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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

TASER INTERNATIONAL, INC.,  
  
Plaintiff,  
  
v.  
  
STINGER SYSTEMS, *et al.*,  
  
Defendants.

Case No. 2:09-cv-289-MMD-PAL

ORDER

(Defendants’ Joint Motion for Partial  
Summary Judgment – dkt. no. 217;  
Taser’s Motion for Rule 56(d) Relief  
– dkt. no. 223)

Before this Court are Defendants’ Joint Motion for Partial Summary Judgment (dkt. no. 217) and Plaintiff’s Motion for Rule 56(d) Relief (dkt. no. 223).

**I. BACKGROUND**

**A. Parties**

Plaintiff TASER International (hereinafter “TASER”), a publicly-traded company, develops numerous technologies for use by law enforcement, military, private security agencies, and consumers. It is most well-known for its TASER Electronic Control Device (“ECD”) product line, a weapon that delivers electrical current to a subject, like a “stun gun,” causing temporary incapacitation. Unlike a stun gun, however, TASER’s ECDs can fire small probes that attach to a subject and allow a user to temporarily incapacitate a subject from a distance. TASER has experienced significant success marketing its ECDs.

Defendant Stinger Systems (“Stinger”) is a former publically traded company that has since sold its assets to Karbon Arms, Inc. It produced a competing ECD. Defendant

1 Robert Gruder (“Gruder”) was Stinger’s CEO during the time period pertinent to this  
2 litigation. Defendant James F. McNulty, Jr. (“McNulty”), an attorney licensed to practice  
3 law in California, sold patents and molds to Stinger in exchange for shares of Stinger  
4 stock. TASER alleges that with Gruder’s approval, McNulty drafted misleading press  
5 releases for Stinger that negatively affected TASER’s stock value.

6 Bestex Company (“Bestex”) is a privately held company that distributes traditional  
7 stun guns, or stun batons, in addition to other “self-protection products.” Yong Su Park  
8 owns Bestex. Defendant McNulty also allegedly drafted press releases for Bestex, and  
9 has represented and counseled Bestex *pro bono* in previous matters. Plaintiff’s Second  
10 Amended Complaint alleges that McNulty authored press releases and other documents  
11 issued by Stinger and Bestex with Gruder’s assistance and/or approval that attempted  
12 to, and succeeded in, damaging TASER by manipulating TASER and Stinger’s stock  
13 prices. Plaintiff alleges that TASER was damaged by the misleading information when  
14 investors “shorted” TASER stock due to the artificially depressed share price, causing  
15 investors to be more hesitant to infuse capital into the company. Plaintiff additionally  
16 alleges that McNulty owned shares in Stinger and Law Enforcement Associates (“LEA”),  
17 a publically traded company that produces and sells surveillance equipment for law  
18 enforcement agencies, when he authored the misleading press releases.

19 **B. Facts**

20 TASER’s case revolves around the drafting and publishing of a series of allegedly  
21 misleading and/or false press releases by Bestex and the Defendants that TASER  
22 claims were designed to devalue its stock and harm its reputation. TASER alleges that  
23 McNulty was a central player in this scheme, creating and drafting the releases and  
24 approaching LEA about partnering to engage in similar conduct.

25 1. May 21, 2007 release (concerning Arizona litigation)

26 On January 5, 2007, TASER brought an action in the District of Arizona against  
27 Stinger claiming patent infringement, patent false marking, and Lanham Act false  
28 advertising claims (“Arizona litigation”). In addition to the patent claims, TASER brought

1 Lanham Act false advertising claims alleging that various misleading and/or false  
2 product-to-product comparisons were made on Stinger’s website and communicated by  
3 a Stinger agent to a law enforcement official. Neither Gruder nor McNulty were parties  
4 to that lawsuit, but McNulty served as Stinger’s counsel at the time. On May 20, 2009,  
5 the parties filed a “Stipulation to Dismiss Claims Under the Lanham Act” wherein they  
6 voluntarily dismissed the Lanham Act claims for the purposes of “streamlining” the  
7 litigation, making note that “there has been no resolution of any factual or legal issue on  
8 the merits, and the dismissal of those claims should not be construed as an adjudication  
9 against or in favor of either party.” (See dkt. no. 217-C.) The Court signed the  
10 stipulation, and included that same language. (Dkt. no. 217-D.) The case ended in a  
11 finding that Stinger infringed one of TASER’s patents resulting in a permanent injunction  
12 enjoining Stinger from producing an infringing ECD gun. (See dkt. no. 217-E.) Final  
13 judgment was entered on August 27, 2010. (*Id.*)

14 TASER alleges that a press release published by Stinger involving both McNulty  
15 and Gruder misled consumers about the nature of the Arizona litigation. On May 21,  
16 2007, Judge Murguia, the presiding judge of the Arizona litigation, entered a protective  
17 order in the case. On May 31, 2007, Stinger issued an allegedly misleading release  
18 concerning this protective order that TASER claims caused a \$40,000,000 loss in  
19 TASER market capital resulting from a drop in stock price.

