

1 WALKUP, MELODIA, KELLY & SCHOENBERGER  
 Richard Schoenberger (State Bar No. 122190)  
 2 rschoenberger@walkuplawoffice.com  
 Spencer Pahlke (State Bar No. 250914)  
 3 spahlke@walkuplawoffice.com  
 Sara Peters (State Bar No. 260610)  
 4 speters@walkuplawoffice.com  
 650 California Street, 26<sup>th</sup> Floor  
 5 San Francisco, CA 94108  
 Telephone: (415) 981-7210  
 6 Facsimile: (415) 391-6965

7 EVERYTOWN LAW  
 8 Alla Lefkowitz (*pro hac vice pending*)  
 alefkowitz@everytown.org  
 9 P.O. Box 14780  
 Washington, D.C. 20044  
 10 (mailing address)  
 Telephone: (646) 324-8365  
 11 Facsimile: (917) 410-6932

12 Len Hong Kamdang (*pro hac vice pending*)  
 lkamdang@everytown.org  
 13 Mark Weiner (*pro hac vice pending*)  
 mweiner@everytown.org  
 14 450 Lexington Avenue, P.O. Box 4184  
 New York, NY 10017  
 15 (mailing address)  
 Telephone: (646) 324-8115  
 16 Facsimile: (917) 410-6932

17 *Attorneys for Plaintiffs*

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

21 MIA TRETТА, through her guardian ad  
 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;  
 26 and DOES 1-50,

27 Defendants.

Case No. 20STCV48910

**PLAINTIFF'S OPPOSITION TO  
 DEFENDANT TERRANCE J.  
 OSMAN DBA 1911 BUILDERS'  
 MOTION TO STRIKE PORTIONS  
 OF PLAINTIFF'S COMPLAINT**

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

**Reservation No.: 66284714409**

Action Filed: December 22, 2020  
 Trial Date: Not yet assigned

1 **TABLE OF CONTENTS**

2 Page(s)

3 I. INTRODUCTION ..... 5

4 II. STATEMENT OF FACTS ..... 6

5 A. Defendant’s Strategy for Selling Ghost Guns..... 6

6 B. The Market for Defendant’s Ghost Guns..... 8

7 III. LEGAL ARGUMENT ..... 9

8 A. California Law Disfavors Motions to Strike ..... 9

9 B. Plaintiff’s Pleadings Satisfy the Requirements for a Properly Pled  
10 Punitive Damages Claim..... 9

11 1. Legal Standard..... 9

12 2. Plaintiff’s Punitive Damages Allegations Meet the Legal  
13 Standard ..... 10

14 C. Defendant’s Motion to Strike Plaintiff’s Public Nuisance Claim  
15 and Associated Plea for an Injunction Should Be Denied..... 13

16 1. PLCAA Background ..... 13

17 2. Defendant Seller Does Not Have a FFL..... 14

18 3. Even if Defendant Seller Had an FFL, Plaintiff’s Nuisance  
19 Claim is Exempted from PLCAA..... 15

20 IV. CONCLUSION ..... 17

21

22

23

24

25

26

27

28

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page(s)**

**Cases**

*Blakemore v. Superior Court*  
(2005) 129 Cal. App. 4th 36.....15

*Clauson v. Superior Court*  
(1998) 67 Cal. App. 4th 1253.....9

*Courtesy Ambulance Service v. Superior Court*  
(1992) 8 Cal.App.4th 1504.....9

*Dawes v. Superior Court*  
(1980) 111 Cal.App.3d 82.....9

*Englund v. World Pawn Exch.*  
(Multnomah Cnty., Ore. Cir. Ct. 2017) 2017 Ore. Cir. LEXIS 3 .....16

*Fremont Indemnity Co.*  
*supra*, 148 Cal.App.4th at 113 .....14

*Hoch v. Allied-Signal, Inc.*  
(1994) 24 Cal.App.4th 48.....10, 11, 13

*Ileto v. Glock, Inc.*  
(9th Cir. 2009) 565 F.3d 1126.....14, 15, 16

*King v. Klocek*  
(N.Y. App. Div. 2020) 187 A.D.3d 1614.....16

*Lackner v. North*  
(2006) 135 Cal.App.4th 1188.....10, 11, 13

*Perkins v. Superior Court*  
(1981) 117 Cal.App.3d 1.....9

*Prescott v. Slide Fire Solutions, LP*  
(D. Nev. 2019) 410 F. Supp. 3d 1123 .....16

