  
14 officials on these same facts, claiming that he's been defamed  
15 and they've engaged in conduct that has injured him in his  
16 business and his reputation.

17 THE COURT: It's too remote. Granted.

18 I don't want the mayor's name in the case. Keep it  
19 out.

20 Six. To preclude the City and its witnesses from  
21 referring to or discussing any of the other defendants sued by  
22 the City.

23 MR. TABER: Your Honor, I --

24 THE COURT: Let me hear from them. It's their motion.

25 MR. RENZULLI: Your Honor, we're taking the position

1 that this case is about Adventure Outdoors and has nothing to  
2 do with the other dealers that at one time were in this suit or  
3 whether they settle or whether they resolved their differences  
4 with the City.

5 THE COURT: No, they can't put anything in about  
6 whether they settled or resolved their differences; but they  
7 can certainly put in evidence with respect to a large number of  
8 actions taken which taken with yours constitute the nuisance,  
9 if you knew that they were taking those actions. That's the  
10 basis of the nuisance, as I understood it.

11 MR. RENZULLI: What I think you're --

12 THE COURT: I don't care -- I don't care whether they  
13 settled or not. That stays out of the case obviously. Their  
14 admission stays out, but proof that there were others that were  
15 doing illegal acts that were contributing to a flow of guns  
16 which when taken together constituted a substantial problem for  
17 the City is the very gravamen of the suit.

18 MR. RENZULLI: Your Honor, what would Adventure  
19 Outdoors know about another dealer that was sued in this case?

20 THE COURT: If Adventure Outdoors knew that others  
21 were engaging in this kind of illegal activity, then by analogy  
22 to the pollution ruling that I gave you on the motion, I  
23 believe it comes in on the -- on your motion to dismiss.

24 MR. ALLAN: Judge, we're also talking -- I think  
25 you're talking about other retail dealers in general. I

1 believe part of the motion Mr. Renzulli is arguing is the other  
2 14 defendants named in the A-1 case.

3 THE COURT: As to those named, they -- their illegal  
4 sales that came into New York can come in but I do not want  
5 anything about their having settled. That doesn't come in.

6 MR. TABER: Well, your Honor, if I might argue that  
7 point, with respect --

8 THE COURT: Well, excuse me. Let me get the motion  
9 straight because I'm now confused based on the argument. I  
10 thought you were arguing with respect to their admissions as  
11 implied from the settlement. I don't want their settlement in.

12 Are you also -- are you also arguing that the illegal  
13 sales of all these other retailers, if they existed, don't come  
14 in?

15 MR. RENZULLI: Of course they don't. There's no  
16 evidence of any illegal sales by any of these other defendants,  
17 other than a complaint.

18 THE COURT: Well, that's another problem. That's  
19 another problem. Are you arguing that if they have illegal  
20 sales information of other retailers that are coming in the  
21 same as yours, as alleged, that doesn't come in? Is that your  
22 position?

23 MR. RENZULLI: Of course that's my -- your Honor, if  
24 they -- we don't know what they have. At least they should  
25 tell us what they have. We don't even have any of that

1 documentation or --

2 THE COURT: Of course they'll tell you.

3 MR. RENZULLI: We weren't doing that in discovery to  
4 determine what they have from the other defendants. As a  
5 matter of fact, it was a protective order as to information and  
6 certain information that they had relative to the other  
7 defendants. We didn't get that information.

8 THE COURT: That's another problem that you're not  
9 prepared. I'm not -- I'm not at this moment discussing the  
10 inadequacy of your preparation. What are you going to do with  
11 these other defendants?

12 MR. TABER: Well, a number of things, your Honor.

13 First of all, with -- if the Court will have us  
14 putting in evidence of illegal sales by those other defendants,  
15 we will put that evidence in.

16 THE COURT: But you have to. That was the whole basis  
17 of my denial of the motion to dismiss for failure of personal  
18 jurisdiction. I understood that was the gravamen of the case.  
19 Didn't you read my opinion with respect to pollution?

20 MR. TABER: We did, your Honor; and I might also add  
21 that with respect to those other defendants, we have produced  
22 the evidence that we have on those other defendants to  
23 Mr. Renzulli, in particular, who represented I think it was six  
24 of those other defendants. So, a great deal of that has been  
25 produced.

1 THE COURT: I'm not interested in what you've produced  
2 in discovery at this moment and whether discovery was  
3 completed. I don't want to go into discovery problems.