20 2. January 9-11, 2008 releases (concerning patent reexamination)

21 TASER further alleges that a series of press releases published in January 2008  
22 similarly damaged TASER. On January 9, 2008, Stinger issued a press release  
23 concerning documents it filed with the United States Patent and Trademark Office to  
24 have one of Taser’s patents reexamined. TASER alleges the January 9 release was  
25 misleading. On January 10, 2008, Stinger issued another allegedly misleading release  
26 concerning an independent firm’s analysis of the patent reexamination documents  
27 publicized in the January 9, 2008, release. On January 11, 2008, Stinger issued a third  
28 release in which it commented on the controversy in allegedly misleading ways.

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3. April 24, 2008, press release and September 6, 2008, email (concerning Stinger lawsuit)

On April 28, 2008, Stinger filed a lawsuit against TASER in the District of Arizona that TASER alleges was vexatious and served as the basis for other misleading press releases. See *Stinger Systems, Inc. v. TASER Int'l*, No. 08-747 (D. Ariz. filed Apr. 28, 2008) (“Stinger lawsuit”). The lawsuit alleged false advertising, unfair competition, and injurious falsehood. The complaint concerned TASER’s circulation of a study conducted by the National Institute of Justice (“NIJ”), the research, development, and evaluation arm of the United States Department of Justice. Stinger accused TASER of misleading consumers about the nature of the report. The lawsuit was filed on April 18, 2008, but TASER alleges that Stinger waited to announce the suit until April 24, 2008, the same day that TASER released its quarterly earnings. According to TASER, the April 24, 2008, press release announcing the lawsuit was misleading because the suit itself was meritless and because Stinger had no intention of prosecuting the suit. Stinger never served TASER, and voluntarily dismissed the lawsuit after the service cutoff date passed and after an order to show cause was issued against Stinger. TASER alleges that the Stinger lawsuit was intended merely to facilitate the misleading press release.

TASER also alleges that a September 6, 2008, email sent by Stinger Regional Sales Director Kevin Scholz, entitled “Stinger Sues Taser,” included misleading text concerning the Stinger lawsuit and a misleading attachment (hereinafter “the Stinger packet”). TASER further alleges that Stinger issued a press release on February 21, 2008, before the filing of the Stinger lawsuit that included similar misleading statements concerning the NIJ report.

4. January 17, 2008, press release (concerning Bestex)

TASER alleges that in January 2007, McNulty approached LEA President Paul Feldman (“Feldman”) on behalf of Bestex to propose a sham agreement between Bestex and LEA to facilitate the publication of press releases that would drive up LEA stock and hurt TASER’s value. TASER provided transcripts of recorded conversations between

1 Feldman and McNulty describing this proposal, including how McNulty planned to use  
2 strategic lawsuits to damage TASER and its stock. On February 9, 2007, LEA wrote to  
3 McNulty rebuffing McNulty and refusing to enter into the arrangement.

4 Almost a year later on January 17, 2008, TASER alleges that McNulty issued a  
5 press release on behalf of Bestex that TASER claims misled the public into believing that  
6 Bestex and LEA had discussed and entered into an agreement. TASER alleges that  
7 McNulty admitted authoring this release to try to push up LEA stock.

8 5. Other press releases

9 TASER alleges that a number of other similarly misleading press releases were  
10 issued by Defendants. These were published on June 9, 2008, and October 26, 2009,  
11 and included allegedly misleading information comparing Stinger products with TASER  
12 products in a manner intended to injure and devalue TASER.

13 **C. This Action**

14 TASER filed its original Complaint in this case on February 11, 2009, against  
15 Stinger, McNulty, and Gruder, alleging 1) violations of the Securities Exchange Act of  
16 1932, 15 U.S.C. § 78j(b); 2) trade libel/defamation; 3) unfair competition in violation of  
17 the Lanham Act, 15 U.S.C. § 1125(a); 4) abuse of process; and 5) deceptive trade  
18 practices. Upon Defendants' motion, this Court dismissed the Securities Exchange Act  
19 claim. TASER filed its Second Amended Complaint on July 28, 2010, alleging all but  
20 one of the same claims, replacing the Securities Exchange Act claim with a civil  
21 conspiracy claim. This Court granted summary judgment to Defendants on the abuse of  
22 process and civil conspiracy claims. (See Dkt. no. 213.)

23 **II. LEGAL STANDARD**

24 Although motions for partial summary judgment are common, Rule 56 of the  
25 Federal Rules of Civil Procedure, which governs summary judgment, does not contain  
26 an explicit procedure entitled "partial summary judgment." As with a motion under Rule  
27 56(c), partial summary judgment is proper "if the pleadings, depositions, answers to  
28 interrogatories, and admissions on file, together with the affidavits, if any, show that

1 there is no genuine issue as to any material fact and that the moving party is entitled to  
2 judgment as a matter of law.” Fed. R. Civ. P. 56(c).

