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13
14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 SANTA ANA DIVISION

17 SUREFIRE, LLC, a California
limited liability company,

18 Plaintiff,

19 v.

20 ADVANCED ARMAMENT CORP.,
a Georgia corporation,

21 Defendant.

Case No. SACV 08-1405 DOC (RNBx)
Assigned to Hon. David O. Carter

**ADVANCED ARMAMENT CORP.'S
OPPOSITION TO SUREFIRE'S
MOTION FOR PRELIMINARY
INJUNCTION**

Hearing Date: 3/23/09
Time: 8:30 a.m.
Courtroom: 9D

TABLE OF CONTENTS

	Page
I. Introduction	- 1 -
II. Factual Background.....	- 1 -
III. Legal Framework.....	- 4 -
A. Standard For Preliminary Injunction.....	- 4 -
B. False Advertising Standard	- 5 -
IV. Argument.....	- 7 -
A. Surefire Cannot Succeed on the Merits.....	- 7 -
1. SureFire is Not Mentioned in the Advertisement, Nor is the Failed Suppressor Clearly Identifiable as a SureFire Suppressor.....	- 8 -
2. SureFire Uses “Spot Welds”	- 9 -
3. SureFire’s Spot Welds Are not As Strong as AAC’s Circumferential Welds	- 10 -
4. SureFire’s Spot Welds are Likely to Fail During “Normal” Semi-Automatic or Full-Automatic Firing	- 11 -
5. AAC’s Suppressors are More Durable Than SureFire’s ..	- 12 -
B. Surefire Has Shown No Harm.....	- 13 -
C. Balancing Harm and Likelihood of Success, SureFire is not Entitled to an Injunction.....	- 14 -
D. The Public Interest favors AAC.....	- 15 -
V. Conclusion	- 16 -

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Benda v. Grand Lodge of the International Association of Machinists & Aerospace Workers, 584 F.2d 308 (9th Cir. 1978).....5

Big Country Foods, Inc. v. Board of Ed. Of the Anchorage Sch. District, 868 F.2d 1085 (9th Cir. 1989)5, 14

CKE Restaurant Inc. v. Jack in the Box, Inc., 494 F. Supp. 2d 1139 (C.D. Cal. 2007)13, 14

Castrol, Inc., v. Pennzoil Co., 987 F.2d 939 (3d Cir. 1993)6

Coastal Abstract Serv., Inc. v. First America Title Insurance Co., 173 F.3d 725 (9th Cir. 1999).....7

Dollar Rent A Car, Inc. v. Travelers Indemnity Co., 774 F.2d 1371 (9th Cir. 1985).....5

International Jensen v. Metrosound U.S.A., 4 F.3d 819 (9th Cir. 1993).....15

Johnson v. California State Board of Accountancy, 72 F.3d 1427 (9th Cir. 1995)5

Mazurek v. Armstrong, 520 U.S. 968, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997).....4

McNeilab, Inc. v. America Home Products Corp., 848 F.2d 34 (2nd Cir. 1988)14

Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867 (9th Cir. 2000).....5

Rice v. Fox Broadcast Co., 330 F.3d 1170 (9th Cir. 2003).....6

Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997)6

Stuhlberg International Sales Co. v. John D. Brush & Co., 240 F.3d 832 (9th Cir. 2001).....15

STATE CASES

Weller v. American Broadcasting Co., 232 Cal. App. 3d 991, 283 Cal. Rptr. 644 (1991)6

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FEDERAL STATUTES

15 U.S.C. § 1125(a)(1)6
Lanham Act, 15 U.S.C. § 1125(a)(1)(B).....5

1 **I. INTRODUCTION**

2 Defendant, Advanced Armament Corp. (“AAC”), respectfully opposes a
3 motion for preliminary injunction filed by the plaintiff, SureFire, LLC
4 (“SureFire”). SureFire’s motion should be denied because the AAC ad is not
5 false or misleading.