*Smith & Wesson Corp. v. City of Gary*  
(Ind. Ct. App. 2007) 875 N.E.2d 422 .....14

*Taylor v. Superior Court*  
(1979) 24 Cal.3d 890.....10

*Taylor v. Superior Court,*  
*supra*, 24 Cal.3d at 895–96 .....11, 13

1	<b>Statutes</b>	
2	15 U.S.C. § 7901(a)(6) .....	13
3	15 U.S.C. § 7902(a).....	13
4	15 U.S.C. § 7903(4) .....	13
5	15 U.S.C. § 7903(5)(A).....	13
6	18 U.S.C. §§ 922(a), 922(t).....	16
7	26 U.S.C. § 5842 .....	16
8	27 C.F.R. 478.124 .....	16
9	California Judges Benchbook, Civil Proceedings Before Trial (995) § 12.94.....	9
10	California Penal Code § 32000(a).....	16
11	California Unsafe Handgun Act.....	16
12	Code Civ. Proc. § 3294 .....	9, 10, 12, 13
13	Code Civ. Proc. § 3294(a).....	10
14	Code Civ. Proc. § 425.10 .....	13
15	Code Civ. Proc. § 436 .....	9
16	Code Civ. Proc. § 452 .....	9
17	Federal Gun Control Act.....	15, 16
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **I. INTRODUCTION**

2 Ghost guns are untraceable, have no serial number, and are marketed to  
3 anyone who wants one, whether the buyer can legally possess a gun or not.  
4 Defendant Terrance J. Osman (“Seller”) is one of approximately 80 sellers of ghost  
5 gun components or kits in the United States, part of a fast-growing movement to arm  
6 buyers—and shooters—who circumvent safeguards that exist in state and federal  
7 law. The result is an onslaught of ghost guns on the streets of America, particularly  
8 in California where they now make up as much about one-third of the guns recovered  
9 at scenes of violent crime.

10 One of those scenes of violent crime was the Saugus High School shooting on  
11 November 14, 2019. Using a ghost gun that Defendant Seller sold as an easy-to-  
12 assemble kit to Mark Berhow (who was legally barred from possessing guns),  
13 Nathaniel Berhow (also barred by virtue of being a minor) shot and killed two of his  
14 classmates, and badly injured others including Plaintiff Mia Tretta.

15 Defendant Seller here attempts to strike Plaintiff’s claims for punitive  
16 damages and public nuisance.<sup>1</sup> Both attempts fail. Plaintiff’s fact-rich Complaint  
17 lays out the Defendant’s business model and how it is designed to make end-runs  
18 around state and federal law and get guns into the hands of prohibited buyers and  
19 shooters like Mark and Nathaniel Berhow. Plaintiff’s allegations, liberally construed  
20 and assumed to be true for purposes of this Motion, amply support a finding by clear  
21 and convincing evidence that by enabling and facilitating dangerous criminals to  
22 access weapons used to shoot and murder innocent civilians for profit, Defendant  
23 Seller’s actions were, at a minimum, despicable and in conscious disregard of the  
24 rights and safety of others.

25 Defendant Seller’s argument that PLCAA’s immunity protects him from  
26

---

27 <sup>1</sup> Because Plaintiff has agreed to withdraw her claim for attorney fees, it is not  
28 addressed in this Opposition.

1 liability for public nuisance is no more availing.<sup>2</sup> As an initial matter, Defendant  
2 Seller could only invoke protection under PLCAA if he had a federal firearms license  
3 (an “FFL”) in his personal capacity, which is the capacity in which he sold the ghost  
4 gun kit at issue. He has no such license. Even if he did have a license, Plaintiff’s  
5 allegations that Defendant violated state and federal law applicable to the sale or  
6 marketing of firearms trigger PLCAA’s “predicate exception,” nullifying any claim of  
7 protection in this case.

8 Plaintiff therefore requests that this Motion to Strike be denied as to both the  
9 claim for punitive damages and the nuisance cause of action.