3 The purpose of summary judgment is to avoid unnecessary trials when there is no  
4 dispute as to the facts before the court. *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18  
5 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the pleadings,  
6 the discovery and disclosure materials on file, and any affidavits “show there is no  
7 genuine issue as to any material fact and that the movant is entitled to judgment as a  
8 matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is “genuine”  
9 if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for  
10 the nonmoving party and a dispute is “material” if it could affect the outcome of the suit  
11 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).  
12 Where reasonable minds could differ on the material facts at issue, however, summary  
13 judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.  
14 1995), *cert. denied*, 516 U.S. 1171 (1996). “The amount of evidence necessary to raise  
15 a genuine issue of material fact is enough ‘to require a jury or judge to resolve the  
16 parties’ differing versions of the truth at trial.’” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897,  
17 902 (9th Cir. 1983) (quoting *First Nat’l Bank v. Cities Service Co.*, 391 U.S. 253, 288-89  
18 (1968)). In evaluating a summary judgment motion, a court views all facts and draws all  
19 inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v.*  
20 *Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

21 The moving party bears the burden of showing that there are no genuine issues  
22 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In  
23 order to carry its burden of production, the moving party must either produce evidence  
24 negating an essential element of the nonmoving party’s claim or defense or show that  
25 the nonmoving party does not have enough evidence of an essential element to carry its  
26 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210  
27 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56’s  
28 requirements, the burden shifts to the party resisting the motion to “set forth specific

1 facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The  
2 nonmoving party “may not rely on denials in the pleadings but must produce specific  
3 evidence, through affidavits or admissible discovery material, to show that the dispute  
4 exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do  
5 more than simply show that there is some metaphysical doubt as to the material facts.”  
6 *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted). “The  
7 mere existence of a scintilla of evidence in support of the plaintiff’s position will be  
8 insufficient.” *Anderson*, 477 U.S. at 252.

9 **III. DISCUSSION**

10 **A. Joint Motion for Partial Summary Judgment (dkt. no. 217)**

11 Defendants’ Joint Motion seeks judgment on the following six<sup>1</sup> issues:

- 12 1. TASER’s standing to sue for violation of 15 U.S.C. § 78j
- 13 2. Claims preclusion
- 14 3. Judicial estoppel
- 15 4. McNulty’s joint and several liability for violations of 28 U.S.C. § 1125(a)  
16 by Stinger
- 17 5. TASER’s failure to establish Lanham Act violation for Bestex’s January  
18 17, 2008, press release
- 19 6. TASER’s failure to establish Lanham Act violation for Stinger’s April 24,  
20 2008, press release and September 6, 2008, email and attachment

21 The Court will address each issue in turn below.

22 1. TASER’s 15 U.S.C. § 78j standing

23 Defendants argue that TASER lacks standing to bring a 15 U.S.C. § 78j securities  
24 fraud action. This Court previously dismissed this count on March 25, 2012. (See dkt.  
25 no. 36.) On June 1, 2010, TASER sought to include it again in its Motion to Amend, (dkt.  
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27 <sup>1</sup> Defendants initially sought partial summary judgment as to a seventh issue –  
28 TASER’s standing to sue for deceptive trade practices – but withdrew their request in  
their Reply. The Court will not address it.



1 no. 57), and the Court rebuffed TASER again for attempting to bring it. (See dkt. no. 86  
2 at 2: 8-10). After filing its Second Amended Complaint, TASER erroneously retained in  
3 the document caption a reference to this original securities fraud claim. Both parties  
4 agree that no securities fraud claim exists per this Court's order, so summary judgment  
5 as to this claim is denied as moot.<sup>2</sup>

6 2. Claim preclusion

7 Defendants argue that TASER's trade libel and deceptive trade practices claims  
8 are precluded under the doctrine of claim preclusion. On May 20, 2009, Stinger and  
9 TASER filed a "Stipulation to Dismiss Claims Under the Lanham Act" in the Arizona  
10 litigation wherein they voluntarily dismissed Lanham act claims for the purposes of  
11 "streamlining" the litigation, making note that "there has been no resolution of any factual  
12 or legal issue on the merits, and the dismissal of those claims should not be construed  
13 as an adjudication against or in favor of either party." (See Dkt. no. 217-C.) Defendants  
14 argue that TASER's 2007 suit filed in the District of Arizona precludes this suit by virtue  
15 of the stipulated agreement to dismiss the claims. TASER counters by arguing that no  
16 identity of the claims exists and that no final judgment on the merits was entered in the  
17 previous Arizona case.

18 "The doctrine of res judicata provides that a final judgment on the merits bars  
19 further claims by parties or their privies based on the same cause of action." *In re*  
20 *Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997) (quoting *Montana v. United States*, 440  
21 U.S. 147, 153 (1979)). Claim preclusion has three elements: 1) an identity of the claims,  
22 2) a final judgment on the merits, and 3) privity between the parties. *Headwaters, Inc. v.*  
23 *U.S. Forest Serv.*, 399 F.3d 1047, 1052 (9th Cir. 2005).

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27 <sup>2</sup> Defendants seek summary judgment on this issue rather than an order denying  
28 the claim as moot, yet no § 78j claim has survived for this Court to adjudicate at the  
summary judgment stage. The proper course of action is to deny summary judgment as  
moot for the claim's erroneous inclusion in the Second Amended Complaint's caption.



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a. *Identity of claims*

In determining whether there is an identity of claims, the Ninth Circuit considers four factors:

Whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. The last of these criteria is the most important.