4 You are not precluded from putting in evidence that  
5 other retailers were acting illegally, thereby adding to the  
6 flow of guns into New York if you can show that this defendant  
7 knew or should have known that this was a general practice in  
8 the field.

9 And as I understood the evidence, it was that the  
10 Federal authorities were constantly reiterating and it was  
11 constantly in the trade journals that this was a problem.

12 MR. TABER: Absolutely.

13 THE COURT: And if that's what you can -- you're  
14 trying to show, that comes in but I don't want you to put in  
15 anything about settling cases. That's out.

16 MR. TABER: Your Honor, if I may on that -- just on  
17 that last point, our intent with respect to the defendants in  
18 this case was simply to say that there were 15 defendants in  
19 the case initially because we -- what we don't want to have --

20 THE COURT: Excuse me. I don't want that.

21 MR. TABER: Okay.

22 THE COURT: I will tell them, if it's requested -- and  
23 I'll put it down so I'll remember to do it -- that they're not  
24 to speculate on why other defendants are not in the case but  
25 that you can show that there was a whole stream of commerce

1 added to by individual retailers is part of your case. Has  
2 been right from the outset.

3 MR. RENZULLI: Well, your Honor, I don't think that's  
4 the way this case has developed in discovery with all due  
5 respects because what Adventure Outdoors might know about a  
6 dealer in Ohio or in another jurisdiction was not discussed in  
7 this case.

8 THE COURT: It doesn't -- the defendant does not have  
9 to know that a particular dealer in Ohio sold a gun illegally.  
10 If the defendant knew that this was a serious problem and it  
11 conducting -- it conducted its activities, adding to the  
12 problem, then under my ruling, as I understood it, in  
13 connection with your motion to dismiss it comes in.

14 These are not isolated, as I understand the theory of  
15 the City, these are not isolated events by one store. It's a  
16 flood of weapons that's coming in because many stores are  
17 violating the law outside the City. If your defendant was the  
18 only one doing this, I don't know -- I don't think there'd be a  
19 nuisance. Your defendant is just a minor store; but when it  
20 contributes to a large flow of weapons from many stores acting  
21 illegally, you have my opinion on personal jurisdiction  
22 indicating that that constitutes a pollution for which each  
23 individual polluter is responsible under traditional law of  
24 equity. That goes way back to the year 1200 in Great Britain.  
25 That's what I thought this case was about.

1 MR. RENZULLI: Your Honor, would that mean that I  
2 would have to defend the actions of all the other once  
3 defendants, now not defendants?

4 THE COURT: I don't know what you're going to do. I'm  
5 not going to tell you, an experienced counsel, what to do. I'm  
6 telling you what I understand the gravamen of the case is.  
7 What you do is a different -- is a problem you're going to have  
8 to resolve. I'm certainly not going to tell you what to do or  
9 not do.

10 MR. RENZULLI: I'm just thinking.

11 THE COURT: I'm trying to decide what the City can do.

12 MR. TABER: And we understand your Honor doesn't want  
13 any mention of the settlements, and there won't be.

14 THE COURT: And I will tell the jury if any, whether  
15 you want it or not, that they're not to speculate why anybody  
16 else isn't here.

17 MR. TABER: I think that will be important when they  
18 hear the proof of these other contributing dealers.

19 THE COURT: All right.

20 MR. RENZULLI: Well, I don't know what that proof is  
21 going to be because we don't have proof on that issue; but the  
22 bottom line is then the defendant has a defense of diminimus as  
23 it relates to Adventure Outdoors. If that testimony can come  
24 in, then there's definitely a diminimus defense as it relates  
25 to Adventure Outdoors; and I'm not asking you for guidance,

1 Judge. I'm trying to find out what case I'm trying, but I  
2 would have the diminimus defense then.

3 THE COURT: You can certainly argue it. No mention is  
4 to be made of my settlements or reasons why other retailers are  
5 not in this case.

6 Seven. To exclude evidence beyond the scope and  
7 pertinent time periods of plaintiff's claims.

8 What is the argument?

9 MR. ALLAN: Judge, we're moving to exclude evidence  
10 regarding sales or business practices of Adventure Outdoors  
11 that precedes three years prior to the filing of the complaint  
12 which is the statute of limitations applicable to public  
13 nuisance. Given that this is a suit for prospective injunctive  
14 relief, we do not believe that the past actions are relevant to  
15 this case but rather the more -- the more recent actions of  
16 Adventure Outdoors that took place within the statute of  
17 limitations for public nuisance actions.