10 **II. STATEMENT OF FACTS**

11 **A. Defendant’s Strategy for Selling Ghost Guns**

12 Ghost guns are “unserialized, untraceable” weapons, the “core building blocks”  
13 of which “are acquired without a background check.” (Compl. ¶ 29.) “The sale of  
14 ghost gun kits and/or components”—Defendant Seller’s precise business enterprise—  
15 thereby “undermines sixty years of federal law directed at preventing dangerous  
16 persons from possessing firearms and assisting law enforcement in tracing firearms.”  
17 (*Id.* ¶ 30.) A known and foreseeable byproduct of this corner of the gun  
18 manufacturing industry is to serve buyers who are otherwise legally barred “from  
19 possessing firearms because of age, dangerous mental health history, or criminal  
20 history.” (*Id.* ¶ 33.) Indeed, these buyers are “attracted by the ability to purchase  
21 nearly complete guns without a background check and lacking serial numbers.” (*Id.*  
22 ¶ 33.) For “criminals and gun traffickers,” “one of their selling points” is that when  
23 those guns are inevitably used in violent crime and recovered in the aftermath of a  
24 shooting, law enforcement cannot trace them to either the shooter or the seller. (*Id.*  
25

---

26  
27 <sup>2</sup> Defendant Seller’s PLCAA arguments in his Demurrer mirror those in the Motion  
28 to Strike as they relate to the Public Nuisance Cause of Action. Plaintiff therefore  
makes the same response to this argument in her Oppositions to both the Demurrer  
and the Motion to Strike.

1 ¶ 32.)

2 Defendant Seller has been an eager member of this market for many years,  
3 going back to at least 2015. (*Id.* ¶ 42.) Defendant “sells kits, frames, parts, and the  
4 tools to create a finished firearm over the internet with no background check.” (*Id.* ¶  
5 14.) He sells his “products without markings to make it difficult for law enforcement  
6 to trace them”—in fact, “the very purpose of ghost guns is to make them  
7 untraceable.” (*Id.* ¶¶ 8-9.) And Defendant Seller does all this through his website  
8 1911builders.com without a federal firearms license. (*Id.* ¶ 14.)

9 Among Defendant Seller’s offerings is the .45 caliber 1911 “Officer Frame,”  
10 making him the only online seller of this ghost gun kit.<sup>3</sup> (*Id.* ¶ 39-40.) Presumably to  
11 increase sales and ensure as many of his 1911 “Officer Frame” ghost gun kits were in  
12 the hands of the public, Defendant Seller advertised his weapons in outlets like  
13 *Recoil Magazine* and through Instagram. In *Recoil*, Defendant “boasted, ‘IT’S  
14 NEVER BEEN EASIER TO BUILD YOUR OWN CUSTOM 1911.’” (*Id.* ¶ 42.) His  
15 website makes building guns as easy as possible, telling potential buyers that “its  
16 kits ‘contain[] all parts needed to finish your full size 80% 1911.’” (*Id.* ¶ 43.) That  
17 work can be done in “only 4 operations [that] are ‘left to be completed,’” resulting in a  
18 “fully functioning firearm” that only needs a magazine—“also available for purchase  
19 on the 1911builders.com website”—to be ready for shooting. (*Id.*)

20 Once a buyer has decided to buy one of Defendant’s ghost gun kits, the buyer  
21 can purchase it with either a credit card or even the cryptocurrency Bitcoin. (*Id.* ¶  
22 44.) Defendant “does not even ask whether a purchaser is prohibited by law from  
23 possessing a firearm.” (*Id.* ¶ 46.) Nor is there the safeguard of signing for the ghost  
24 gun kit, as Defendant lets buyers opt out of signing upon delivery, “meaning the  
25 package could end up in just about anyone’s hands upon delivery, regardless of who  
26 purchased it.” (*Id.* ¶ 45.) “In other words, at 1911builders.com, any person—

27 \_\_\_\_\_  
28 <sup>3</sup> As Defendant admits in his Motion to Strike, he sold the ghost gun kit at issue, as Plaintiff alleged in her Complaint. (Def. Mot. to Strike at 3, 4-5; Compl. ¶ 41.)

1 no matter their age or criminal history or fitness to possess a lethal weapon—can buy  
2 the components, parts, tools, and educational materials necessary to quickly and  
3 easily assemble a homemade firearm.” (*Id.* ¶ 43.)

