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18 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 19 COUNTY OF LOS ANGELES

20 MIA TRETТА, through her guardian ad  
 21 litem Tiffany Shepis-Tretta,

22 Plaintiff,

23 v.

24 TERRANCE J. OSMAN, an individual  
 a/k/a 1911builders.com; MAMI  
 25 MATSURA-BERHOW, an individual;  
 and DOES 1-50,

26 Defendants.

Case No. 20STCV48910

**PLAINTIFF'S OPPOSITION TO  
 DEFENDANT TERRANCE J.  
 OSMAN DBA 1911 BUILDERS'  
 DEMURRER TO PLAINTIFF'S  
 COMPLAINT**

Date: June 28, 2021  
 Time: 8:30 a.m.  
 Dept.: F-49

**Reservation No.: 66284714409**

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 Trial Date: Not vet assigned

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1 **I. INTRODUCTION**

2 Defendant Terrance J. Osman (“Defendant Seller”), operating as  
3 1911Builders.com, is in the business of selling online, to anybody with a credit card,  
4 build-it-yourself gun kits from which fully functioning, lethal firearms known as  
5 “ghost guns” can be quickly and easily assembled. (Compl. ¶ 43). Defendant Seller  
6 sells these ghost gun kits without taking any reasonable steps to prevent legally  
7 prohibited individuals from buying them. He sold one such kit for a ghost gun – so-  
8 named because they lack serial numbers and thus are difficult to trace – to Mark  
9 Berhow, a man prohibited by law from possessing firearms, for him to assemble at  
10 home. (*Id.* ¶ 4). Mr. Berhow’s sixteen-year-old son later took that firearm to his high  
11 school and used it to shoot Plaintiff Mia Tretta, then fifteen years-old, in the  
12 stomach, murder two of her friends, and wound two other children. (*Id.* ¶¶ 21-26).  
13 Plaintiff brings this suit to seek recompense for her injuries and put a halt to  
14 Defendant Seller’s dangerous and unlawful activity.

15 In his demurrer (the “Demurrer” or “Dem.”), Defendant Seller relies on several  
16 incorrect propositions of law, and raises factual disputes that, as a matter of black-  
17 letter law, are not cognizable at this stage. Defendant Seller makes two arguments:  
18 (1) his products do not meet the federal or state definition of “firearm” and therefore  
19 nothing he did was unlawful, and (2) he has immunity from liability for his actions  
20 pursuant to the Protection of Lawful Commerce in Arms Act (“PLCAA”), 15 U.S.C. §§  
21 7901-7903. Defendant Seller is legally and factually wrong on both counts.

22 Addressing the latter argument first, PLCAA protection does not apply here  
23 for the simple reason that Congress only granted such protection to firearms dealers  
24 who have a Federal Firearms License (“FFL”). (See 15 U.S.C. § 7903(6)(B).) As the  
25 Plaintiff alleged in her Complaint, Defendant Seller does not have an FFL in his  
26 personal capacity. (Compl. ¶ 14). In his Demurrer, Defendant Seller claims (without  
27 evidence) that he does, in fact, have an FFL; but that is merely a counter-assertion  
28

1 not cognizable at this stage.<sup>1</sup> (See, e.g., *Fremont Indemnity Co. v. Fremont General*  
2 *Corp.* (2007) 148 Cal.App.4th 97, 113-114 [“A demurrer is simply not the appropriate  
3 procedure for determining the truth of disputed facts”] [citation omitted].) And  
4 because PLCAA does not apply to this case, Plaintiff does not need to allege any  
5 statutory violations at all; Plaintiff’s common-law negligence, negligent entrustment  
6 and public nuisance claims do not require them. While Plaintiff *also* asserts  
7 violations of state and federal statutes to underscore the recklessness of Defendant  
8 Seller’s behaviors and to establish negligence *per se*, proof of such violations is not  
9 necessary to the survival of any of Plaintiff’s causes of action.