6
7 SureFire and AAC compete in the market for firearm suppressors,
8 accessories meant to reduce the visual and audible muzzle blast from weapons
9 used by the military and elite law enforcement agencies. SureFire alleges AAC
10 published a false advertisement highlighting the advantages of AAC’s “fully
11 welded [sound suppressor] core” versus “spot welded” cores. Because the AAC
12 ad is completely truthful and accurate, SureFire has not met its burden of
13 proving the existence of a false or misleading statement of fact or the existence
14 of any serious question regarding the advertisement’s veracity. Accordingly,
15 SureFire’s motion should be denied in its entirety.
16

17 **II. FACTUAL BACKGROUND**

18
19 Commonly referred to as “silencers,” sound suppressors reduce audible
20 muzzle blast through a series of “baffles” arranged inside of a metal tube.¹ Each
21 baffle is connected to a spacer along their respective outside diameters. This
22

23 _____
24 ¹ The use of a sound suppressor protects the hearing of the user, among other advantages.

1 arrangement of baffles and spacers is further connected to a base. The entire
2 assembly (baffles, spacers, and base) is commonly referred to as the “core” of a
3 sound suppressor because it resides inside of a metal tube, hidden from view.

4 AAC published an advertisement late last year intended to feature its
5 newly redesigned sound suppressor for the .556 mm (.223 caliber) line of
6 weapons, the model “M4-2000.” Re-released in 2008, AAC’s “M4-2000, Mod
7 08” suppressor contains continuous circumferential welds at each baffle-to-
8 spacer connection. Circumferential welds provided a significant improvement
9 over AAC’s prior design, which utilized “plug welds.” (*See* Declaration of
10 Robert Silvers, hereinafter “Silvers Decl.” at ¶¶ 13 & 18.) A “plug weld” is a
11 kind of spot weld that adds filler material into a hole drilled into two abutting
12 pieces of metal. (*Id.* at ¶ 13.) Because a plug weld does not join all abutting
13 metal at the seam, it is not continuous, and as a result, is not as strong. (*Id.* at
14 ¶¶ 17-18.)

15
16
17 The advertisement for AAC’s redesigned suppressor contained the legend
18 “strength means durability” underneath a two-panel layout exposing the interior
19 cores of two different suppressors. Both suppressors are shown within a
20 partially cut away exterior tube.

21
22 The suppressor on the left side of the advertisement is labeled “competitor
23 brand silencer” with a “spot-welded core” while the suppressor on the right side
24

1 of the advertisement is AAC’s redesigned M4-2000, Mod 08 silencer, showing
2 an improved “fully-welded core” in an unpainted (silver) exterior tube. AAC’s
3 continuous welds are easily seen in the unfinished core where they appear as
4 amber or yellow stripes at each baffle-to-spacer connection. (*Id.* at ¶¶ 7-8.)

5
6 The spot welded core on the left side of the advertisement has failed.
7 Cracks are visible and the baffles have separated from the base portion. (*Id.* at
8 ¶¶ 12.) Underneath the legend “strength means durability,” the advertisement
9 states as follows:

10 Advanced technology yields advanced results. Advanced
11 Armament Corp. sound suppressors employ 360° circumfrential
12 [sic] fusion welds to achieve maximum strength and durability.
13 Most manufacturers do not. Traditional spot welds can fatigue,
14 crack, and break under the high-stress environment of semi and
15 full-auto firing. AAC’s™ automated robots weld an extremely
16 precise, incredibly strong core. Rely on the strongest. Depend on
17 the best. Choose Advanced Armament Corp.

18 The advertisement makes no representations about failure rates for spot welded
19 cores nor does it predict or forecast a failure for any specific shooting condition.
20 (*See* Declaration of Kevin Brittingham, hereinafter “Brittingham Decl.” at ¶ 10.)
21 Instead, it says that spot welded cores “*can* fatigue, crack, and break under the
22 high-stress environment of semi and full-auto firing.” (*Id.* emphasis added.)

23 While the advertisement in question does not specifically identify
24 SureFire, one of SureFire’s directors, Mr. Barry Dueck, recognized the core on
the left side of the advertisement as SureFire’s. SureFire filed its complaint for

1 false advertising on December 11, 2008 under the Lanham Act and California’s
2 Business and Profession’s code, §§ 17500 and 17200, respectively.