*Headwaters*, 399 F.3d at 1052 (quoting *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982); see also *U.S. v. Tohono O’Odham Nation*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1723, 1730 (2011) (“The now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on *factual overlap*”) (emphasis added).

There exists no identity of facts between the Arizona litigation and this one. The Arizona case arose from alleged patent infringement on three patents, false advertising under 15 U.S.C. § 1125(a) relating to product-to-product comparisons made by Stinger and Stinger’s agent, and patent false marketing. The facts that gave rise to this litigation revolve around a series of press releases published between May 31, 2007, and October 26, 2009, actions that occurred after the filing of the Arizona lawsuit.<sup>3</sup> The case before this Court concerns representations made by Defendants in a series of press releases that were not the subject of the prior suits. There is no overlapping “transactional nucleus of facts,” see *Headwater*, 399 F.3d at 1052, and the differing types of claims preclude a finding of claim preclusion. TASER does not bring any patent

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<sup>3</sup> Gruder’s declaration attached to the Joint Motion suggests that the settlement in the Arizona litigation concerned claims revolving around the same press releases that are the subject of this litigation. The complaint in the record demonstrates that the press releases were not the subject of the Arizona litigation. Defendants have not provided undisputed evidence that the press releases became an issue as the Arizona litigation proceeded.

1 infringement claims. TASER here alleges unfair competition under § 1125(a)(1)(A), but  
2 alleged false advertising under § 1125(a)(1)(B) in the Arizona litigation.<sup>4</sup>

3 Putting aside the obviously different patent infringement issues in the Arizona  
4 case, it is true that in both suits TASER fundamentally complains about unfair business  
5 practices. But such a general commonality between the suits is not enough to preclude  
6 TASER from bringing an additional suit, for that would, as TASER rightly points out,  
7 secure in Defendants an indefinite right into the future to engage in myriad different  
8 forms of unfair business practices and Lanham Act violations. That surely cannot be the  
9 law.

10 For these reasons, no identity of the claims exists.

11 *b. Final judgment on the merits*

12 In addition, TASER argues there was no final judgment on the merits,  
13 notwithstanding Defendants' citation to *Headwaters* for the proposition that a stipulated  
14 dismissal with prejudice may preclude a party from reasserting the same claims in a  
15 subsequent action in the same court. Preclusion requires that the prior judgment  
16 "actually passes directly on the substance of a particular claim." *Semtec Int'l, Inc. v.*  
17 *Lockheed Martin Corp.*, 531 U.S. 497, 501-02 (2001).

18 Defendants' argument is inapposite for the simple reason that it overlooks the  
19 plain, unambiguous language in the settlement agreement that the agreement not have  
20 claim preclusive effect. See *U.S. ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 911  
21 (9th Cir. 1998) ("A settlement can limit the scope of the preclusive effect of a dismissal  
22 with prejudice by its terms."). The agreement notes that both parties maintain the merits

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26 <sup>4</sup> Defendant Gruder in his declaration says that the settlement negotiations in the  
27 Arizona litigation concerned Lanham Act unfair competition claims (as opposed to false  
28 advertising claims). This characterization conflicts with the record before this Court.  
Specifically, TASER's Arizona complaint labeled the relevant Counts 4 and 5 as false  
advertising claims, whereas the complaint in this case is captioned as bringing unfair  
competition claims.

1 of their respective claims, but “wish to streamline the litigation.” (See *dk.* no. 217-C at  
2 ¶¶ 4-5.) The settlement concludes with following paragraph:

3 TASER and Stinger stipulate and agree that although the Lanham Act  
4 claims in the case should be dismissed with prejudice, there has been no  
5 resolution of any factual or legal issue on the merits, and the dismissal of  
6 those claims should not be construed as an adjudication against or in favor  
7 of either party.

8 (*Id.* at ¶ 8.) This paragraph is expressly intended to preclude the application of res  
9 *judicata*, since the parties clearly intended that no adjudication on the merits (and thus,  
10 no final judgment) was made. Defendants argue in their Reply that such language is  
11 standard and included solely to indicate that neither party admits culpability. Were that  
12 argument tenable, then paragraphs 4 and 5 would be rendered superfluous. See, e.g.,  
13 *ELM Retirement Center, LP v. Callaway*, 246 P.3d 938, 942 (Ariz. Ct. App. 2010) (“In  
14 interpreting a contract, we do not construe one term in a way that renders another  
15 meaningless.”).

16 Indeed, Defendants cite to *Epic Metals Corp. v. H. H. Robertson Co.*, 870 F.2d  
17 1574, 1576 (Fed. Cir. 1989) for the proposition that parties must “expressly reserve in a  
18 consent judgment the right to relitigate some or all issues that would otherwise have  
19 been barred,” which is precisely what happened here. This would be an altogether  
20 different case without this express language, and Defendants might then stand on a  
21 different footing in making their preclusion argument. Defendants also rely on *Reyn’s*  
22 *Pasta Bella LLV v. Visa USA, Inc.*, 442 F.3d 741, 748 (9th Cir. 2006) for the rule that a  
23 court’s approval of a settlement constitutes a final judgment on the merits for claim  
24 preclusion purposes even as to untried factually related claims that the court has not  
25 actually passed upon. *Reyn’s Pasta Bella* is of no use to Defendants, however, since  
26 the case involved the very same set of allegedly unlawful financial conduct that gave rise  
27 to both cases. Here, as previously explained, the factual predicates are altogether  
28 different, and cannot be the basis for the application of preclusion doctrine.