18 THE COURT: Motion denied. You can show that the  
19 course of conduct has changed, or the Government can show that  
20 it's a consistent course of conduct. That's what this case is  
21 about.

22 MR. ALLAN: Judge, as an alternative we would argue  
23 that the scope of evidence would be limited to the discovery  
24 period in this case.

25 THE COURT: Denied.



1           Did you give him notice of each one of the Adventures  
2 you're going to rely on?

3           MR. TABER: Yes, your Honor.

4           THE COURT: Okay.

5           Eight. To exclude evidence regarding other Wallace  
6 entities.

7           What's that?

8           MR. ALLAN: Judge, Mr. and Mrs. Wallace have related  
9 corporations. There is Wallace & Wallace Adventure Outdoors  
10 which is the defendant in this case, Smyrna Pawn, and then  
11 Smyrna Police Distributors. We're moving to exclude evidence  
12 regarding the other three entities that are not named as  
13 defendants in this case.

14           Wallace & Wallace does not engage in the sale of  
15 firearms, is essentially a parent corporation or a holding  
16 corporation.

17           In regard to Smyrna Police Department or Smyrna Police  
18 Supply, it is a wholesale distributor of firearms to law  
19 enforcement. It does not sell firearms to the ultimate  
20 consumer.

21           Smyrna Pawn is also a separate business. It is  
22 located at a different location than Adventure Outdoors, and  
23 its conduct has not been at issue in this case.

24           THE COURT: Well, Smyrna Pawn is like any other  
25 retailer, though I don't see that that's excluded. If Smyrna

1 Pawn is adding to the flow of weapons, it's just like A-1 or  
2 somebody else. Doesn't make any difference. The fact that  
3 Wallace is involved doesn't make any difference.

4 I suppose if you want to, if they have evidence on  
5 Smyrna Pawn, to prevent prejudice, we can exclude the  
6 relationship with Smyrna Pawn to Wallace but Smyrna Pawn will  
7 be treated as any -- any other retailer.

8 MR. TABER: Your Honor, I think the only connection  
9 between, where the evidence overlaps is the one I just showed  
10 you a moment ago where it was Smyrna Pawn/Adventure Outdoors.  
11 That's not a problem.

12 MS. ASH: There are other pieces of evidence that  
13 contain both the names of Wallace, Adventure Outdoors and  
14 Smyrna Pawn on exhibits that we intend to produce and the  
15 defendant has --

16 THE COURT: If they're on already, you can use them;  
17 but, otherwise, don't introduce it. There's no inference to be  
18 drawn from the mere fact that they were operating two different  
19 entities that might have had different policy.

20 MS. ASH: In fact, Wallace & Wallace is the Federal  
21 Firearms License holder under which Adventure Outdoors operates  
22 their business. So, it's intertwined with Adventure Outdoors  
23 and for us not to be able to refer to Wallace & Wallace which  
24 is all over the documents -- the name Wallace & Wallace, both  
25 five or six key documents, 30 exhibits that defendant has put

1 on their exhibit lists mention Wallace & Wallace or Smyrna  
2 Pawn. So, for us to not be able to refer to them would be  
3 extremely prejudicial.

4 THE COURT: Well, what is your theory, that Wallace  
5 conducted its activities in the two entities the same way?

6 MS. ASH: That Wallace & Wallace is the owner of  
7 Adventure Outdoors and as the owner -- and the holder of the  
8 license.

9 THE COURT: Wallace & Wallace is not being sued.

10 MS. ASH: No, but their motion was to exclude any  
11 reference or any documents which refer to Wallace & Wallace.

12 THE COURT: No, if it's on the documents, it comes in  
13 but, otherwise, I -- you're not to argue, as I understand it,  
14 that a separately operated store is related in some way to  
15 the -- that is, their mode of operations is related in some way  
16 necessarily to the mode of operations of this defendant. It --  
17 it is a reasonable inference.

18 I think that's apparent that the same owner will  
19 operate two stores the same way but it -- I don't want to. I  
20 don't think it's necessary. If it's on the document, it's on  
21 the document but I don't -- I don't want that separate  
22 relationship emphasized. I see no point in it.

