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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: 20STCV48910

[Complaint filed: 12/22/2020]

JUDGE: STEPHEN P. PFAHLER
DEPT.: F-49

DEFENDANT TERRENCE J. OSMAN’S
REPLY TO OPPOSITION OF PLAINTIFF
AND IN SUPPORT OF MOTION TO
STRIKE PLAINTIFF’S COMPLAINT

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

Reservation No.: 66284714409

Defendant TERRENCE J. OSMAN DBA 1911 BUILDERS (hereinafter “Defendant”) respectfully submits the following Reply to Opposition of Plaintiffs and in Support of Motion to Strike Plaintiff’s Complaint.

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1 **I. INTRODUCTION**

2 Plaintiff fails to allege with the requisite specificity any facts to support her claims for punitive
3 damages against Defendant. Plaintiff argues in her Opposition that her Complaint does allege facts that
4 tracks the requisite language of California Civil Code section 3294, even though Plaintiffs make no
5 mention of the statute, do not cite its language, and do not allege an entitlement to punitive damages
6 until their “Prayer for Relief.” Plaintiff alleges that Defendant violated various statutes in selling an
7 alleged “ghost gun” to the shooter or his father. At issue in this matter though is an “80 Kit” that was
8 sold to the shooter’s father that it appears was ultimately completed with further machining and parts to
9 make it a functionable firearm. Defendant did not sell a “firearm” pursuant to the law and Defendant
10 disputes Plaintiff’s allegations regarding statute violations. Nevertheless, simply alleging that
11 Defendant violated statutes and this was the proximate cause of Plaintiffs’ injury is not sufficient for
12 punitive damage claims. Plaintiff’s allegations basically amount to alleging negligence or even gross
13 negligence against Defendant, which is not sufficient for punitive damage claims. Plaintiff has not
14 alleged anywhere in the Complaint that Defendants acted with the requisite **“oppression, fraud or**
15 **malice that constitutes despicable conduct”** pursuant to California Civil Code section 3294 thereby
16 entitling Plaintiff to punitive damages against this Defendant. Accordingly, Plaintiffs claims for
17 punitive damages should be stricken.

18 Plaintiff also alleged an entitlement to an injunction in her prayer pursuant to her cause of action
19 for Public Nuisance and alleges that this claim is not barred by 15 USC §§ 7901-7903 or the Protection
20 of Lawful Commerce in Arms Act (hereinafter “PLCAA”). Plaintiff’s causes of action for Public
21 Nuisance is barred against Defendant, as Defendant is immune to this type of general tort cause of
22 action, as alleged by Plaintiff in her Complaint, pursuant to the PLCAA and Plaintiff’s Public Nuisance
23 cause of action does not meet the “predicate exception” of the PLCAA.

24 Plaintiff also does not allege a basis and there is no contractual or statutory basis to pursue
25 attorneys’ fees against Defendant and Plaintiff previously agreed that this portion of the motion is
26 undisputed and will be removed against Defendant (Declaration of Sean R. Ferron, ¶ 4, filed
27 concurrently with Motion to Strike.)

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2 **II. PLAINTIFF’S COMPLAINT FAILS TO ALLEGE SUFFICIENT FACTS TO SUPPORT**
3 **A CLAIM FOR PUNITIVE DAMAGES AGAINST THIS DEFENDANT**

4 In order to state a claim for punitive damages, a plaintiff must allege facts that establish, by clear
5 and convincing evidence, that the defendant has engaged in oppression, fraud or malice that constitutes
6 despicable conduct. (California Civil Code section 3294; *Stewart v. Truck Ins. Exchange* (1993) 17
7 Cal.App.4th 468, 482). Conclusory allegations that seek punitive damages are improper; rather a
8 plaintiff must allege specific facts that meet the clear and convincing standard as set forth in California
9 Civil Code section 3294. A plaintiff must allege that the defendant acted with oppression, fraud, or
10 malice, for example, that the defendant had the intent to inflict injury or destroy reputation. (*Smith v.*
11 *Sup. Ct.* (1992) 10 Cal.App.4th 1033, 1041-42; *G.D. Searle v. Sup. Ct.* (1975) 49 Cal.App.3d 22, 28-29).