10           Moreover, even if Defendant Seller had an FFL, PLCAA would not apply  
11 because, as explained below, this case would fit into two of PLCAA’s exceptions. (See  
12 15 U.S.C. § 7903(5)(A)(i)-(vi).) First, PLCAA exempts claims for negligent  
13 entrustment, such as Count II of the Complaint. (See 15 U.S.C. § 7903(5)(A)(ii).)  
14 Second, because Plaintiff has alleged violations of numerous federal and state  
15 statutes (Compl. ¶¶ 52-66), PLCAA’s so-called “predicate exception” would apply.  
16 (See 15 U.S.C. § 7903(5)(A)(iii).)

17           Contrary to the Defendant Seller’s other argument, the complete ghost gun  
18 kits sold by Defendant Seller *do* meet the federal definition of “firearm,” because they  
19 are “designed to or may readily be converted to expel a projectile by the action of an  
20 explosive.” (18 U.S.C. § 921(a)(3).) Indeed, that is exactly how Defendant Seller  
21 advertises them. (See Compl. ¶ 42). Because Defendant Seller’s ghost gun kits meet  
22 the federal definition of “firearm,” Defendant Seller has violated numerous provisions  
23 of federal law by selling them without serial numbers or background checks. While  
24 Defendant Seller relies on the prior determination by the Bureau of Alcohol, Tobacco,  
25

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26 <sup>1</sup> As discussed below, in reality, the FFL that Defendant Seller is referring to is for a  
27 separate business called Firearms Performance Center of which he is a corporate  
28 officer; that business did not sell the ghost gun kit at issue here, and therefore  
Defendant Seller is incorrect in his belief that it provides him protection. Regardless,  
it is a disputed factual question.

1 Firearms and Explosives (the “ATF”) that certain unfinished frames and receivers –  
2 sold *alone* – do not constitute “firearms” under federal law (Dem. at 6, n.1),  
3 Defendant Seller fails to recognize that the ATF has stated that a complete kit –  
4 similar to the one at issue here – *does* meet the federal definition of firearm. (Compl.  
5 ¶ 44). More importantly, the question of whether a particular unfinished frame or  
6 kit qualifies as a firearm is a factual question that depends on the specifications of  
7 each product. In other words, whether Defendant’s product is “designed” or “readily  
8 convertible” to expel a projectile is another factual question, which is a dispute not  
9 resolvable at this stage. Finally, Defendant’s sale also violates California law,  
10 namely the California Unsafe Handgun Act (the “CUHA”), by causing to be  
11 manufactured handguns that do not meet that statute’s safety requirements. (See  
12 Compl. ¶¶ 55-66).

13 In short, the Demurrer should be overruled for numerous reasons, each of  
14 which is fatal to Defendant Seller’s arguments.

## 15 **II. RELEVANT ALLEGATIONS**

16 At 7:30 A.M. on November 14, 2019, then fifteen-year-old Plaintiff Mia Tretta,  
17 a high school freshman, arrived on the quad of Saugus High School and walked over  
18 to see her best friend, fourteen-year-old Dominic Blackwell. (Compl. ¶ 2.) At the  
19 same time, sixteen-year-old Nathaniel Berhow (the “Shooter”) walked onto the quad  
20 with an unmarked, 1911-style<sup>2</sup> “Officer Frame” ghost gun, and opened fire. (*Id.* ¶ 3.)  
21 Dominic and another student, Gracie Ann Muehlberger, were killed; Mia was shot in  
22 the stomach; and two other children were wounded. (*Id.*) Mia was airlifted to a  
23 hospital where she spent the next six days recovering from the gunshot wound and  
24 subsequent surgery. (*Id.*) She survived, but suffers both physical pain and  
25 psychological repercussions to this day. (*Id.*) The Shooter took his own life with the  
26 last round in the gun. (*Id.*)

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<sup>2</sup> A “1911” frame is so-named because it is based on the Colt 1911, a firearm originally used by the United States military in World War I.