23 MS. ASH: I think our concern was primarily on the  
24 documentation.

25 THE COURT: No, I don't see any reason for redaction.

1 MR. ALLAN: That's not part of our motion, your Honor.

2 MR. RENZULLI: That's not part of our motion, your  
3 Honor.

4 THE COURT: Okay.

5 So, Wallace & Wallace, Inc., and police distributors  
6 is out.

7 Nine. To exclude reference to or use of firearm trace  
8 data.

9 MR. ALLAN: Judge, we're moving to exclude the trace  
10 data used by the City in this case on two grounds.

11 The first ground is based upon the 2006 and 2008  
12 appropriations accounts which provide that trace data shall be  
13 inadmissible in evidence in civil actions.

14 Our second ground is based on the unreliability of a  
15 trace data being relied upon by the City in this case. In the  
16 NAACP and the *Beretta* cases, the plaintiffs received trace data  
17 directly from the Bureau of Alcohol, Tobacco and Firearms under  
18 a protective order issued by this Court.

19 In this case that has not been -- there has been no  
20 disclosure of ATF data directly to the plaintiff. Rather, the  
21 City is relying upon trace data that was received pursuant to  
22 Freedom of Information Act that one of its experts received  
23 several years ago, in addition to a combination of New York  
24 City and New York State trace data.

25 The New York City trace data is data that the City of

1 New York had requested from the ATF limited to firearms  
2 recovered within the City of New York itself. The New York  
3 State trace data is data that the attorney general of New York  
4 State had requested from the ATF and insofar as it relates to  
5 the City of New York was turned over to the City also.

6 Those trace data, they are not as robust as was relied  
7 upon in this court in NAACP and *Baretta*. They contain  
8 substantially fewer fields and do not have the same reliability  
9 as coming directly from the ATF.

10 Further, they were disclosed pursuant to restrictions  
11 that they be used only for law enforcement use; and obviously  
12 in this case the City's using them for purposes of civil  
13 litigation.

14 MR. PROSHANSKY: Your Honor, the appropriations rider  
15 you've already ruled on. That's certainly no barrier to the  
16 trace data, you said, in the *Beretta* case that if the data was  
17 already in the City's hands, it wasn't covered by the rider.  
18 So, all of this data that we're talking about here has been in  
19 our hands since the *Beretta* case.

20 The notion of unreliability, I think there's nothing  
21 that the data that was released by the Freedom of Information  
22 Act came from the ATF. There's no reason to believe it's any  
23 less reliable than pure ATF data. What counsel is  
24 characterizing as New York City data was data released directly  
25 from ATF to New York City. So, it's ATF data as well.

1           As far as the reliability of the data, actually  
2 defendant's principle argument is simply the data's not  
3 reliable at all, not that it's less robust or more robust.  
4 Your Honor has worked extensively with this data and ruled on a  
5 number of occasions that it is reliable generally. I can read  
6 the findings of fact from the NAACP case, but I think the  
7 parties are all well aware of those.

8           In addition, not using the ATF trace data in quite the  
9 same statistical fashion as it was used in NAACP and even  
10 *Beretta* which is to draw general inferences out of statistical  
11 analyses of the data. We're simply following one gun from one  
12 dealer to one location in New York. There's no complex  
13 statistics involved, and there's no reason to require a  
14 representative database.

15           So, on those grounds I would ask that the defendant's  
16 motion be denied.

17           MR. ALLAN: Judge, should --

18           THE COURT: Yes.

19           MR. ALLAN: Two brief points. In regard to the  
20 *Beretta* case, you had certified the issue of the appropriations  
21 act in the Second Circuit; and, obviously, that has never been  
22 ruled upon. We would request that again you certify that same  
23 issue. In regard to the reliability of the trace data in  
24 *Beretta* and NAACP, it was produced simultaneously to both  
25 experts for the City and experts for the defendant; and,

1 therefore, everybody knew what they were getting. In this case  
2 the City has had this data for several years before it was ever  
3 produced to the defendants.

4 THE COURT: You've never seen it?

5 MR. ALLAN: No, we have seen it, yes.

6 THE COURT: Motion denied. The question of weight  
7 will be decided by the jury in court.

8 MR. SCHACHNER: Your Honor, if I --

9 THE COURT: You want to leave?

10 MR. SCHACHNER: I just wanted to be clear about one  
11 thing. Is the City trying to introduce the trace data that you  
12 received pursuant to a protective order in *Beretta*?

