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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

CLAUDIA APOLINAR and EMMANUEL PEREZ-PEREZ,

Plaintiffs,

v.

POLYMER80, INC., a Nevada corporation, and DOES ONE through FIFTY,

Defendants.

Case No. 2:21-cv-08401-PA-PVC

PLAINTIFFS' OPPOSITION TO DEFENDANT POLYMER80, INC.'S MOTION TO DISMISS OR, ALTERNATIVELY, STRIKE SCANDALOUS MATERIAL

Judge: Hon. Percy Anderson
Date: December 6, 2021
Time: 1:30 p.m.
Crtrm.: 9A

Trial Date: Not vet assigned

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I. INTRODUCTION

Defendant Polymer80 sells "ghost gun" kits used to build home-assembled firearms throughout California. A fully assembled and operational firearm built from such a kit is called a ghost gun because it has no serial number, making it virtually untraceable by law enforcement, and can be acquired over the internet without a background check. The proliferation of ghost guns is contributing to the large increase in violent crime in Los Angeles and throughout the state and poses a lethal threat to the safety of law enforcement personnel and all other citizens.

That threat foreseeably came to catastrophic fruition on September 12, 2020. That evening, a person legally barred from having a firearm due to prior felony convictions used the gun he could easily procure and knew would be nearly impossible to trace—a Glock-style handgun built from one of Polymer80's PF940C ghost gun kits—to ambush Plaintiffs. He shot Deputy Claudia Apolinar multiple times, including in the jaw and both arms; he shot Deputy Emmanuel Perez five times, including in the head and hand.

Defendant's Motion to Dismiss attempts to pull its conduct within the scope of the Protection of Lawful Commerce in Arms Act ("PLCAA") provides the gun industry. Those strained efforts fail because Defendant violated multiple laws. Any one of those violations strips it of PLCCA protection:

- **The Federal Gun Control Act ("GCA").** Defendant's gun building kits, which allowed Californians to make Glock-style handguns, are "firearms" under the GCA. They are "designed to or may readily be converted" into functioning weapons or the frame of such weapons. Defendant's sale of these kits without background checks or serial numbers is illegal under federal law.
- **The California Unsafe Handgun Act ("CUHA").** By aiding and abetting the manufacture of handguns that violate CUHA's safety requirements, Defendant's sale of these kits was illegal under state law.

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- **The California Assembly of Firearms Law ("CAFL").** By aiding and abetting the manufacture of firearms that cannot comply with CAFL's serialization requirement, Defendant further violated state law.
- **The California Unfair Competition Law ("UCL").** By advertising that its kits were legal to build and own (which they are not) and that the ATF agreed with this conclusion (which it had not), Defendant engaged in unlawful and unfair competition through its business practices, violating state law.

Given that Plaintiffs adequately pleaded violations of each of these laws—when only one such violation is sufficient to overcome PLCAA protection—Defendant's PLCAA-based dismissal arguments should be rejected.

Without PLCAA protection, Defendant bears liability for Plaintiffs' injuries under the common law theories of negligence and nuisance. Contrary to Defendant's claim, the criminal act of a third party is not a superseding intervening cause where, as here, the likelihood of that criminal act is the very hazard that makes Defendant negligent.

II. FACTUAL BACKGROUND

Defendant Polymer80, Inc. manufactures, advertises, and sells do-it-yourself firearm-assembly kits. First Am. Compl. for Dmgs. ¶ 10, ECF No. 1-1 ("FAC"). These kits contain the instructions and components necessary for the quick and easy home assembly of firearms, including Glock-style semiautomatic handguns. *Id*. Two different ghost gun kits are at issue in this case. Defendant's "Buy Build Shoot" kit contains "all the necessary components to build a complete" Glock-style "PF940C™ or PF940v2™ pistol." FAC ¶¶ 61, 62 (including photo[1]). Defendant's

[1] The FAC's photos are of Polymer80 PF940v2 Buy Build Shoot and pistol frame kits. For purposes of the legal issues here, those kits contain the same parts and are materially identical to Defendant's PF940C Buy Build Shoot and pistol frame kits.

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PF940C pistol frame kit is not an all-parts-included gun building kit, but instead a kit that allows the quick and easy completion of the pistol's core component, the frame.[2] FAC ¶ 63. The frame in the kit is nearly finished. FAC ¶ 63. It comes with a jig and drill bits (to do the minimal drilling required to complete the frame), as well as other components to facilitate assembly into a functioning weapon when combined with other parts sold separately. FAC ¶ 63 (including photo). Polymer80 sells both kits indiscriminately, without background checks or serial numbers, making them nearly impossible to trace. FAC ¶¶ 11, 60.[3]

For that reason, as Polymer80 knows, ghost gun kits are particularly attractive to criminals and other dangerous individuals who are prohibited by law from possessing firearms. FAC ¶ 14. In recent years, ghost guns have turned up increasingly often at crime scenes, both nationwide and in California and Los Angeles in particular. FAC ¶¶ 15-16. Polymer80 plays no small role in this trend. From public reports, Polymer80 is by far the largest seller and manufacturer of ghost gun kits, responsible for 86% of the roughly 1,475 ghost guns seized by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") in 2019. FAC ¶ 17.