1 The Shooter was able to obtain the ghost gun because Defendant Seller  
2 negligently sold an easy-to-assemble gun kit to his father, Mark Berhow, despite the  
3 fact that Mark was prohibited by law from possessing firearms. (Compl. ¶ 4.)<sup>3</sup>  
4 Between 2013 and 2015, Mark had numerous contacts with law enforcement,  
5 including an arrest stemming from abuse of his daughter and a psychiatric episode  
6 which found Mark wandering the street in his underwear intoxicated, demanding his  
7 firearms from a neighbor. (*Id.* ¶¶ 24-26.) Following the latter incident, police took  
8 Mark to a psychiatric hospital for a review pursuant to Welfare and Institutions Code  
9 Section 5150, rendering him a prohibited possessor of firearms. (*Id.* ¶ 26; see also  
10 Cal. Wel. & Inst. Code § 8103(f)(1)(A) and 18 U.S.C. § 922(g)(4).)

11 Defendant Seller sells ghost gun kits at his website 1911builders.com, along  
12 with the components, parts, tools and educational materials necessary to quickly and  
13 easily assemble them into homemade firearms. (Compl. ¶ 43.) Defendant Seller  
14 markets the simplicity with which a completed firearm can be constructed from his  
15 kits, boasting in his advertisements that, “IT’S NEVER BEEN EASIER TO BUILD  
16 YOUR OWN CUSTOM 1911.” (*Id.* ¶ 42.) His website explains that only four  
17 operations are “left to be completed” in order to have a fully functioning firearm and  
18 that only the magazine (which is also available for purchase on the website) must be  
19 purchased separately. (*Id.* ¶ 43.)

20 Defendant Seller allows any person to purchase a ghost gun kit with a credit  
21 card, or even Bitcoin. (Compl. ¶ 45.) He takes no reasonable steps to ensure that  
22 purchasers are not prohibited from purchasing or possessing firearms despite  
23 knowing that his deadly products will likely end up in the hands of dangerous  
24 persons looking to evade state and federal law. (*Id.* ¶ 8.) Defendant Seller also does  
25 not include a serial number on the ghost gun, rendering it extraordinarily difficult for  
26

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27 <sup>3</sup> The Complaint alleges that Defendant Seller sold the ghost gun kit *either* to Mark  
28 Berhow or to his minor son, the Shooter. Discovery has since made clear it was sold  
to Mark Berhow, a fact that does not appear to be in dispute.

1 law enforcement to trace such guns when they predictably and too-frequently appear  
2 at crime scenes, as one did here. (*Id.* ¶ 9.) Indeed, that is one of the primary selling  
3 points of ghost guns. As one federal appellate court has noted in the analogous  
4 context of handguns with obliterated serial numbers, “[t]here would appear to be no  
5 compelling reason why a law-abiding citizen would prefer an unmarked firearm.  
6 These weapons would then have value primarily for persons seeking to use them for  
7 illicit purposes.” (Compl. ¶ 32, citing *United States v. Marzzarella*, 614 F.3d 85, 95  
8 (3d Cir. 2010)). Defendant Seller’s ghost gun kits simply take the work out of  
9 obliterating the serial number.

10 In short, despite owing a duty to exercise reasonable care in the sale of lethal  
11 products, Defendant Seller illegally, negligently, recklessly and with malice and  
12 oppression, sells ghost gun kits over the internet – including to Mark Berhow.  
13 (Compl. ¶ 50).

14 **III. ARGUMENT**

15 **A. Legal Principles Governing Demurrers**

16 A demurrer is a pleading used to test the legal sufficiency of other pleadings;  
17 in other words, a demurrer raises issues of law—*not fact*—regarding the form and  
18 content of the opposing party’s pleading. (Code Civ. Proc., §§ 422.10, 589; see  
19 *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) For the purpose of  
20 testing the sufficiency of a cause of action, courts treat a demurrer as admitting the  
21 truth of all material facts properly pleaded—i.e., all ultimate facts alleged—as well  
22 as those facts that may be implied or inferred from the express allegations. (*C & H*  
23 *Foods Co. v. Hartford Ins. Co.*, (1984) 163 Cal.App.3d 1055, 1062.)