13 MR. PROSHANSKY: No.

14 MR. SCHACHNER: I wanted to be sure. With that, I  
15 would request to leave.

16 THE COURT: All right. You're excused.

17 Ten. To preclude the City and its witnesses from  
18 referring or discussing certain firearms related prosecutions.

19 MR. RENZULLI: Your Honor, that motion is along the  
20 lines of our evidentiary motions under 404(b) of the Federal  
21 Rules of Evidence. We have one issue that the Court has raised  
22 already that these prosecutions would be hearsay.

23 Secondly, that these prosecutions are being used by  
24 the City to establish -- and I would submit wrongly -- that  
25 because folks were prosecuted in terms of purchasing guns at

1 our store, that somehow that implicates the way that the gun  
2 was sold or the gun was sold illegally. That's the first  
3 issue.

4 The second issue is that what they're trying to do is  
5 say that all of these prosecutions are the same. They're all  
6 straw purchases; and a number of these prosecutions only one  
7 person comes in, lies and buys, and walks out. Deceives the  
8 dealer.

9 So, the weight of the -- I mean, the -- this evidence  
10 is basically being proffered to say that because there was a  
11 prosecution in the shop at a certain time, that that's exactly  
12 what Adventure Outdoors is doing today which is unlawfully  
13 selling guns.

14 So, our 403 or our 404(b) analysis, those -- an  
15 hearsay -- those prosecutions should not be admitted into  
16 evidence.

17 THE COURT: What are you doing?

18 MR. COSTA: With regard to the hearsay argument, as I  
19 understand it, we're going to be briefing that question. That  
20 wasn't part of the their motion. They only moved with respect  
21 to 403 and 404, and this is not improper evidence. We're not  
22 claiming conformity on a particular occasion. We're offering  
23 this evidence as direct proof of their unlawful sales  
24 practices.

25 I want to point out something actually very



1 interesting here. There are about 10 or 12 prosecutions at  
2 issue. Yet they only chose to move with respect to seven of  
3 them. The reason why they do that is because Mr. Wallace  
4 remembers in contacting ATF with regard to three of them, he  
5 had --

6 THE COURT: Say that again.

7 MR. COSTA: There are approximately ten prosecutions  
8 that are tied to Adventure Outdoors. They're only moving to  
9 exclude seven of them. The other three, Mr. Wallace has  
10 offered testimony that he recalls contacting ATF and,  
11 therefore, wants to put on proof that he's done the right thing  
12 in that regard. Yet, these prosecutions suffer from the same  
13 flaws that -- the alleged flaws that --

14 THE COURT: I don't understand. What's the evidence  
15 you're going to offer? I don't understand.

16 MR. COSTA: That there were ten or twelve -- I don't  
17 know the exact number -- prosecutions.

18 THE COURT: Give me one prosecution. What are you  
19 going to show? Prosecution what?

20 MR. COSTA: That there was a straw purchase -- that  
21 somebody was convicted of a straw purchase from -- through the  
22 documentary evidence of the conviction for straw purchasing of  
23 guns that were purchased from Adventure Outdoors.

24 THE COURT: Convicted after trial?

25 MR. COSTA: Some convicted; I believe most of them are

1 guilty pleas.

2 MR. TABER: Your Honor, we have -- I have a list in  
3 front of me. One, for example, is the prosecution of Rick  
4 Buttram; and we have the docket number. They've been advised  
5 of that.

6 THE COURT: Where were they prosecuted?

7 MR. TABER: This particular case was prosecuted in the  
8 Northern District of Georgia. At least one of his guns is  
9 known to have traveled to New York City. He was prosecuted for  
10 in total during the period 2000 to 2004 a total of 15 handguns  
11 that were straw purchased and --

12 THE COURT: Well, how do you avoid hearsay problem?

13 MR. TABER: Well, it goes to the point that your Honor  
14 asked us to brief which we will brief with respect to the  
15 conviction records and making sure we have it properly  
16 documented and I appreciate the Court's point and we need to  
17 address that and we will but what they're saying in essence is  
18 the prosecution isn't worth anything, a conviction isn't worth  
19 anything.