3 After the complaint was filed, counsel for AAC agreed that the
4 advertisement in its original form would be withdrawn and that a revised
5 advertisement would be prepared. A revised advertisement was prepared by
6 AAC specifying the number of rounds fired through the failed suppressor on the
7 left side of the advertisement (580 rounds) and specifying that the suppressor on
8 the right side of the advertisement was unfinished and unfired. The revised
9 advertisement was published in February 2009.²

11
12 **III. LEGAL FRAMEWORK**

13 **A. Standard For Preliminary Injunction**

14 A preliminary injunction is a drastic and extraordinary remedy that should
15 not be granted unless the movant, by a clear showing, carries the burden of
16 persuasion. *See Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138
17 L. Ed. 2d 162 (1997). The Plaintiff’s burden may be met by “demonstrating
18 either (1) a combination of probable success on the merits and the possibility of
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20 _____
21 ² While it is not relevant to the instant motion, counsel for AAC and SureFire
22 did not clearly communicate regarding the revised advertisement. Counsel for
23 SureFire apparently believed that the revised advertisement would be provided
24 before it was published, and counsel for AAC believed that SureFire would
make a further inquiry regarding the content of the revised advertisement. In
any case, the fact that there would be a revised advertisement was not concealed.

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irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in his favor.” *Dollar Rent A Car, Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1374-75 (9th Cir. 1985); *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000). Courts in the Ninth Circuit have explained that “[t]hese are not separate tests, but outer reaches of a single continuum.” *Dollar Rent A Car*, 774 F.2d at 1374-75 (quoting *Benda v. Grand Lodge of the Int’l Ass’n of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978) (internal quotation marks omitted)). In any situation, the court must find that there is at least a fair chance of success on the merits, see *Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995), and that there is some threat of an immediate irreparable injury. See *Big Country Foods, Inc. v. Board of Ed. Of the Anchorage Sch. Dist.*, 868 F.2d 1085, 1088 (9th Cir. 1989). In other words, it would be error to grant a preliminary injunction where a plaintiff did not have a fair chance of succeeding or where no credible evidence of irreparable harm has been shown. *See id.*

B. False Advertising Standard

To prove a claim for false advertising under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), plaintiffs must establish: (1) that the defendant made false statements of fact about its own or another's product in an advertisement; (2) that those advertisements actually deceived or have the tendency to deceive a

1 substantial segment of their audience; (3) that such deception is material, in that
2 it is likely to influence the purchasing decision; (4) that defendant caused its
3 falsely advertised goods to enter interstate commerce; and (5) that plaintiff has
4 been or is likely to be injured as the result of the foregoing either by direct
5 diversion of sales from itself to defendant, or by lessening of the goodwill which
6 its products enjoy with the buying public. *Rice v. Fox Broad. Co.*, 330 F.3d
7 1170, 1180 (9th Cir. 2003).

9 “To demonstrate falsity within the meaning of the Lanham Act, a plaintiff
10 may show that the statement was literally false, either on its face or by necessary
11 implication or that the statement was literally true, but likely to mislead or
12 confuse consumers.” *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134,
13 1139 (9th Cir. 1997) (citing *Castrol, Inc., v. Pennzoil Co.*, 987 F.2d 939, 946 (3d
14 Cir. 1993)). “When evaluating whether an advertising claim is literally false,
15 the claim must always be analyzed in its full context.” *Southland Sod Farms*,
16 108 F.3d at 1139.

18 Liability under the relevant provision of the Lanham Act requires a
19 “representation of fact.” 15 U.S.C. § 1125(a)(1) (emphasis added). Similarly,
20 California law requires that the offending statement “expressly or impliedly
21 assert a fact that is susceptible to being proved false,” and must be able to be
22 reasonably “interpreted as stating actual facts.” *Weller v. American*
23
24

1 *Broadcasting Co.*, 232 Cal. App. 3d 991, 1001, 283 Cal. Rptr. 644, 650 (1991).
2 Statements of “mere puffery” or opinion are not actionable. *Coastal Abstract*
3 *Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 730-731 (9th Cir. 1999)
4 (rejecting false advertising claims as “mere puffery” based on statements that
5 competitor was “too small” to handle business).
6

7 **IV. ARGUMENT**

8 **A. Surefire Cannot Succeed on the Merits**

9 SureFire cannot succeed on the merits of its claim because the
10 advertisement in question is not literally false, either expressly or by “necessary
11 implication.” In this case, SureFire bears the burden of proving that the
12 particular claims made in AAC’s advertisement are false. SureFire claims that
13 the AAC advertisement in question makes the following literally false
14 statements: “(1) the SureFire suppressor shown uses spot welds; (2) SureFire’s
15 spot welds are not as strong as the fusion welds used by AAC; (3) SureFire’s
16 spot welds are likely to fail during normal semi-automatic and full-automatic
17 firing; and (4) AAC’s suppressors are more durable than suppressors like the
18 SureFire suppressor shown.” (Motion for P.I., Docket No. 16-2 at 9:9-13.)³ As
19
20

21
22
23 ³ None of these statements appear expressly in the ad in question. SureFire
24 appears to argue that these statements should be implied.