4 **B. The Market for Defendant’s Ghost Guns**

5 Defendant Osman is part of a rapidly growing industry that has quickly  
6 multiplied in size. Defendant Osman is among about 80 other ghost gun  
7 manufacturers in the United States. (*Id.* ¶ 33.) The marketing and sales efforts of  
8 Defendant Osman and his industry have quickly grabbed market share among  
9 dangerous criminals who shoot and murder innocent civilians. (*Id.* ¶ 35.) Depending  
10 on the location in California, ATF estimates show that these marketing and sales  
11 efforts have been a terrible success—ghost guns are found at between 30 and 41% of  
12 violent crime scenes in California. (*Id.*) Translating these into absolute numbers,  
13 and only focusing on guns recovered at the scenes of violent crime, “[t]he Bureau of  
14 Alcohol, Tobacco, Firearms and Explosives (“ATF”) estimates that about 10,000 ghost  
15 guns were recovered in the United States [in 2019], including about 2,700 in  
16 California.” (*Id.* ¶ 10.)

17 The most dangerous buyers for ghost guns like the ones sold by Defendant  
18 Osman fit a pattern of espousing anti-government, racist, and violent ideology, for  
19 whom ghost guns offer an easy way to get a gun. The problem is nationwide. In  
20 Virginia, “white supremacists planning anti-government actions” “made their own  
21 fully automatic assault rifle.” (*Id.* ¶ 34.) A “felon and member of the white  
22 nationalist group Patriot Front in Texas pled guilty to possession of three homemade  
23 assault rifles and one homemade pistol.” (*Id.*) In New York, a “man travelling with a  
24 far right armed militia to a counter protest was arrested with a ghost gun.” (*Id.*) In  
25 California, “two far-right anti-government activists used a ghost gun to murder a  
26 security officer for the Oakland, California federal courthouse and a Sheriff’s Deputy  
27 in Santa Cruz.” (*Id.*)

28 In short, “it was foreseeable to the ghost gun industry, including Defendant...



1 that many if not most buyers purchasing ghost guns or ghost gun ‘kits’ would do so  
2 because they were legally prohibited from owning guns or because they had criminal  
3 intentions for the purchased ghost gun, or both.” (*Id.* ¶ 37.)

4 **III. LEGAL ARGUMENT**

5 **A. California Law Disfavors Motions to Strike**

6 As with demurrers, motions to strike are disfavored. The policy of the law is to  
7 construe the pleadings “liberally... with a view to substantial justice.” (Code Civ.  
8 Proc. § 452.) Motions to strike are only appropriate in limited circumstances when  
9 the allegations are irrelevant, false, or improperly pled. (Code Civ. Proc. § 436.) In  
10 ruling on a motion to strike, the allegations in the complaint are considered in  
11 context and are presumed to be true.

12 “[J]udges read allegations of a pleading subject to motion to strike as a whole,  
13 all parts in their context, and assume their truth.” (*Clauson v. Superior Court* (1998)  
14 67 Cal. App. 4th 1253, 1255; see also *Courtesy Ambulance Service v. Superior Court*  
15 (1992) 8 Cal.App.4th 1504, 1519; *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82,  
16 91; California Judges Benchbook, Civil Proceedings Before Trial (1995) § 12.94, p.  
17 611.) Therefore, the factual allegations included in Plaintiff’s Complaint are taken as  
18 true and are liberally construed.

19 **B. Plaintiff’s Pleadings Satisfy the Requirements for a Properly  
20 Pled Punitive Damages Claim**

21 **1. Legal Standard**

22 In order to survive a motion to strike a punitive damages claim, the plaintiff  
23 must plead the ultimate facts showing an entitlement to such relief. (*Clauson v.*  
24 *Superior Court, supra*, 67 Cal. App. 4th 1253, 1255.) Courts are liberal as to the fact  
25 pleading requirements necessary to support a punitive damage claim. (See, e.g.,  
26 *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6-7.) Plaintiff here complied with  
27 these pleading requirements.

28 Civil Code Section 3294 authorizes an award of punitive damages in

1 noncontract actions “where it is proven by clear and convincing evidence that the  
2 defendant has been guilty of...malice[.]” (Civ. Code § 3294(a).) “Malice” is defined in  
3 the statute as conduct “intended by the defendant to cause injury to plaintiff, or  
4 despicable conduct that is carried on by the defendant with a willful and conscious  
5 disregard for the rights or safety of others.” (*Id.* at § 3294(c)(1).)