One such Polymer80 ghost gun is at the center of this case. On September 12, 2020, a convicted felon—legally barred from purchasing or possessing a firearm—ambushed two Los Angeles County Sheriff's deputies and, with his Polymer80 PF940C handgun, shot and grievously wounded them. FAC ¶¶ 1-3, 9, 12. These deputies, Plaintiffs Claudia Apolinar and Emmanuel Perez-Perez, sustained multiple severe and lasting injuries. *See* FAC ¶¶ 35-42. They seek to recover damages from Polymer80, alleging that its promotion and sale of ghost gun kits, without

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[2] In a pistol, the frame is the gun's basic outline; it houses the trigger and magazine, and serves as a foundation for the slide and barrel (*i.e.*, the parts a bullet passes through when fired). FAC ¶ 47.

[3] Moreover, Polymer80 sells these kits into California, despite knowing that, once assembled, the firearms will be illegal to possess. FAC ¶¶ 81-84, 93.

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background checks or serial numbers and in violation of federal and state gun laws, was "negligent, reckless, despicable, and malicious" and done with "conscious disregard for the health and safety of others," and that it created a public nuisance. *See* FAC ¶¶ 22, 119-20. In short, Plaintiffs allege that Polymer80 has "creat[ed] a market that unreasonably and directly and indirectly put untraceable, no-background check guns in the hands of dangerous persons, foreseeably resulting in the use of its guns in criminal acts," including the attempt on Plaintiffs' lives. FAC ¶¶ 22-23.

Polymer80's sale and promotion of ghost gun kits in California violates several state and federal laws. FAC ¶¶ 72-114. Because PLCAA offers protection only to gun sellers and manufacturers who comply with federal and state laws "applicable to the sale or marketing of the product," Defendant's state and federal law violations strip it of PLCAA protection. Polymer80 violated the GCA by shipping unserialized ghost gun kits into California without background checks. FAC ¶¶ 74-75. Polymer80 aided and abetted violations of CUHA by manufacturing and selling, in California, kits containing all the instructions and components to make handguns or the frames of handguns that are illegal under CUHA. FAC ¶¶ 84-85. Polymer80 aided and abetted violations of CAFL by manufacturing and selling, in California, kits containing all the instructions and components to make firearms that were not—and indeed, could not be—serialized as required by CAFL. FAC ¶¶ 91-94. And finally, Polymer80 violated California's UCL, including by falsely representing that ATF had deemed Polymer80's ghost gun kits legal, despite that ATF never made such a determination and despite Polymer80's knowledge that the assembled ghost guns would be *illegal* under California law. FAC ¶¶ 98-102.

Plaintiffs filed their initial complaint in Los Angeles Superior Court on August 9, 2021, and the FAC on August 20, 2021. On October 22, 2021, Polymer80 filed a notice of removal, then filed the instant motion to dismiss one week later.[4]

[4] Plaintiffs intend to file a motion to remand on November 16, 2021. By opposing

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III. LEGAL ARGUMENT

A. Legal standard

A complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The allegations need only "be enough to raise a right to relief above the speculative level." *Id.* The claims must be "plausible," which "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting the allegations. *Id.* at 556. A district court reviewing a complaint under Rule 12(b)(6) must "construe the complaint in a light most favorable to the non-moving party," *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007). The Ninth Circuit is particularly hostile to 12(b)(6) motions to dismiss. *See, e.g., Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) ("The Rule 8 standard contains 'a powerful presumption against rejecting pleadings for failure to state a claim.'") (citation omitted).

Here, Defendant repeatedly emphasizes that certain facts alleged in the FAC are "*[u]pon information and belief*." Mem. of P. & A. in Supp. of Mot. to Dismiss, ECF No. 10, hereinafter "Mtn." 4:21, 5:3, 5:9, 6:22-23, 7:14 (emphasis in original). But pleading facts "on information and belief" is sufficient to survive a motion to dismiss as long as the other *Iqbal-Twombly* factors are satisfied. *Johnson v. Shasta Cty.*, 83 F. Supp. 3d 918, 926 (E.D. Cal. 2015) (citing *Hightower v. Tilton*, No. C08-1129-MJP, 2012 WL 1194720, at *3-4 (E.D. Cal. Apr. 10, 2012)).

Finally, leave to amend shall be freely given when justice so requires. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). "This policy is to be applied with extreme liberality." *Id*. (citations omitted).

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this motion to dismiss, Plaintiffs do not waive any right to seek remand.