1 no statement made by AAC in the ad is false, each of these claims by SureFire
2 fails.

3
4 **1. SureFire is Not Mentioned in the Advertisement, Nor is**
5 **the Failed Suppressor Clearly Identifiable as a SureFire**
6 **Suppressor**

7 As articulated in its motion, SureFire’s four theories for proving the
8 existence of a literal falsity rest on the premise that AAC has directly compared
9 its suppressor to a SureFire suppressor. But the advertisement at issue does not
10 expressly mention SureFire. Consequently, all of SureFire’s theories for
11 liability rest on the unsupported assertion that the failed suppressor is
12 “immediately recognizable [by a consumer] as a SureFire suppressor.” (Dueck
13 Decl., Docket No. 16-8 at ¶ 10.) Mr. Dueck’s assertion is without support and
14 there is evidence to the contrary. First, the SureFire core is certainly not unique
15 in its construction. As explained in the declaration of Robert Silvers, more than
16 one manufacturer uses the same baffle-to-spacer weld construction as SureFire.
17 (Silvers Decl. at ¶ 9.) Thus, even if a consumer were familiar with the internal
18 welding used in the SureFire suppressor, it is not easily distinguishable from
19 suppressors made by other manufacturers, such as Ops, Inc. Moreover, features
20 like SureFire’s circumferential tube weld line and its shape for the front plate on
21 the tube exterior are not so well known that they could be used by consumers to
22 identify the suppressor in the advertisement as a SureFire product. (*Id.* at ¶ 10.)
23
24

1 In short, many other companies use variations of these features, making it
2 unlikely that a typical consumer could determine that the suppressor on the left
3 side of the advertisement at issue in this case is made by SureFire. (*Id.*)
4

5 In fact, at least one consumer was actually surprised to learn that the
6 suppressor on the left side of the advertisement was made by SureFire. (*Id.* at
7 ¶ 11 and Exh. C., stating “[f]or the record, I did not know that the silencer that
8 the AAC silencer was compared to was a SureFire silencer”.)

9 Without evidence supporting SureFire’s claims that consumers would
10 recognize the suppressor on the left side of the advertisement as a SureFire
11 suppressor (like survey evidence or focus group evidence), a discussion of
12 SureFire’s theories for liability is a purely academic exercise. Hence, SureFire
13 has failed to make a threshold showing that any of the statements in AAC’s
14 advertisement are recognizably directed to a SureFire suppressor.
15

16 **2. SureFire Uses “Spot Welds”**

17 Assuming for the sake of argument that SureFire can establish that the
18 advertisement in question identifies and describes the character of SureFire’s
19 welds, SureFire’s sound suppressors, in fact, do use “spot welds.” (Silvers Decl.
20 at ¶ 16.)
21

22 In his declaration, Mr. Dueck attempts to distinguish SureFire’s welds
23 from spot welding, calling them “tack welds” because some filler material is
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used. (Dueck Decl. at ¶ 16.) But filler material is also used in MIG or TIG welding and this type of welding is commonly referred to as “spot welding” when it is done in one place on the seam of two adjoining metal parts. Despite Mr. Dueck’s selected phrasing, a leading welding dictionary states that the term “spot weld” can refer to “resistance, MIG or TIG spot welding. Resistance spot welds are made from electrodes on both sides of the joint, while TIG and MIG spots are made from one side only.” (Silvers Decl. at ¶ 16 and Exhibits D and E.) *See also* <http://files.aws.org/technical/facts/FACT-21.PDF>. According to Mr. Dueck’s description of SureFire’s welding process at paragraph 16 of his declaration, it is likely that SureFire uses a form of MIG or TIG welding. (Silvers Decl., at ¶ 16.) And since SureFire welds in only one spot, its welding is accurately referred to as “spot welding.”

Thus, even if AAC’s advertisement *did* expressly describe SureFire’s welds as “spot welds,” this is an accurate term for the type of weld used by SureFire.