6       Though not defined in the statute, the adjective “despicable” connotes conduct  
7 that is “so vile, base, contemptible, miserable, wretched or loathsome that it would be  
8 looked down upon and despised by ordinary decent people.” (*Lackner v. North* (2006)  
9 135 Cal.App.4th 1188, 1210 [internal quotation marks omitted].) To establish  
10 “conscious disregard”—the other malice requirement—“the plaintiff must show ‘that  
11 the defendant was aware of the probable dangerous consequences of his conduct, and  
12 that he willfully and deliberately failed to avoid those consequences.’” (*Hoch v.*  
13 *Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [quoting *Taylor v. Superior Court*  
14 (1979) 24 Cal.3d 890, 895–96].)

## 15                   2.       Plaintiff’s Punitive Damages Allegations Meet the Legal 16                   Standard

17       Plaintiff’s punitive damages allegations focus on “malice” as set out in Civil  
18 Code § 3294, and its required showing of “despicable conduct” and “conscious  
19 disregard of the rights or safety of others.” The Complaint satisfies both  
20 requirements by establishing the following, all of which much be assumed true for  
21 purposes of this Motion:

- 22       • For years, Defendant Seller has sold unserialized, untraceable building  
23 blocks that can easily be converted into firearms. (Compl. ¶ 29.)
- 24       • In selling his ghost gun kits, Defendant Seller advertises how easily  
25 they can be converted into weapons. (*Id.* ¶¶ 42-43.)
- 26       • Defendant Seller takes no steps to avoid selling to those who are legally  
27 barred from possessing guns, and attracts those very buyers by  
28 performing no background check. (*Id.* ¶ 33.)

- 1 • Defendant Seller sells to anyone who comes to his website with a credit  
2 card or Bitcoin, and he will deliver to anyone without requiring so much  
3 as a signature. (*Id.* ¶¶ 43-46.)
- 4 • Defendant Seller’s business model is a selling point to people who  
5 should never possess a gun, and undermines 60 years of federal law  
6 intended to keep these very people from getting guns. (*Id.* ¶¶ 30, 32.)
- 7 • As a result of Defendant Seller’s and other ghost gun kit sellers’ efforts  
8 ghost guns are now found at approximately 1/3 of California’s violent  
9 crime scenes. (*Id.* ¶ 35.)
- 10 • Approximately 10,000 ghost guns were recovered nationally in 2019  
11 alone, with 2,700 of them in California. (*Id.* ¶ 10.)
- 12 • The buyers for these guns have violent, anti-government, racist  
13 ideologies that they use their ghost guns to promote through violent  
14 crime, including recent incidents in Virginia, Texas, New York, and  
15 California. (*Id.* ¶ 34.)

16 Defendant Seller’s conduct was “despicable.” He skirted federal law to get  
17 guns into the hands of people who were otherwise barred from possessing firearms, a  
18 behavior “so vile, base, contemptible, miserable, wretched or loathsome that it would  
19 be looked down upon and despised by ordinary decent people.” (See *Lackner v.*  
20 *North, supra*, 135 Cal.App.4th at 1210.)

21 Defendant also consciously disregarded the rights and safety of others. With it  
22 well known that ghost guns were getting to violent crime scenes in unprecedented  
23 numbers and into the hands of violent extremists, Defendant Seller was “aware of  
24 the probable dangerous consequences of his conduct”—consequences “he willfully and  
25 deliberately failed to avoid....” (See *Hoch v. Allied-Signal, Inc., supra*, 24  
26 Cal.App.4th at 61 [quoting *Taylor v. Superior Court, supra*, 24 Cal.3d at 895–96].) In  
27 fact, Defendant not only failed to avoid those consequences, he made achieving those  
28 consequences—arming the public with ghost guns—the goal of his business

1 operation.