24 In ruling on a demurrer, the court must give the complaint a “reasonable  
25 interpretation, reading it as a whole and its parts in their context.” (*Blank v.*  
26 *Kirwan*, (1985) 39 Cal. 3d 311, 318.) The complaint must also be “liberally construed,  
27 with a view to substantial justice between the parties.” (Code Civ. Proc., § 452; see  
28 *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) This rule of liberal

1 construction means that where allegations may be subject to different reasonable  
2 interpretations, the court must draw “inferences favorable to the plaintiff, *not* the  
3 defendant.” (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228,  
4 1238, emphasis added.)

5 **B. PLCAA Protection Does Not Apply**

6 Defendant Seller argues that PLCAA provides him protection from the claims  
7 in the Complaint. He is wrong. First we describe how PLCAA works, before turning  
8 to the variety of reasons why PLCAA does not apply.

9 **1. PLCAA Background**

10 PLCAA was enacted in 2005 to protect the firearms industry from being held  
11 liable in cases where the injury was solely caused by a third party’s criminal conduct  
12 and where the gun industry defendant did nothing wrong. (See 15 U.S.C. § 7901(a)(6).)  
13 PLCAA applies only to firearms dealers who have obtained an FFL. (Id. § 7902(6)(B)  
14 [stating that the term “seller” refers to a dealer “who is licensed to engaged in business  
15 as such a dealer under chapter 44 of title 18.”].) PLCAA’s operative clause provides  
16 that “[a] qualified civil liability action may not be brought in any Federal or State  
17 court.” 15 U.S.C. § 7902(a). A “qualified civil liability action” is defined as:  
18

19 [A] civil action . . . brought by any person against a  
20 manufacturer or seller of a qualified product . . . for damages  
21 . . . or other relief, resulting from the criminal or unlawful  
22 misuse of a qualified product by the person or a third party  
23 . . . .

24 (15 U.S.C. § 7903(5)(A).) A “qualified product” is a firearm or component “that has  
25 been shipped or transported in interstate or foreign commerce.” (15 U.S.C. § 7903(4).)

26 As Defendant Seller notes (Dem. at pp. 6-7), PLCAA contains six exceptions that  
27 bring a case outside of its protection. “[T]he proper analysis for determining the  
28 applicability of the PLCAA is two-fold, requiring first a determination whether the

1 lawsuit in question is a ‘qualified civil liability action’ and second an analysis whether,  
2 if it is, any of the PLCAA’s six exceptions to this definition apply.” (*Chavez v. Glock*,  
3 (2012) 207 Cal.App.4th, 1283, 1317 [reversing grant of summary judgment on PLCAA  
4 grounds and determining there were triable issues of fact as to whether case qualified  
5 as a “qualified civil liability action”] [citation omitted].) Two of those exceptions are  
6 relevant here: (i) the “predicate exception” and (ii) the negligent entrustment  
7 exception.  
8

9 First, PLCAA allows a plaintiff to bring a case against a member of the gun  
10 industry that has knowingly violated gun laws:  
11

12 The term ‘qualified civil liability action’ . . . shall not include  
13 an action **in which a manufacturer or seller of a**  
14 **qualified product knowingly violated a State or**  
15 **Federal statute applicable to the sale or marketing of**  
16 **the product**, and the violation was a proximate cause of the  
17 harm for which relief is sought[.]

18 (15 U.S.C. at § 7903(5)(A)(iii) [emphasis added].) “This exception has come to be known  
19 as the ‘predicate exception,’ because a plaintiff not only must present a cognizable  
20 claim, he or she also must allege a knowing violation of a ‘predicate statute.’” (*Ileto v.*  
21 *Glock, Inc.* (9th Cir. 2009) 565 F.3d 1126, 1132; see also *Smith & Wesson Corp. v. City*  
22 *of Gary* (Ind. Ct. App. 2007) 875 N.E.2d 422, 429-30.)