3. SureFire’s Spot Welds Are not As Strong as AAC’s Circumferential Welds

The AAC advertisement at issue makes no direct comparison of the strength of *SureFire’s* welds (or other spot welds) to the strength of AAC’s circumferential welds. However, even if it did, SureFire has not proven that it is

1 false to state that circumferential welds are stronger than spot welds. Common
2 sense tells one that a longer weld along the seam of two adjoining metal pieces
3 will be stronger than a shorter “spot” weld. This common sense is supported by
4 numerous examples of the use of continuous welding over tack welding or spot
5 welding in applications calling for greater strength or rigidity. (Silvers Decl. at
6 ¶¶ 17-18.)

7
8 Regardless of whether or not continuous welding is indeed stronger than
9 “spot welding,” SureFire has failed to carry its burden of proof on this issue.
10 SureFire offers nothing besides Mr. Dueck’s unsupported speculation that
11 SureFire’s “tack welds” are at least equal to or stronger than AAC’s continuous
12 circumferential welds.

13
14 **4. SureFire’s Spot Welds are Likely to Fail During**
15 **“Normal” Semi-Automatic or Full-Automatic Firing**

16 The gap between what AAC’s advertisement actually says and what
17 SureFire thinks it says is at its widest when SureFire alleges a literally false
18 statement concerning a “likely” failure at “normal” firing conditions. The
19 closest statement made on the issue of failure is that “traditional spot welds can
20 fatigue, crack or break under the high-stress environment of semi and full auto
21 firing (emphasis added).” This statement is true.
22
23
24

1 The AAC advertisement makes no express or implied representation
2 about what constitutes “normal” semi-automatic or full-automatic firing.
3 (Brittingham Decl. at ¶ 10.) Moreover, there is no statement made in the
4 advertisement regarding when welds will necessarily fail or that welds of this
5 type are “likely” to fail. Mr. Brittingham’s testing of the SureFire suppressor,
6 and the failed core itself, are proof that welds of this kind “can” fail under a
7 protocol used by the military. (Brittingham Decl. ¶¶ 4-6.) Again, SureFire has
8 failed to meet its burden to prove this statement false.
9

10
11 **5. AAC’s Suppressors are More Durable Than SureFire’s**

12 Even if the advertisement in question claimed that AAC’s suppressors are
13 more durable than SureFire’s (it does not), SureFire has failed to show that such
14 a statement would be false. In an attempt to prove this (hypothetical) statement
15 false, Surefire relies on an old “competition” that was held between the parties
16 in 2006, involving a potential contract from the U.S. Army. What SureFire fails
17 to explain, however, is that this competition involved an *old version* of AAC’s
18 silencer, one that used “spot welds” and did not employ the full, 360°
19 circumferential welding technology as used in the AAC M4-2000, Mod 08
20 suppressor shown in the advertisement at issue in this case. (Silvers Decl. at
21 ¶ 13.) This 2006 competition is therefore irrelevant to SureFire’s claims of
22 equivalent or superior durability.
23
24

1 Not only has SureFire failed to meet its burden to show that its suppressor
2 is as durable or more so than AAC’s newly redesigned suppressor featured in
3 the advertisement, it simply could not do so. According to AAC’s testing of
4 both units, SureFire’s suppressor failed after only 580 rounds, while AAC has
5 been unable to cause a failure of its M4-2000, Mod 08 suppressor featured in the
6 advertisement despite firing up to 960 rounds under the same conditions.
7 (Brittingham Decl. at ¶¶ 11-13.)
8

9
10 **B. Surefire Has Shown No Harm**

11 Surefire offers only the most speculative allegations of irreparable harm,
12 relying again on the unsupportable conclusion that a consumer will recognize
13 the failed suppressor core on the left side of the advertisement as SureFire’s.
14 Mr. Dueck claims in his declaration that the advertisement will cause SureFire
15 reputational harm (Dueck Decl. ¶¶ 22-23), but these claims are simply irrelevant
16 unless SureFire can establish that the advertisement makes a “direct
17 comparison” to SureFire. *See CKE Rest. Inc. v. Jack in the Box, Inc.*, 494 F.
18 Supp. 2d 1139, 1145 (C.D. Cal. 2007) (denying preliminary injunction in
19 absence of a “direct comparison” in advertisement to plaintiff).
20

21 In *CKE Rest.*, this court denied a preliminary injunction where the
22 advertisement in question failed to refer to the plaintiff by name, but instead said
23 “our competitor’s product.” *Id.* “The injury in cases involving non-comparative
24

1 statements ‘accrue[] equally to all competitors; none is more likely to suffer
2 from the offending broadcasts than any other.’” *Id.* (quoting *McNeilab, Inc. v.*
3 *Am. Home Products Corp.*, 848 F.2d 34, 38 (2nd Cir. 1988)).