2 As Plaintiff alleged in her Complaint, in summary, Defendant Seller’s  
3 “malicious conduct” included the following:

- 4 a. Willfully designing, constituting, packaging, marketing, advertising,  
5 and selling the product in such a manner that it was at least as  
6 dangerous as a finished firearm, but removing it from the legal  
7 protections, background checks, and serialization requirements that are  
8 mandatory in the context of firearm sales, even though  
9 Defendant...knew that innocent members of the public would likely be  
10 injured if they sold the product in this manner,
- 11 b. Willfully failing to take reasonable steps, or indeed any steps at all, to  
12 ensure that the purchaser was not legally prohibited from purchasing or  
13 possessing a firearm, and/or unfit to safely possess a firearm, even  
14 though Defendant...knew that innocent members of the public would  
15 likely be injured if they did not take steps to perform reasonable steps to  
16 verify the fitness of purchasers,
- 17 c. Designing, constituting, packaging, marketing, advertising, and selling  
18 the product in such a manner (i.e., as a ghost gun without a serial  
19 number or background check or traceability by law enforcement) that it  
20 was likely to attract buyers unfit to own and possess firearms, even  
21 though Defendant...knew that innocent members of the public would  
22 likely be injured if they kept enticing unfit persons to buy dangerous  
23 instrumentalities[.]

24 (*Id.* ¶¶ 88; see also *id.* ¶ 49.)

25 This conduct is worthy of punitive damages.

26 Defendant Seller makes three counterarguments: Plaintiff’s allegations were  
27 insufficiently specific; Plaintiff did not say the words “punitive damages” until the  
28 Prayer for Relief and did not reference § 3294; and Plaintiff did not allege that  
29 Defendant intended to injure her. None withstand scrutiny.

30 *Specificity.* Plaintiff’s Complaint lays out in specific detail how Defendant and  
31 the ghost gun industry act “despicably” under California law of malice, and in  
32 conscious disregard of others’ rights and safety, by examining Defendant’s business  
33 model, strategy, and sale of the ghost gun at issue in the larger context of the ghost  
34 gun industry. (See Compl. ¶¶ 8-9, 14, 30, 32-35, 37, 39-40, 42-46, 49, 88.)

35 “*Punitive damages*” / *Prayer for Relief.* Nor is there any requirement that a  
36 plaintiff recite the words “punitive damages” anywhere in the complaint except for in  
37

38

1 the prayer for relief. A plaintiff need only allege a “statement of the facts  
2 constituting the cause of action, in ordinary and concise language,” accompanied by a  
3 “demand for judgment for the relief to which the pleader claims to be entitled,” which  
4 is precisely what Plaintiff did. (See Code Civ. Proc., § 425.10.)

5 *Intent to injure.* There is no requirement of intent for punitive damages.  
6 While intentional conduct may be one route to punitive damages, so too is the  
7 malicious conduct alleged in Plaintiff’s Complaint. (Civ. Code § 3294; *Lackner v.*  
8 *North, supra*, 135 Cal.App.4th at 1210; *Hoch v. Allied-Signal, Inc., supra*, 24  
9 Cal.App.4th at 61; *Taylor v. Superior Court, supra*, 24 Cal.3d at 895–96.)

10 **C. Defendant’s Motion to Strike Plaintiff’s Public Nuisance Claim**  
11 **and Associated Plea for an Injunction Should Be Denied**

12 Defendant argues that the claim for injunctive relief is barred because he has  
13 immunity from any claim of public nuisance due to PLCAA. Defendant is wrong.

14 **1. PLCAA Background**

15 PLCAA was enacted in 2005 to protect the firearms industry from being held  
16 liable in cases where the injury was solely caused by a third party’s criminal conduct  
17 and where the gun industry defendant did nothing wrong. (See 15 U.S.C. §  
18 7901(a)(6).) PLCAA applies only to firearms dealers who have obtained an FFL. (Id.  
19 § 7902(6)(B) [stating that the term “seller” refers to a dealer “who is licensed to  
20 engaged in business as such a dealer under chapter 44 of title 18.”].) PLCAA’s  
21 operative clause provides that “[a] qualified civil liability action may not be brought  
22 in any Federal or State court.” (15 U.S.C. § 7902(a).) A “qualified civil liability  
23 action” is defined as:

24 [A] civil action . . . brought by any person against a  
25 manufacturer or seller of a qualified product . . . for  
26 damages . . . or other relief, resulting from the criminal or  
unlawful misuse of a qualified product by the person or a  
third party . . . .