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1 c. *Accord and satisfaction*

2 Defendants further argue that the stipulated dismissal constituted an accord and  
3 satisfaction that serves to clear any obligations and liabilities between the two parties.

4 To establish an accord and satisfaction, Defendants must demonstrate four  
5 elements: “(1) a proper subject matter; (2) competent parties; (3) an assent or meeting of  
6 the minds of the parties; and (4) consideration.” *Flagel v. Sw. Clinical Physiatrists, P.C.*,  
7 755 P.2d 1184, 1188 (Ariz. 1988).

8 Even assuming that the other three requirements of a proper accord and  
9 satisfaction are met, the inclusion of the express language discussed above destroys  
10 whatever claim Defendants have to the existence of a meeting of the minds that conflicts  
11 with this express language. *See, e.g., Vinnell Corp. v. State ex rel. Bob Skousen*  
12 *Contractor, Inc.*, 505 P.2d 547, 549 (Ariz. 1973) (a court “will not disregard [the] plain  
13 and definite meaning [of a contract] and substitute another that is less convincing”);  
14 *Ringle v. Bruton*, 86 P.3d 1032, 1039 (Nev. 2004) (“[W]hen a contract is clear,  
15 unambiguous, and complete, its terms must be given their plain meaning and the  
16 contract must be enforced as written; the court may not admit any other evidence of the  
17 parties’ intent because the contract expresses their intent”). No accord and satisfaction  
18 existed since the express language of the settlement forecloses the application of claim  
19 preclusion.

20 3. Judicial estoppel

21 Defendants argue that TASER is estopped from claiming injuries from the  
22 February 21, 2008, release, since TASER claimed in the Arizona litigation that the losses  
23 it sought in this suit were the exclusive result of alleged patent infringement and  
24 damages from the January 9, 10, and 11, 2008 press releases. TASER counters by  
25 noting that Defendants’ argument is based on an expert damages report filed in the  
26 Arizona litigation which was not adopted by the Court and which did not represent  
27 TASER’s position.

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1 “Judicial estoppel is an equitable doctrine that precludes a party from gaining an  
2 advantage by asserting one position, and then later seeking an advantage by taking a  
3 clearly inconsistent position.” *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778,  
4 782 (9th Cir. 2001). In determining whether to apply the doctrine of judicial estoppel, a  
5 court may apply three factors outlined by the Supreme Court in *New Hampshire v.*  
6 *Maine*, 532 U.S. 742, 750 (2001). First, “a party’s later position must be ‘clearly  
7 inconsistent’ with its earlier position.” *Id.* at 750. Second, courts often inquire whether  
8 the party achieved success in the prior proceeding, as “judicial acceptance of an  
9 inconsistent position in a later proceeding would create the perception that either the first  
10 or the second court was misled.” *Id.* (internal quotations and citations omitted). Third,  
11 courts consider whether, if not estopped, “the party seeking to assert an inconsistent  
12 position would derive an unfair advantage or impose an unfair detriment on the other  
13 party.” *Id.* at 751. The Ninth Circuit has restricted judicial estoppel to cases where the  
14 court relied on the party’s previous inconsistent position. *See Hamilton*, 270 F.3d at 783.

15 First, it is not clear that TASER’s position on damages in the Arizona lawsuit is  
16 clearly inconsistent with the case at bar. Defendants’ arguments are based on the  
17 expert damages report which was not adopted by the Court, and which did not represent  
18 any position adopted by TASER. While the report offered its analysis of potential  
19 damages incurred by TASER on the three days in which some of the challenged press  
20 releases were published, the existence of this expert report does not conflict with any  
21 positions taken by TASER here. As explained in Part III.A.2, not only are the claims in  
22 the two cases different, the factual predicates that underlie the claims are different. The  
23 Arizona litigation involved patent infringement and false advertising on a website, while  
24 this suit involves allegedly misleading press releases. These are not the same factual  
25 predicates, so failure to bring a claim in one does not estop TASER from bringing a claim  
26 for the other. For this reason, Defendants’ citation to *New Hampshire* is unavailing.  
27 *New Hampshire* involved the application of judicial estoppel on a water boundary case  
28 that involved fundamentally the same dispute as the original case. The state of New

1 Hampshire sought to redefine its boundaries as against Maine, directly contrary to a prior  
2 settlement agreement between the two states in place over twenty years ago. Here, the  
3 cases are fundamentally distinct, involve different sets of challenged acts, and involve  
4 different legal rights.

5 Second, TASER would not retain an unfair advantage by pursuing its claims here.  
6 The Arizona litigation concerned patent infringement and false advertising, and this  
7 litigation concerns unfair competition. Failing to allow TASER to present evidence in  
8 support of the latter would prejudice TASER's right to pursue civil violations against  
9 Defendants independent of its prior patent victory. For these reasons, it is inappropriate  
10 to apply judicial estoppel to bar TASER from pursuing its suit.