4 Thus, SureFire is required to offer “some indication of actual injury and
5 causation” to satisfy Lanham Act standing requirements and to ensure its injury
6 is not speculative. *CKE Rest.*, 494 F. Supp. 2d at 1146 (quoting *McNeilab*, 848
7 F.2d at 38). With only speculation about its supposed injury, SureFire is not
8 entitled to an injunction.
9

10
11 **C. Balancing Harm and Likelihood of Success, SureFire is not
12 Entitled to an Injunction**

13 Given that SureFire has been unable to establish a way that it could
14 succeed on the merits of its claim, no amount of irreparable injury would
15 warrant an injunction on these facts. *See Big Country Foods*, 868 F.2d at 1088.
16 Even in cases where a modest showing on likelihood of success has been made,
17 a very strong showing of irreparable injury is required. For example, where a
18 Plaintiff seeking preliminary injunction only succeeds in establishing that
19 “serious questions” exist about the merits, it must meet the more difficult test of
20 showing that “the balance of hardships tips sharply in favor of the moving
21 party.” *Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 840 (9th
22 Cir. 2001). SureFire could not meet such a burden. “In evaluating the balance
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1 of hardships a court must consider the impact granting or denying a motion for a
2 preliminary injunction will have on the respective enterprises.” *Int’l Jensen v.*
3 *Metrosound U.S.A.*, 4 F.3d 819, 827 (9th Cir. 1993) (considering the relative
4 size and strength of the parties).

5
6 An injunction, if entered, would have a much more harmful impact on
7 AAC than allowing the ad to simply continue running. AAC is small relative to
8 SureFire. (Brittingham Decl. at ¶ 13.) An injunction would deprive AAC of
9 advertising and marketing its newly-improved silencer in the manner it has
10 deemed most effective. Further, this is a new product for AAC, and one of
11 AAC’s most important products. An abrupt removal of the advertisement could
12 harm AAC’s fledgling product launch and raise questions about the continued
13 viability of the product among AAC’s most loyal customers. By contrast,
14 SureFire’s primary line of business is the manufacture and sale of flashlights.
15 (*Id.*) Suppressors make up only between one percent and five percent of
16 SureFire’s business. (*Id.*) The impact of an injunction on suppressor advertising
17 would harm AAC greatly because this is a core product for AAC.
18
19

20 **D. The Public Interest favors AAC**

21 It is in the interest of the public to have complete information about
22 AAC’s new products. AAC sells primarily to the military, including to select
23 law enforcement agencies. It is paramount that they have access to the best
24

1 products available. Suppressing the truth about the superior durability of the
2 suppressors available from AAC harms the troops and the public interest.

3
4 **V. CONCLUSION**

5 SureFire has not shown it is likely to succeed on the merits, nor has it
6 shown anything besides speculation on the issue of harm. The balance of these
7 factors weighs strongly against the drastic and extraordinary remedy of a
8 preliminary injunction. SureFire's motion should be denied.

9 DATED: March 9, 2009

By s/ Mark P. Walters

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CERTIFICATE OF SERVICE

I, Marlon R. Muñoz, hereby certify that on March 9, 2009, I caused the foregoing **ADVANCED ARMAMENT CORP.’S OPPOSITION TO SUREFIRE’S MOTION FOR PRELIMINARY INJUNCTION** to be served on the following parties as indicated below:

Jonathan Hangartner, Esq. X-Patents, APC 5670 La Jolla Blvd. La Jolla, CA 92037 <i>Attorneys for Plaintiff</i>	<input type="checkbox"/> By United States Mail <input type="checkbox"/> By Legal Messenger <input checked="" type="checkbox"/> By Electronic CM/ECF <input type="checkbox"/> By Overnight Express Mail <input type="checkbox"/> By Facsimile <input type="checkbox"/> By Email [by agreement of counsel]
--	--

DATED: March 9, 2009

s/ Marlon R. Muñoz
For David K. Tellekson (*pro hac vice*)
Mark P. Walters (*pro hac vice*)
DARBY & DARBY P.C.