27 (15 U.S.C. § 7903(5)(A).) A “qualified product” is a firearm or component “that has  
28 been shipped or transported in interstate or foreign commerce.” (15 U.S.C. §

1 7903(4).) PLCAA contains six exceptions that bring a case outside of its protection.  
2 One of those exceptions is relevant to the public nuisance claim: the “predicate  
3 exception.” PLCAA allows a plaintiff to bring a case against a member of the gun  
4 industry that has knowingly violated gun laws:

5  
6 The term ‘qualified civil liability action’ . . . shall not  
7 include an action **in which a manufacturer or seller of**  
8 **a qualified product knowingly violated a State or**  
9 **Federal statute applicable to the sale or marketing**  
10 **of the product**, and the violation was a proximate cause  
11 of the harm for which relief is sought[.]

12 (15 U.S.C. at § 7903(5)(A)(iii) [emphasis added].) “This exception has come to be known  
13 as the ‘predicate exception,’ because a plaintiff not only must present a cognizable  
14 claim, he or she also must allege a knowing violation of a ‘predicate statute.’” (*Ileto v.*  
15 *Glock, Inc.* (9th Cir. 2009) 565 F.3d 1126, 1132; see also *Smith & Wesson Corp. v. City*  
16 *of Gary* (Ind. Ct. App. 2007) 875 N.E.2d 422, 429-30.)

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

18 First and foremost, as noted above, PLCAA applies only to firearms dealers  
19 who have obtained an FFL. (15 U.S.C. at § 7902(6)(B).) The Complaint alleges that  
20 Defendant Seller does not have an FFL. (Compl. ¶ 14 [“Neither Terrance Osman nor  
21 1911builders.com has a federal firearms license.”].) Thus, PLCAA protection does  
22 not apply, full stop.

23 In his concurrently-filed Demurrer, Defendant Seller—without any citation or  
24 affidavit—asserts that he “does maintain a Federal Firearms License.” (Dem. at 6.)  
25 Defendant Seller does not even present the Court with the purported license, let  
26 alone move for judicial notice of it; and in his Motion to Strike, he does not even  
27 allege it. Even if he had sought judicial notice, “[t]aking judicial notice of a document  
28 is not the same as accepting the truth of its contents or accepting a particular  
interpretation of its meaning.” (*Fremont Indemnity Co., supra*, 148 Cal.App.4th at

1 113 [reversing trial court for sustaining demurrer on the basis of a judicially-noticed  
2 document].) In reality, Defendant Seller is referencing an inapplicable license.  
3 Terrence Osman is a corporate officer in a different business: a corporation registered  
4 in California called Firearms Performance Center. That business *does* have an FFL,  
5 but it is not the business that sold the ghost gun kit at issue and is therefore not the  
6 defendant in this lawsuit. Thus, that FFL cannot provide any protection to  
7 Defendant Seller here, who personally sells the ghost gun kits, using the alias of  
8 1911builders.com, wholly outside of the scope of the corporation’s license. In any  
9 event, as noted, Defendant Seller does not even allege that he has an FFL in his  
10 Motion to Strike, and Plaintiff’s allegations are assumed to be true for purposes of  
11 this Motion. (See *Blakemore v. Superior Court*, (2005) 129 Cal. App. 4<sup>th</sup> 36, 54.)  
12 Thus, because Defendant Seller has no FFL, the Court should reject Defendant  
13 Seller’s claimed PLCAA immunity out of hand.

14 **3. Even if Defendant Seller Had an FFL, Plaintiff’s Nuisance**  
15 **Claim is Exempted from PLCAA**

16 Even if Defendant Seller did have an FFL, PLCAA protection would not apply  
17 because the Complaint alleges state and federal predicates.

18 Defendant Seller argues that PLCAA protects him from a claim of public  
19 nuisance because “[t]he California statute codifying Public Nuisance is not the type of  
20 statute that meets the predicate exception” because it is not a “statute applicable to  
21 the sale or marketing of” firearms. (Motion at 9 [citing *Ileto v. Glock, Inc., supra*, 565  
22 F.3d at 1135-36].) Defendant misunderstands PLCAA and Plaintiff’s Complaint.  
23 While Defendant is correct that some courts have held that a general public nuisance  
24 statute cannot form a PLCAA predicate, such rulings are irrelevant here because  
25 public nuisance is not the alleged predicate in Plaintiff’s Complaint. Rather, public  
26 nuisance is the common-law *cause of action*; Plaintiff alleges separate state and  
27 federal predicate offenses that indisputably *are* applicable to the sale and marketing  
28 of firearms, such as violations of the federal Gun Control Act. And courts throughout