23 Relying on the predicate exception, courts have universally held that negligence  
24 claims are not barred by PLCAA when they are predicated on knowing violations of  
25 law applicable to the sale of firearms and ammunition. (See e.g., *King v. Klocek* (N.Y.  
26 App. Div. 2020) 187 A.D.3d 1614 [permitting negligence case to proceed against gun  
27 store that sold handgun ammunition to an underage individual because the case fit  
28 within PLCAA’s predicate exception]; *Smith & Wesson Corp. v. City of Gary* (Ind. Ct.

1 App. 2007) 875 N.E.2d 422, 434-45 [allowing negligence and public nuisance claims to  
2 proceed after concluding that violation of a statutory public nuisance law triggered  
3 application of the predicate exception]; *Corporan v. Wal-Mart Stores E., LP* (D. Kan.  
4 2016) No. 16-2305-JWL, 2016 U.S. Dist. LEXIS 93307, at \*3-13 [permitting plaintiff's  
5 negligence claim to proceed where the defendant's alleged conduct, with anticipated  
6 amendments to the complaint, fell within the predicate exception]; *Chiapperini v.*  
7 *Gander Mountain Co., Inc.* (N.Y. Sup. Ct. Monroe Cnty. 2014) 13 N.Y.S.3d 777, 787-88  
8 [permitting plaintiffs' negligence claim to proceed because the complaint had  
9 sufficiently alleged knowing violations of gun laws].)

12 Because the predicate exception refers to “*an action in which*” a seller violates  
13 federal law, courts have held that once a predicate violation against a defendant is  
14 alleged, a claim-by-claim analysis of the lawsuit is not required, and the entire lawsuit  
15 can bypass PLCAA. (See e.g., *Corporan, supra*, at \*13, n.4 [“[B]ecause the court finds  
16 the predicate exception applicable to this action, it declines to engage in the claim-by-  
17 claim analysis advanced by defendants.”]; *Williams v. Beemiller, Inc.* (N.Y. App. Div.  
18 2012) 952 N.Y.S.2d 333, 339, *amended by* 951 N.Y.S.2d 444 (N.Y. App. Div. 2013)  
19 [concluding that a separate analysis of the plaintiff's negligent entrustment and  
20 negligence per se exceptions is unnecessary after determining that the predicate  
21 exception applies]; *Englund v. World Pawn Exch.* (Multnomah Cnty., Ore. Cir. Ct.  
22 2017) 2017 Ore. Cir. LEXIS 3, \*11 [“[T]he Court notes that the predicate exception's  
23 broad language provides that an entire ‘action’ survives – including all alleged claims.  
24 . . .”]. For this reason, even *if* Defendant Seller had an FFL, as long as the Plaintiff had  
25 adequately alleged that Defendant Seller violated any predicate statute, her entire  
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1 action could proceed.

2 Finally, as noted above, PLCAA contains an explicit exception for claims of  
3 negligent entrustment, such as Plaintiff’s second cause of action. *See* 15 U.S.C. §  
4 7903(5)(A)(ii) (excepting “an action brought against a seller for negligent  
5 entrustment.”).

## 7 2. Defendant Seller Does Not Have a FFL

8 First and foremost, as noted above, PLCAA applies only to firearms dealers  
9 who have obtained an FFL. *Id.* § 7902(6)(B). The Complaint alleges that Defendant  
10 Seller does not have an FFL. (Compl. ¶ 14 [“Neither Terrance Osman nor  
11 1911builders.com has a federal firearms license.”].) Thus, PLCAA protection does  
12 not apply, full stop. This single fact, which appears on the face of the Complaint,  
13 ends the inquiry.