12 The following are the definitions for malice, oppression and fraud as defined respectively in
13 California Civil Code section 3294(c)(1)-(3):

- 14 (1) ‘Malice’ means conduct which is intended by the defendant to cause injury to the plaintiff
15 or despicable conduct which is carried on by the defendant with a willful and conscious
16 disregard of the rights or safety of others.
- 17 (2) ‘Oppression’ means despicable conduct that subjects a person to cruel and unjust
18 hardship in conscious disregard of that person’s rights.
- 19 (3) ‘Fraud’ means an intentional misrepresentation, deceit, or concealment of a material fact
20 known to the defendant with the intention on the part of the defendant of thereby
21 depriving a person of property or legal rights or otherwise causing injury.

22 Plaintiff has alleged causes of action against Defendant for Negligence, Negligent Entrustment,
23 and Public Nuisance. Plaintiff has made allegations in her causes of action that amounts to Defendant
24 “unlawfully and negligently” selling an alleged “ghost gun” to the shooter or the shooter’s father.
25 Plaintiff also makes very broad allegations regarding Defendant selling “ghost guns” to the general
26 public through its website and failing to comply with statutes that only apply to the sale of “firearms.”
27 Defendant is not selling “firearms” pursuant to the law.

1 In order to recover punitive damages, the act complained of must not only be willful in the
2 sense of intentional, but must also be accompanied by aggravated circumstances amounting to malice in
3 fact. (*Ebaugh v. Rabkin* (1972) 22 Cal.App.3d 891, 894.) There must be an intent to vex, annoy, or
4 injure. (*Id.*) **Mere negligence, even gross negligence, is not sufficient to justify an award of punitive**
5 **damages. (*Id.*)** [Emphasis added]. “Consequently, to establish malice, ‘it is not sufficient to show only
6 that the defendant's conduct was negligent, grossly negligent or even reckless.’” (*Bell v. Sharp Cabrillo*
7 *Hosp.* (1989) 212 Cal.App.3d 1034, 1044). Carelessness, characterized as negligence or recklessness, is
8 not sufficient to support an award of punitive damages. (*Nolin v. Nat’l Convenience Stores, Inc.* (1979)
9 95 Cal.App.3d 279, 285-286.) Plaintiff has not alleged that Defendant acted with any intent to vex,
10 annoy, or injure Plaintiff or anyone else. Moreover, Plaintiff has not alleged any malice in fact on the
11 part of Defendant and instead solely rely on Defendant’s alleged violations of statute and unlawful sale
12 of the “80 Kit” which she supports with law that does not apply to Defendant as the seller of non-
13 complete “firearms.”

14 Simply alleging that Defendant violated a statute that was the proximate cause of Plaintiff’s
15 injuries is not sufficient for punitive damage claims. Plaintiff’s allegations basically amount to alleging
16 negligence or even gross negligence against Defendant, which is not sufficient for punitive damage
17 claims. Plaintiffs have not alleged anywhere in the Complaint that Defendants acted with the requisite
18 **“oppression, fraud or malice that constitutes despicable conduct”** pursuant to California Civil Code
19 section 3294 thereby entitling Plaintiffs to punitive damages against this Defendant.

20 Accordingly, Plaintiff’s prayer for punitive damages against this Defendant should be stricken
21 with prejudice.

22
23 **III. PLAINTIFF IS BARRED FROM SEEKING AN INJUNCTION AGAINST**
DEFENDANT

24 Public Nuisance is not an enumerated as an exception under the PLCAA. The PLCAA preempts
25 common law claims like public nuisance against sellers of firearms like Defendant. Congress did not
26 provide an enumerated exception for general negligence or public nuisance. “Congress consciously
27 considered how to treat tort claims” and it “chose generally to preempt all common law claims” except
28 negligent entrustment and negligence per se. (*Illeto v. Glock* 565 F.3d 1126, 1135 n.6 (9th Cir. 2009)).

1 An action in which a seller of a firearm “knowingly violated a State or Federal statute applicable
2 to the sale or marketing” of a firearm and “the violation was a proximate cause of the harm for which
3 relief is sought” is an exception to PLCAA immunity. 15 U.S.C. § 7903(5)(A)(iii) (hereinafter referred
4 to as “predicate exception”). The California statute codifying Public Nuisance is not the type of statute
5 that meet the predicate exception. Public Nuisance is codified by California Civil Code section 3480,
6 which states “A public nuisance is one which affect at the same time an entire community or
7 neighborhood, or any considerable number of persons, although the extent of the annoyance or damage
8 inflicted upon individuals may be unequal.”