1 the country have consistently permitted nuisance and negligence claims to go  
2 forward when they are predicated on a statute applicable to the sale and marketing  
3 of firearms or ammunition. (See, e.g., *King v. Klocek*, (N.Y. App. Div. 2020) 187  
4 A.D.3d 1614 [permitting negligence case to proceed against gun store that sold  
5 handgun ammunition to an underage individual because the case fit within PLCAA’s  
6 predicate exception]; *Prescott v. Slide Fire Solutions, LP*, (D. Nev. 2019) 410 F. Supp.  
7 3d 1123, 1138-39 [predicate exception applied to negligence claims (among others)  
8 where plaintiffs alleged violations of federal false statement laws]; *Englund v. World*  
9 *Pawn Exch.*, (Multnomah Cnty., Ore. Cir. Ct. 2017) 2017 Ore. Cir. LEXIS 3, \*11-14,  
10 24 [permitting nuisance claim, among others, to go forward where plaintiff had  
11 alleged violations of the federal Gun Control Act, as well as state statutes applicable  
12 to the sale of firearms].)

13         In *Ileto*, which Defendant relies on, the Court criticized the fact that, “[t]o meet  
14 the requirements of the predicate exception, Plaintiffs do not point to an allegation of  
15 a knowing violation of any *separate* statute,” other than public nuisance and  
16 negligence, the causes of action. (*Ileto v. Glock, Inc.*, *supra*, 565 F.3d at 1132  
17 [emphasis in original].) Rather, the plaintiffs argued that because California had  
18 taken the step of codifying its civil code, the public nuisance statute could be a  
19 “statute applicable to the sale or marketing of firearms.” (*Id.* at 1132-3.) The Ninth  
20 Circuit rejected this novel theory. Here, of course, Plaintiff *has* alleged violations of  
21 separate statutes that are indisputably “statutes applicable to the sale or marketing  
22 of” firearms. Namely, Plaintiff alleges violations of (1) the Federal Gun Control Act,  
23 by selling firearms without serial numbers and without conducting background  
24 checks (Compl. ¶¶ 52-54, citing 18 U.S.C. §§ 922(a), 922(t) and 26 U.S.C. § 5842; see  
25 also 27 C.F.R. 478.124 and 478.125), and (2) the California Unsafe Handgun Act  
26 (Compl. ¶¶ 55-59, citing Cal. Penal Code § 32000(a)), by causing to be manufactured

27  
28



1 firearms that do not meet statutory safety requirements.<sup>4</sup>

2 Thus, Plaintiff has sufficiently alleged violations of multiple federal and state  
3 statutes—though she would need allege only one—that are applicable to the sale and  
4 marketing of firearms and that proximately caused her harm. Therefore, even *if*  
5 Defendant Seller had an FFL, the predicate exception would apply and PLCAA would  
6 not confer protection.

7 **IV. CONCLUSION**

8 Based on the above, Defendant’s Motion to Strike Portions of Plaintiff’s  
9 Complaint should be denied.

10

11 Dated: June 15, 2021

WALKUP, MELODIA, KELLY & SCHOENBERGER

12

13

By: 

14

RICHARD H. SCHOENBERGER  
SPENCER J. PAHLKE  
SARA M. PETERS  
Attorneys for PLAINTIFFS

15

16

17

**EVERYTOWN LAW**  
ALLA LEFKOWITZ\*  
LEN HONG KAMDANG\*  
MARK WEINER\*  
Attorneys for PLAINTIFF

18

19

20

*\*Pro Hac Vice Applications Pending*

21

22

23

24

25

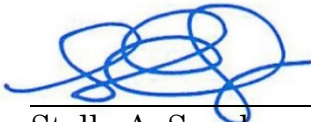
26

---

27 <sup>4</sup> Defendant makes no argument in his Motion to Strike that Plaintiff failed to  
28 sufficiently allege violations of these statutes. Defendant’s arguments to the contrary  
in his Demurrer are addressed in Plaintiff’s concurrently-filed Opposition to  
Defendant’s Demurrer.



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



Stella A. Saephan

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28