11 4. McNulty's joint and several liability

12 Defendants argue that McNulty is not jointly and severally liable for any 1125(a)  
13 violations on the part of Stinger's, but they again misconstrue the law. As discussed  
14 above, "a corporate officer's active participation in infringing activity is sufficient to  
15 subject him or her to joint and several liability" for Lanham Act violations. *See Hair*  
16 *Assocs.*, 987 F. Supp. at 590-91; *see, e.g., Transgo, Inc. v. Ajac Transmission Parts*  
17 *Corp.*, 768 F.2d 1001, 1023 (9th Cir. 1985) (affirming award of joint and several liability),  
18 *cert. denied*, 474 U.S. 1059 (1986); *PepsiCo, Inc. v. IRIE Motivations, Inc.*, 2008 WL  
19 5732153, at \*1 (C.D. Cal. Dec. 29, 2008) (awarding joint and several liability for Lanham  
20 Act violations); *see also* 4 McCarthy on Trademarks and Unfair Competition § 25:23 (4th  
21 ed. 2007) ("Since trademark infringement and unfair competition are torts, the doctrine of  
22 joint tortfeasors is applicable."). So long as there is some showing made that McNulty  
23 was personally involved in the challenged conduct, Defendants' argument fails as a  
24 matter law. Although TASER has not deposed McNulty to determine his exact  
25 involvement with Stinger Systems – for example, whether he directly authored the  
26 challenged press releases, what his exact motivations behind the press releases were,  
27 whether he had authority over the publication of the press releases, and what influence  
28 he had within Stinger Systems – Defendants have not met their burden of showing, as a

1 matter of law, that McNulty had no personal involvement in the creation, drafting, and  
2 publication of the releases.

3 5. Lanham Act claim for Bestex January 17, 2008, release

4 Next, Defendants seek summary judgment on TASER's Lanham Act claim for the  
5 January 17, 2008, Bestex release arguing that, in the absence of naming Bestex, no  
6 claim can proceed against McNulty, Gruder, or Stinger. Defendants note that TASER  
7 does not show that Stinger or Gruder had anything to do with the release, or that  
8 McNulty himself published the release. Defendants additionally argue that TASER does  
9 not demonstrate that Gruder or McNulty are direct competitors of TASER, which is  
10 required to state a Lanham Act violation.

11 A principal may be held liable for infringing acts of an agent acting with actual or  
12 apparent authority under the Lanham Act. *American Tel. and Tel. Co. v. Winback and*  
13 *Conserve Program, Inc.*, 42 F.3d 1421, 1429-34 (3d Cir. 1994) (“[T]he Lanham Act is  
14 derived generally and purposefully from the common law tort of unfair competition, and  
15 its language parallels the protections afforded by state common law and statutory  
16 torts.”), *cert. denied*, 514 U.S. 1103 (1995). “[A] corporate officer’s active participation in  
17 infringing activity is sufficient to subject him or her to joint and several liability for  
18 trademark infringement with the corporation.” *Hair Assocs., Inc. v. National Hair*  
19 *Replacement Servs., Inc.*, 987 F. Supp. 569, 590-91 (W.D. Mich. 1997). “[P]ersonal  
20 liability for trademark infringement and unfair competition is established if the officer is a  
21 moving, active conscious force behind [the defendant corporation’s] infringement.”  
22 *Bambu Sales, Inc. v. Sultana Crackers, Inc.*, 683 F. Supp. 899, 913 (E.D.N.Y. 1988)  
23 (internal quotations omitted).

24 TASER has not yet demonstrated that Stinger or Gruder were involved in the  
25 Bestex release, and the evidence of Stinger’s involvement in this release is either  
26 inconclusive or nonexistent. Given, however, Plaintiff’s legitimate concerns about  
27 inadequate discovery – for example, no deposition has been taken of either Gruder or

28 ///



1 Park – a ruling on the issue of Gruder or Stinger’s liability for the Bestex release would  
2 be premature, and is barred by Rule 56(d).

3 TASER does, however, provide sufficient evidence of McNulty’s involvement in  
4 the Bestex release to create a material issue of fact to warrant denial of summary  
5 judgment. Defendants, citing to cases including *Halicki v. United Artists*  
6 *Communications, Inc.*, 812 F.2d 1213 (9th Cir. 1987), ask this Court to strike Plaintiff’s  
7 unfair competition claim as to this release against both individual defendants since  
8 neither are direct competitors of TASER’s. While it is true that the Ninth Circuit in *Halicki*  
9 refused to “mutilate” the Lanham Act by expanding unfair competition actions to allow  
10 those against non-competitors (in that case, a producer of a movie against a theater  
11 company), Defendants pick at straws by asking this Court to rule that the individual  
12 defendants must be direct competitors to TASER. See *Waits v. Frito-Lay, Inc.*, 978 F.2d  
13 1093, 1109 (9th Cir. 1992) (noting that the plaintiff in *Halicki* “lacked a discernibly  
14 competitive interest: he and the distributor were not independent actors in the  
15 marketplace, but rather had a contractual relationship in which the distributor agreed to  
16 act in the marketplace on the plaintiff’s behalf.”). A showing that either McNulty or  
17 Gruder acted as agents of the infringing company (in this case, Bestex) and a showing of  
18 “active participation” in or a “moving, active conscious force behind” infringing activity,  
19 see *Hair Assocs., Inc.*, 987 F. Supp. at 590-91, suffices to hold them liable for Lanham  
20 Act unfair competition. Indeed, Defendants argued in their Joint Partial Motion for  
21 Summary Judgment as to the civil conspiracy claim that both Gruder and McNulty were  
22 agents of Stinger, thereby triggering the intra-corporate conspiracy doctrine. (See dkt.  
23 no. 132 at 6.) Bestex need not be named in order for its agent to be personally liable.  
24 See, e.g., *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978) (explaining  
25 that individual corporate officer may be held liable for unfair infringement when he is an  
26 “actual participant” in the tort); *Solo Cup Co. v. Paper Machinery Corp.*, 359 F.2d 754,  
27 760 (7th Cir. 1966) (“the individual defendant cannot hide behind the corporate veil” in  
28 an unfair infringement action); *Lahr v. Adell Chemical Co.*, 300 F.2d 256, 260 (1st Cir.