14 In his Demurrer, Defendant Seller – without any citation – asserts that,  
15 contrary to the allegations of the complaint, he “does maintain a Federal Firearms  
16 License.” (Dem. at 6). Incredibly, Defendant Seller’s demurrer asks the Court to  
17 disregard the allegations of the complaint in favor of this opposing, yet wholly  
18 unsupported, allegation. Defendant Seller does not present the Court with the  
19 purported license, let alone move for judicial notice of it. Even if he had, “[t]aking  
20 judicial notice of a document is not the same as accepting the truth of its contents or  
21 accepting a particular interpretation of its meaning.” (*Fremont Indemnity Co., supra*,  
22 148 Cal.App.4th at 113 [reversing trial court for sustaining demurrer on the basis of  
23 a judicially-noticed document].)<sup>4</sup>

24 \_\_\_\_\_  
25 <sup>4</sup> In reality, Defendant Seller is referencing an inapplicable license. Terrence  
26 Osman is a corporate officer in a different business: a corporation registered in  
27 California called Firearms Performance Center. That business *does* have an FFL,  
28 but it is not the business that sold the ghost gun kit at issue and is therefore not the  
Defendant in this lawsuit. Thus, that FFL cannot provide any protection to  
Defendant Seller here, who personally sells the ghost gun kits, using the alias of  
1911builders.com, wholly outside of the scope of the corporation’s license.

1 In any event, all Defendant Seller has done is attempt to raise a factual  
2 dispute that is clearly not cognizable on a demurrer. “It is black letter law a  
3 demurrer tests the pleading alone... Defendants cannot set forth allegations of fact in  
4 their demurrers which, if true, would defeat plaintiff’s complaint.” (*Gould v.*  
5 *Maryland Sound Industries, Inc.*, (1995) 31 Cal.App.4th 1137, 1145.)

6 Thus, because Defendant Seller has no FFL, Defendant Seller has no possible  
7 claim to PLCAA protection. The Court should reject Defendant Seller’s claimed  
8 PLCAA immunity out of hand, regardless of the applicability of PLCAA exceptions.

9 **3. Even if Defendant Seller Had an FFL, PLCAA Would Still**  
10 **Not Apply**

11 Even if Defendant Seller did have an FFL, which again he does not, PLCAA  
12 protection would not apply because the Complaint meets two of PLCAA’s exceptions:  
13 the predicate exception and the negligent entrustment exception.

14 With respect to the predicate exception, Plaintiff has alleged knowing  
15 violations of federal and state statutes applicable to the sale or marketing of  
16 firearms, including the Federal Gun Control Act and the California Unsafe  
17 Handguns Act. (Compl. ¶¶ 52-66.)

18 **a. Defendant Seller’s Violations of the Gun Control Act**

19 First, Plaintiff has alleged violations of the federal Gun Control Act based on  
20 Defendant Seller’s sale of firearms without serial numbers and without conducting  
21 background checks. (Compl. ¶¶ 52-54, citing 18 U.S.C. §§ 922(a), 922(t) and 26  
22 U.S.C. § 5842; see also 27 C.F.R. 478.124 and 478.125 [requiring recording of serial  
23 numbers before sale of firearms].) Defendant Seller argues that these laws are not  
24 applicable to him because, he argues, the Gun Control Act only applies to “completed  
25 firearms” and his products “are not completed firearms.” (Dem. at 5.) He is wrong.

26 The Federal Gun Control Act of 1968 does not limit the definition of “firearms”  
27 to completed weapons. Instead, Congress defined “firearms” broadly to include, in  
28 relevant part, “(A) any weapon (including a starter gun) which will or *is designed to*

1 *or may readily be converted* to expel a projectile by the action of an explosive; [and]  
2 (B) the frame or receiver of any such weapons. . . .” (18 U.S.C. § 921(a)(3) [emphasis  
3 added].) The ghost gun kits sold by Defendant Seller, including the one sold to Mark  
4 Berhow, are “designed to or may readily be converted to expel a projectile.” (See *id.*)  
5 Indeed, as noted above, Defendant Seller explicitly *advertises* the fact that his kits  
6 may readily be converted to a completed firearm; that is the whole purpose of the kits  
7 he sells. (Compl. ¶ 42.) As the Complaint alleges, the ghost gun kit, along with a  
8 separately purchased magazine also available on the website, provides all the parts  
9 necessary to “quickly and easily assemble a homemade firearm.” (*Id.* ¶ 43.) Thus,  
10 the ghost gun kits at issue are “firearms” under federal law.