20 THE COURT: Well, I can't rule on these unless I know  
21 what your theory is to avoid a hearsay objection. Some court  
22 in another state said, you're claiming that, this defendant  
23 illegally sold a gun to a Mr. X, right?

24 MR. TABER: The Court doesn't say that Adventure  
25 Outdoors illegally sold the gun. The court -- Adventure

1 Outdoors was not a party to the criminal prosecution.

2 THE COURT: Right.

3 MR. TABER: There is a prosecution against a  
4 purchaser --

5 THE COURT: Right.

6 MR. TABER: -- for engaging in trafficking and the  
7 trafficking occurred through purchases at Adventure Outdoors.

8 THE COURT: Well, and that you're going to show by  
9 how?

10 MR. TABER: Through, as I understand it, the  
11 conviction-related court documents.

12 MR. COSTA: These are also materials relied upon by  
13 the expert in giving his opinion, and I believe they come in  
14 under 703.

15 THE COURT: Oh, this is not coming in independently?  
16 It's coming in --

17 MR. COSTA: It may come in both, but it is also  
18 material relied upon by the expert.

19 MR. RENZULLI: How do we cross-examine these  
20 individuals?

21 THE COURT: That's what's bothering me. It's hearsay.  
22 I don't understand the exception that it comes in under. This  
23 Court has held that some defendant, Mr. X, made straw  
24 purchases, right?

25 MR. TABER: Yes, your Honor.

1 THE COURT: That's the conviction. And made them with  
2 respect to a gun sold by Adventure.

3 MR. TABER: I believe that's correct, your Honor.

4 THE COURT: And how do you meet the hearsay problem?

5 MR. TABER: I would have thought, your Honor, that the  
6 governmental records and the conviction, the -- which is, in  
7 essence, a part of the a -- I mean, there's an admission  
8 against interest component but I don't want to do this on the  
9 fly. I think we need to brief it for the Court.

10 THE COURT: I think you better.

11 MS. GALENO: I'm just looking --

12 THE COURT: The defendant in the civil case now had no  
13 interest certainly in defending that case.

14 MS. GALENO: Your Honor, A judgment and Commitment  
15 Order is a public record. I can pull it up in the court files.

16 THE COURT: It may be a public record, but it doesn't  
17 make it less hearsay.

18 MS. GALENO: It's hearsay exception under 803.

19 THE COURT: Well, you better brief it. I think --

20 MR. TABER: And we shall do so, your Honor.

21 THE COURT: -- think both sides better brief it. I  
22 finds it very difficult to deal with.

23 MR. RENZULLI: I would just like to --

24 THE COURT: They may, if it's a plea, he may have  
25 pleaded. The criminal defendant may have pleaded for a variety

1 of reasons. We don't readily allow statements in pleas to be  
2 used against other parties in criminal cases. Why should it be  
3 different in civil cases? Burden of proof is a little less but  
4 I don't --

5 MS. GALENO: Well, we're trying to get --

6 THE COURT: I'm very dubious about showing that a plea  
7 or even a conviction --

8 MS. GALENO: We were trying to rely less on  
9 allocutions, your Honor, than we were on, like, Judgment and  
10 Commitment orders, things like that which would be public  
11 record.

12 THE COURT: But they would depend on the allocution or  
13 the commitment. Doesn't -- doesn't help us any that the  
14 hearsay is solidified into a document if it was originally  
15 hearsay as to this civil defendant. I mean, some guy out there  
16 in Chicago or wherever they pled guilty may have had an animus  
17 against this civil defendant or may have pleaded in order to  
18 get a reduced sentence.

19 Knowing how criminal cases are conducted throughout  
20 the United States, I don't have a great deal of assurance in  
21 the probative force that you're relying on -- that is, that  
22 this civil defendant sold something illegally to that criminal  
23 defendant.

24 MS. GALENO: We certainly appreciate your Honor's  
25 concern, and we will brief it and see if we can persuade you

1 and make you more comfortable, your Honor.

2 THE COURT: You'll have to. It's not irrelevant  
3 because I've already decided that other sales will come in  
4 certainly by this defendant and even by other defendants, but  
5 whether this particular sale was illegal is bothersome. So,  
6 I'm going to reserve not on the irrelevant and prejudicial but  
7 on the hearsay. I think it raises a hearsay issue.