1 1962) (same); *Hair Associates*, 987 F. Supp. at 590-591 (same); *Bambu Sales*, 683 F.  
2 Supp. at 913 (same).<sup>5</sup>

3 With respect to McNulty, the Court holds that Defendants have not met their  
4 burden on summary judgment. Notwithstanding whatever additional discovery Plaintiff  
5 might need from McNulty, the record before the Court demonstrates that, at the very  
6 least, McNulty was personally involved in the Bestex release. An email written by  
7 McNulty to the PR Wire Service with the entire release demonstrates some level of  
8 personal participation in the publication of the email. This fact, alongside TASER's  
9 general demonstration of McNulty's efforts to propose, write, and push the press release  
10 tactics, raises a genuine issue of material fact regarding how involved McNulty was in  
11 the creation and publication of the Bestex release. TASER need not demonstrate that  
12 McNulty published the release himself (though the aforementioned email is very close to  
13 actual publication). Defendants do not demonstrate as a matter of law that McNulty is  
14 free from § 1125(a) liability for the Bestex release.

15 6. Stinger's April 24, 2008, and September 6, 2008, publications

16 Finally, Defendants argue that TASER's Lanham Act claims surrounding Stinger's  
17 April 24, 2008, press release and September 6, 2008, email (both relating to the Stinger  
18 lawsuit that TASER claims was malicious) fail as a matter of law because TASER does  
19 not demonstrate that they were false or misleading. After considering the evidence  
20 available at this stage of the litigation, the Court cannot hold as a matter of law that the  
21 press releases and the Stinger packet were not false or misleading.

22 "The Lanham Act was intended to make actionable the deceptive and misleading  
23 use of marks and to protect persons engaged in commerce against unfair competition."  
24 *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767-68 (1992) (quoting 15 U.S.C. §  
25 1127). "Lanham Act Section 43(a) [codified as 15 U.S.C. § 1125(a)(1)] jurisprudence

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26  
27 <sup>5</sup> The fact that McNulty was not a paid employee is immaterial for this analysis,  
28 since he was, by all accounts, acting as an agent of Stinger in the course of his legal  
counsel and release writing.

1 recognizes two distinct protectable interests: protection against unfair competition in the  
2 form of an action for false advertising and protection against false association in the form  
3 of a lawsuit for false endorsement.” *Kournikova v. Gen. Media Commc’ns Inc.*, 278 F.  
4 Supp. 2d 1111, 1116-17 (C.D. Cal. 2003).

5 The prohibition on unfair competition under section 43 of the Lanham Act provides  
6 that

7 [a]ny person who, on or in connection with any goods or services, . . . uses  
8 in commerce any word, term, name, symbol, or device, or any combination  
9 thereof, or any false designation of origin, false or misleading description of  
10 fact, or false or misleading representation of fact, which—

11 (A) is likely to cause confusion, or to cause mistake, or to deceive as  
12 to the affiliation, connection, or association of such person with  
13 another person, or as to the origin, sponsorship, or approval of his  
14 or her goods, services, or commercial activities by another person....

15 \* \* \*

16 shall be liable in a civil action by any person who believes that he or she is  
17 or is likely to be damaged by such act.

18 15 U.S.C. § 1125(a)(1). “Section 43(a), 15 U.S.C. § 1125(a), is one of the few provisions  
19 [of the Act] that goes beyond trademark protection and addresses unfair competition.”  
20 *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1143 (9th Cir. 2008) (quoting  
21 *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 28 (2003)).

22 “To demonstrate falsity within the meaning of the Lanham Act, a plaintiff may  
23 show that the statement was literally false, either on its face or by necessary implication,  
24 or that the statement was literally true but likely to mislead or confuse consumers.”  
25 *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997). Even if  
26 the releases are literally false, the Lanham Act prohibits misleading, confusing, or  
27 deceptive advertisements. *Id.*

28 a. *April 24, 2008 (dkt. no. 95-17)*

The press release headline reads “TASER sued for false advertising, unfair  
competition and injurious falsehood.” It describes how the Stinger suit arises out of the  
distribution of the NIJ report that the release says was based on an older version of  
Stinger’s technology. The release includes quotations from the complaint’s allegations

1 that describe how TASER represented to these consumers that the report was up to  
2 date. The release also included allegedly misleading assessments of Stinger's newest  
3 technology as against TASER's.