11 In his Demurrer, Defendant Seller argues that his products are not “firearms”  
12 because the ATF previously has stated that certain unfinished frames and receivers –  
13 the core building blocks of firearms for pistols and semi-automatic rifles, respectively  
14 – are not firearms under federal law. (See Dem. at 5-6, n. 1.) However, while that  
15 may have been the ATF’s position with respect to certain individual, stand-alone  
16 unfinished frames and receivers,<sup>5</sup> those rulings do not address kits. Indeed, with  
17 respect to kits, similar to the one sold to Mark Berhow – the ATF recently confirmed  
18 in a federal search warrant application prior to a raid on another ghost gun kit seller  
19 that a kit from which an operable handgun can be quickly and easily assembled *is* a  
20 “firearm” under federal law, and therefore requires a serial number and a  
21 background check. (Compl. ¶ 44.)

22 More importantly, by contesting that his products are not “firearms,”  
23 Defendant Seller has merely raised another fact issue dependent on the technical  
24 specifications of the kit at issue, which are not resolvable at this stage. (See *Fremont*  
25

26 <sup>5</sup> For example, ATF determined that a single frame sold by Defendant Seller is not a  
27 firearm. See [https://1911builders.com/wp-content/uploads/2018/10/ATF-  
28 Determination-frame-letter-1-4.pdf](https://1911builders.com/wp-content/uploads/2018/10/ATF-Determination-frame-letter-1-4.pdf) (last visited June 10, 2021). There is no evidence  
that Defendant Seller ever submitted one of the kits he sells to ATF for a  
determination of whether it constitutes a “firearm.”



1 *Indemnity Co., supra*, 148 Cal.App.4th at 113 [citation omitted]; *Westside Concrete*  
2 *Co., Inc. v. Department of Industrial Relations*, 123 Cal.App.4th 1317, 1327  
3 [reversing where “trial court improperly resolved that factual dispute on demurrer”].)  
4 In other words, it is a factual question whether or not the kit sold to Mark Berhow  
5 was “designed to or [was] readily be converted to” expel a projectile that must be  
6 analyzed after discovery. As they are sufficiently alleged to be such firearms in the  
7 complaint, this is another sufficient reason to overrule the demurrer.

8 **b. Defendant Seller’s Violations of CUHA**

9 Second, Plaintiff has alleged violations of the California Unsafe Handgun Act  
10 (CUHA). (Compl. ¶¶ 55-59.) In particular, Plaintiff alleges that Defendant Seller  
11 “caused to be manufactured handguns that do not meet the safety requirements of  
12 CUHA by marketing, selling, and transferring all of the components, parts,  
13 materials, tools and instructional videos needed to build an unsafe handgun.” (*Id.* ¶  
14 59.) Plaintiff also alleges that Defendant Seller “aided and abetted the manufacture  
15 of unsafe handguns.” (*Id.* ¶ 16.)

16 Defendant Seller argues that he did not violate CUHA because he “did not sell  
17 a ‘firearm’ and therefore could not have sold an ‘unsafe handgun’ pursuant to  
18 California law.” (Dem. at 7.) Defendant Seller misunderstands the statute. The  
19 CUHA does not require the sale of a firearm; rather, it creates liability for any person  
20 in California “who manufactures or **causes to be manufactured**” an unsafe  
21 handgun.<sup>6</sup> (Cal. Penal Code § 32000(a) [emphasis added].) Defendant Seller does not  
22 dispute that, once manufactured, the completed ghost gun does not meet the safety  
23 requirements of the CUHA, nor has it been approved and placed on the roster of  
24 approved firearms maintained by the California DOJ. Nor does Defendant Seller  
25 dispute that he provides all of the components, tools, and instructions to his  
26

27 <sup>6</sup> Contrary to Defendant Seller’s confused argument, Plaintiff does not allege in the  
28 Complaint that the ghost gun kits sold by Defendant Seller are “firearms” under the  
California definition of that term.