8 MR. RENZULLI: Yes, your Honor. In addition, we also  
9 anticipated that the City might try to offer them through their  
10 experts. So, we have a line of testimony from their experts as  
11 to what investigation they did concerning these prosecutions  
12 where these criminal defendants pled to deceiving and lying on  
13 the paperwork. That's what they pled to; and they did not do  
14 any investigation, did not talk to the criminal defendant, did  
15 not talk to the prosecutors. So, we're left with relatively no  
16 information.

17 THE COURT: Well, you better --

18 MR. RENZULLI: We'll brief that.

19 THE COURT: You better address the experts, too. I'm  
20 not sure you have a basis for the expert's testimony.

21 MS. GALENO: Well, your Honor, the documents that the  
22 expert looked at wouldn't necessarily come into evidence; but  
23 an expert can look at anything, be it admissible or  
24 inadmissible, and render an opinion.

25 THE COURT: No. They can -- that is true but I have

1 to be satisfied that the data they were using is reliable and  
2 I'm not satisfied.

3 MS. GALENO: They would have been looking at the same  
4 court records we've been discussing. So ...

5 THE COURT: Correct.

6 MS. GALENO: We understand, your Honor.

7 THE COURT: It's a nice problem.

8 To include the testimony of the expert Daniel Webster.

9 MR. BURRUANO: Yes, your Honor. Adventure Outdoors is  
10 moving to exclude the testimony of Daniel Webster and in  
11 general but also to exclude specific studies and testimony  
12 concerning those studies that the City has indicated it will  
13 elicit from him at trial. At the outset, I should note that  
14 there were certain parts of our motion that the City did not  
15 oppose concerning what Mr. Webster was supposed to testify  
16 about at trial; and we would ask that those be granted as  
17 unopposed.

18 Our major concern and problem with Mr. Webster is,  
19 although he relies solely on trace data which, as I understand  
20 your Honor's rulings, you deem as reliable, so I won't burden  
21 the Court with any arguments concerning that; but he does not  
22 control for other factors that could have affected the results  
23 of his study. So, he tries to use trace data to come to  
24 broader conclusions.

25 For instance, there was a Milwaukee study where he

1 just used trace data and he came to the conclusion that a  
2 single retail dealer can cause something like a 40 percent  
3 reduction in the number of traces in Milwaukee but he didn't  
4 look for any other factors to determine whether there was law  
5 enforcement initiatives that could have caused the reduction  
6 traces, whether there was a reduction in the number of FFLs  
7 that could have caused the number of -- reduction in the number  
8 of traces.

9 All he did was pick a designated event -- excuse  
10 me -- and look at the number of traces before that event that  
11 he chose and looked at the number of traces after that event.

12 So, we don't think that type of analysis is reliable,  
13 regardless of whether this Court deems the trace data reliable.  
14 The conclusions that he draws from it are not reliable because  
15 he doesn't independently verify or control for other factors.

16 We also don't think on a larger issue that  
17 Mr. Webster's testimony is really relevant to any of the issues  
18 in this case. He readily admits that he has not conducted any  
19 studies regarding the public nuisance in New York. He hasn't  
20 conducted any studies regarding the alleged problem of gun  
21 trafficking to New York. He doesn't -- didn't conduct any  
22 studies regarding interstate firearm trafficking.

23 He's done not only no analysis of Adventure Outdoors,  
24 but he hasn't done any analysis of whether a local retail  
25 dealer in one state can have an effect on a number of guns



1 recovered in another state.

2 Most of his studies have just been he focuses on what  
3 effect a local retailer can have on the number of guns  
4 recovered in that locality. He doesn't really do interstate  
5 analysis, and that's what this case is really about.

6 So, we don't think -- I mean, the purpose of an expert  
7 is to assist a jury in coming to his conclusions and his  
8 findings of fact and Mr. Webster provides no assistance in that  
9 regard. Therefore, we would ask that the testimony be  
10 excluded, your Honor.

11 THE COURT: I see.

12 One of the attorneys must leave at 3:30. So, I think  
13 we ought to break now. We're starting tomorrow at what time?

14 MR. FARIDI: 11:15.

15 THE COURT: At 11:15 tomorrow. So, I'll hear the  
16 counterargument tomorrow.

17 Will somebody order immediate copy so we'll have the  
18 full text?

19 MR. TABER: Thank you, your Honor.

20 THE COURT: Thank you.

21 (Whereupon the proceedings adjourned to May 22, 2008.)  
22  
23  
24  
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