4 The facts surrounding the institution of the Stinger lawsuit demonstrate at least a  
5 triable issue of fact as to whether the lawsuit was filed for the purpose of releasing  
6 misleading press statements. First, Stinger did not serve TASER. Second, the release  
7 does not provide adequate background into the nature of the NIJ report, who the NIJ is,  
8 or what the report said. Third, there is evidence in the record that Stinger and McNulty  
9 wanted to pursue misleading press releases as an avenue for devaluing TASER,  
10 thereby making it more likely that the lawsuit and the April 28, 2008, release were  
11 intended to mislead. Fourth, the telephone recordings suggest that McNulty  
12 contemplated vexatious litigation meant to drive down TASER stock.

13 Based on these facts, Defendants have not met their burden of demonstrating  
14 that no genuine issue of material facts exists as to whether the April 24, 2008, release  
15 was misleading. The mere fact that the Stinger lawsuit was indeed pending when the  
16 press release was distributed does not foreclose a Lanham Act claim. *See id.*

17 *b. Kevin Scholz email and Stinger Packet (dkt. nos. 95-15 and*  
18 *95-16)*

19 For the same reasons, there remains a genuine issue of material fact regarding  
20 whether the Scholz email and Stinger packet are misleading or deceptive. The email  
21 sent by Scholz discusses the lawsuit of TASER and includes within its attachment an  
22 almost verbatim copy of the April 24 press release. It additionally talks about TASER  
23 "masquerading" the NIJ report, claims there was collusion between the university  
24 conducting an independent test of TASER's products and TASER's Board of Advisors,  
25 and makes a number of other allegations against TASER. Given that the impetus of the  
26 email appears to be the Stinger lawsuit – the subject line read "Stinger Sues TASER" –  
27 Defendants cannot demonstrate as a matter of law that the Stinger packet email or  
28 attachment were not misleading, deceptive, or confusing.

1 Based on the foregoing, Defendants' Joint Motion for Partial Summary Judgment  
2 is denied.

3 **B. Motion for Rule 56(d) Relief (dkt no. 223)**

4 TASER seeks a ruling from this Court denying Defendants' Joint Motion on the  
5 ground that TASER has not had adequate opportunity to reap the fruits of discovery for  
6 the purposes of responding to the Motion. Defendants contend that Rule 56(d) relief is  
7 inappropriate because Plaintiff has all relevant information it needs to defend the Motion.

8 Under Fed. R. Civ. P. 56(d), if, in response to a summary judgment motion, "a  
9 nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present  
10 facts essential to justify its opposition," the Court may defer consideration of the motion,  
11 deny the motion, allow the parties time to complete additional discovery, or grant other  
12 appropriate relief. The party requesting additional time to conduct discovery to oppose  
13 summary judgment "must show: (1) it has set forth in affidavit form the specific facts it  
14 hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after  
15 facts are essential to oppose summary judgment." *Family Home & Fin. Ctr., Inc. v. Fed.*  
16 *Home Loan Mortgage Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). If the nonmovant does  
17 not satisfy these requirements, the Court may rule on summary judgment without  
18 granting additional discovery. *Id.* Rule 56(d) has been read as "requiring, rather than  
19 merely permitting, discovery 'where the nonmoving party has not had the opportunity to  
20 discover information that is essential to its opposition.'" *Metabolife Intern., Inc. v.*  
21 *Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (quoting *Anderson*, 477 U.S. at 250 n. 5).

22 First and foremost, because the Court denies summary judgment on the six  
23 issues discussed above, Taser's request for Rule 56(d) relief as to them is denied as  
24 moot.

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1 The following issues require consideration of evidence not available to the  
2 nonmovant, TASER, as they have to do with questions of Stinger and Gruder's role in  
3 the challenged conduct:

- 4 1. TASER's failure to establish Lanham Act violation for Bestex's January 17,  
5 2008, press release (with respect to Defendants Stinger and Gruder)
- 6 2. TASER's failure to establish Lanham Act violation for Stinger's April 24,  
7 2008, press release and September 6, 2008, email and attachment (with  
8 respect to Defendants Stinger and Gruder)


9 Given that TASER has not had the opportunity to depose Gruder and Yong Suk  
10 Park (see dkt. no. 264 at 5-6), TASER does not have at its disposal all of the facts  
11 necessary to adequately respond to the remaining issues. TASER's Rule 56(d) Motion  
12 as to these issues is granted.

13 **IV. CONCLUSION**

14 Accordingly, IT IS HEREBY ORDERED THAT Defendants' Joint Motion for Partial  
15 Summary Judgment (dkt. no. 217) is DENIED.

16 IT IS FURTHER ORDERED THAT Plaintiff's Motion for Rule 56(d) Relief (dkt. no.  
17 223) is GRANTED IN PART and DENIED IN PART.

18 DATED THIS 2<sup>nd</sup> day of August 2012.

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22 UNITED STATES DISTRICT JUDGE  
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