1 customers to easily assemble a completed firearm. Thus, Defendant Seller “causes to  
2 be manufactured” unsafe handguns in California, including the one used to shoot  
3 Plaintiff. For the same reason, alternatively, Defendant Seller aids and abets the  
4 manufacture of unsafe handguns.

5 Thus, Plaintiff has sufficiently alleged multiple violations of multiple federal  
6 and state statutes that are applicable to the sale and marketing of firearms and that  
7 proximately caused her harm. Therefore, even *if* Defendant Seller had an FFL, the  
8 predicate exception would doubly apply, under both federal and state statutes, and  
9 he would have no PLCAA protection .

#### 10 4. PLCAA Does Not Apply to Negligent Entrustment Claims

11 Even *if* Defendant had an FFL, and even *if* Plaintiff had failed to sufficiently  
12 alleged state and federal predicate exceptions, PLCAA would still not apply to  
13 Plaintiff’s claim for negligent entrustment, one of the three causes of action. (Compl.  
14 ¶¶ 95-100.) PLCAA explicitly excepts from its scope “an action brought against a  
15 seller for negligent entrustment or negligence per se.” (15 U.S.C. § 7903(5)(A)(ii).)  
16 Here, Plaintiff has alleged that Defendant Seller “negligently, illegally, recklessly,  
17 willfully, maliciously and oppressively transferred the subject ghost gun kit to the  
18 Shooter or Mark Berhow – both prohibited from purchasing or possessing firearms –  
19 despite the fact that Defendant Seller, at the time of the transfer, knew or should  
20 have known that the purchaser was unfit and incompetent to purchase firearms...”  
21 and, further, that “Defendant’s negligent entrustment of the firearm to the Shooter  
22 or the Shooter’s father was a direct and proximate cause of Mia’s injuries.” (Compl. ¶  
23 98.) Thus, even if the Court were to accept Defendant Seller’s (legally fallacious)  
24 arguments that PLCAA applies to Plaintiff’s claims, the negligent entrustment claim  
25 would still survive. Defendant Seller provides no argument to the contrary.

26 In sum, Plaintiff sufficiently alleged all of the elements necessary for her three  
27 causes of action – negligence, negligent entrustment, and public nuisance – and  
28 Defendant Seller makes no argument to the contrary. Rather, Defendant Seller

1 incorrectly invokes the protection of PLCAA, which does not apply for the reasons  
2 outlined above, and raises a factual dispute about whether his ghost gun kits are  
3 firearms, a dispute neither resolvable nor potentially dispositive at this stage. The  
4 demurrer should be overruled.

5 **IV. CONCLUSION**

6 For the foregoing reasons, Plaintiff respectfully requests that this Court  
7 overrule the Defendant Seller's demurrer in its entirety.

8

9 Dated: June 15, 2021

WALKUP, MELODIA, KELLY & SCHOENBERGER

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11

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9 **PLAINTIFF'S OPPOSITION TO DEFENDANT TERRANCE J. OSMAN DBA**  
10 **1911 BUILDERS' DEMURRER TO PLAINTIFF'S COMPLAINT**

11 to:

12 Sean R. Ferron, Esq.  
13 LAW OFFICES OF ADRIENNE D. COHEN  
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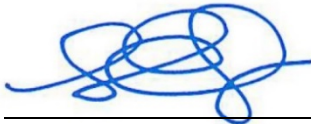
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I declare under penalty of perjury under the laws of the State of California  
that the foregoing is true and correct.

Executed on June 15, 2021, at San Francisco, California.



Stella A. Saephan

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