9 Plaintiff can only possibly seek an injunction against Defendant pursuant to their cause of action
10 for Public Nuisance and not their other causes of action. Plaintiffs argue in their Opposition that their
11 cause of action for Public Nuisance meets the “predicate exception” to the PLCAA and therefore is not
12 barred by the PLCAA. This is incorrect, as the alleged statutory violation must be the “proximate
13 cause” of the harm for it to meet the exception in the PLCAA. In the present matter, the shooter clearly
14 intentionally caused the shooting and engaged in criminal activity that has proximately caused Plaintiff’s
15 alleged injuries. Plaintiff alleges this in her Complaint. The shooter’s responsibility for Plaintiff’s
16 injuries is clear and this is the proximate cause of Plaintiffs’ alleged injuries. The PLCAA makes it
17 clear when defining the “products liability” exception to the PLCAA that the exception does not apply
18 when the allegedly defective firearm discharge is the result of a “volitional act” that constitutes “a
19 criminal offense.” The criminal act “shall be considered the sole proximate cause” of any resulting
20 personal injuries or death. (15 USC 7903(5)(A)(v), *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283,
21 1317-1318). Accordingly, it is clear that when a shooting is the result of an intentional act that
22 constitutes a criminal offense like in this matter, Congress intended that that act be considered the “sole
23 proximate cause.”

24 Plaintiff further argues in her Opposition that Defendant does not have a Federal Firearm License
25 and therefore the PLCAA does not apply to him as a “seller” of “qualified products” under the PLCAA
26 and she is able to maintain her Public Nuisance cause of action. Defendant disputes Plaintiff’s
27 allegations relating to the license, but a Federal Firearms License is not required to sell “80 Kits” like
28 those being sold by Defendant. Most importantly, even if Defendant did not maintain a Federal

1 Firearms License, the PLCAA still applies to him, as the PLCAA only requires a Federal Firearm
2 License when selling “firearms” and not components of “firearms.” (15 U.S.C. §7903(6), 18 U.S.C.
3 §921(a)(11), 18 U.S.C § 923.) Accordingly, even if Plaintiff is correct that Defendant does not
4 individually maintain a Federal Firearms License and maintains it for another business, he still is
5 afforded the protection of the PLCAA as he sold a “qualified product” pursuant to the PLCAA, did not
6 sell a “firearm” that is at issue in the present matter.


7 Accordingly, Plaintiff’s cause of action for Public Nuisance is barred against Defendant and in
8 turn, Plaintiffs are not able to seek an injunction against Defendant.

9 **IV. CONCLUSION**

10 Based upon the foregoing, Defendant respectfully requests that this Court strike Plaintiffs’
11 prayers for punitive damages, attorneys’ fees, and injunction against Defendant, with prejudice, and
12 without leave to amend.

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14
15 DATED: June 18, 2021

LAW OFFICES OF ADRIENNE D. COHEN

16 
17 By: _____
18 **ADRIENNE D. COHEN,**
19 **SEAN R. FERRON,**
20 **Attorney for Defendant,**
21 **TERRENCE J. OSMAN DBA 1911**
22 **BUILDERS**

PROOF OF SERVICE
(C.C.P. SECTION 1013 (a), 2015.5)

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the county aforesaid; I am over the age of eighteen and not a party to the within action; my business address is 1551 N. Tustin Ave., Ste. 750, Santa Ana, CA 92705.

On June 18, 2021, I served the foregoing document described as:

DEFENDANT TERRENCE J. OSMAN'S REPLY TO OPPOSITION OF PLAINTIFF AND IN SUPPORT OF MOTION TO STRIKE PLAINTIFF'S COMPLAINT

in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

- I caused to be delivered next business day via FedEx, such envelope by hand to the offices of the addressee(s).

- I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, I deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Ana, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

- The document was served via electronic transmission using E-mail to the address(es) listed in the attached Service List.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on June 18, 2021, at Santa Ana, California.


Justin R. Turbow

SERVICE LIST

RE: **MIA TRETТА, ET AL. VS TERRANCE J. OSMAN, ET AL.**
LASC Case No.: 20STCV48910

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