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B. PLCAA does not protect Defendant, given that Defendant violated multiple statutes, each of which serves as a predicate exception—as alleged in the FAC

1. PLCAA provides no basis for dismissal in this case

PLCAA was enacted in 2005 and protects the firearms industry from liability in cases where the injury was solely caused by a third party's criminal conduct and where the gun industry defendant did nothing wrong. *See* 15 U.S.C. § 7901(a)(6). PLCAA's operative clause provides that "[a] qualified civil liability action may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). A "qualified civil liability action" is defined as: "[A] civil action . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages . . . or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . ." 15 U.S.C. § 7903(5)(A).[5]

However, this case involves one of six enumerated exceptions that bring a case outside of PLCAA's protection—the predicate exception. *See Soto v.*

[5] Defendant advances a puzzling position: that it is entitled to protections for firearms manufacturers for manufacturing products it contends are not firearms. This position is contrary to the text of PLCAA, as well as Ninth Circuit case law. See Ileto v. Glock, Inc., 565 F.3d 1126, 1144-46 (rejecting defendant's argument it was entitled to PLCAA protection because it qualified as a "seller" under PLCAA, where that aspect of the defendant's business was not related to the case). Under PLCAA, a covered "manufacturer" is defined, with respect to the product at issue, as "a person who is engaged in the business of manufacturing the product . . . and who is licensed to engage in business as such a manufacturer under [the Gun Control Act.]" 15 U.S.C. § 7903(2) (emphasis added). Under the Defendant's view, the kit that was built into the product used to shoot the Plaintiffs is not a firearm, but simply a component or combination of components. However, no federal firearms license is required to manufacture non-firearm components. See Bureau of Alcohol, Tobacco, Firearms and Explosives, Q&A, available at https://www.atf.gov/firearms/qa/does-gca-control-sale-firearms-parts. Thus, if the Court were to accept Defendant's incorrect argument that the product at issue is not a firearm, then PLCAA would provide no protection at all. See Ileto, 565 F.3d at 1146 ("the logical reading of the statute [] require[s] a nexus between the basis of the allegations and the nature of the defendant's business").

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Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 301 (Conn. 2019). PLCAA allows a plaintiff to bring a case against a member of the gun industry that has "knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought[.]" 15 U.S.C. § 7903(5)(A)(iii). "This exception has come to be known as the 'predicate exception,' because a plaintiff not only must present a cognizable claim, he or she also must allege a knowing violation of a 'predicate statute.'" *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132 (9th Cir. 2009); *see also Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 429-30 (Ind. Ct. App. 2007).

Relying on the predicate exception, numerous courts have held that negligence and public nuisance claims are not barred by PLCAA when they are predicated on knowing violations of law applicable to the sale of firearms or ammunition.[6] And because the predicate exception refers to "an action in which" a seller violates federal or state law, courts have held that once a predicate violation against a defendant is properly alleged, a claim-by-claim analysis of the lawsuit is not required, and the entire lawsuit can bypass PLCAA.[7] Here, as explained below,

[6] *See, e.g.*, *King v. Klocek*, 187 A.D.3d 1614 (N.Y. App. Div. 2020) (permitting negligence case to proceed against gun store because the case fit within PLCAA's predicate exception); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434-45 (Ind. Ct. App. 2007) (allowing negligence and public nuisance claims to proceed after concluding that violation of a statutory public nuisance law triggered application of the predicate exception); *Corporan v. Wal-Mart Stores E., LP*, No. 16-2305-JWL, 2016 WL 3881341, at *4 (D. Kan. July 18, 2016) (permitting plaintiff's negligence claim to proceed where the defendant's alleged conduct, with anticipated amendments to the complaint, fell within the predicate exception); *Chiapperini v. Gander Mountain Co.*, 13 N.Y.S.3d 777, 787-88 (N.Y. Sup. Ct. 2014) (permitting plaintiffs' negligence claim to proceed because the complaint had sufficiently alleged knowing violations of gun laws).

[7] *See, e.g.*, *Corporan*, 2016 WL 3881341, at *4, n.4 ("[B]ecause the court finds the predicate exception applicable to this action, it declines to engage in the claim-by-claim analysis advanced by defendants."); *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 339 (N.Y App. Div. 2012), *amended by* 951 N.Y.S.2d 444 (N.Y. App. Div.

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Plaintiffs have adequately alleged knowing violations of both federal and state predicate statutes. Defendants are therefore not entitled to PLCAA protection.

2. Plaintiffs allege violations of the Federal Gun Control Act

The GCA, 18 U.S.C. § 921(a)(3) (emphasis added), provides:

> The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

This statutory language readily supports the conclusion that Plaintiffs have more than adequately alleged that Defendant's Buy Build Shoot and pistol frame kits are "firearms." The FAC specifically avers the kits are "designed to" and "may readily be converted" into an operable weapon or the frame or receiver of "any such weapon." FAC ¶ 73. That they can be "readily" "converted" is the entire purpose of Defendant's enterprise. Defendant's stated goal to sell kits through which any customer can "exercise . . . gun ownership," Mtn. 3:2, is surely to sell a "firearm," for it "may readily be converted" into and is "designed" to become an operable weapon or the key component of such a weapon.

The GCA unambiguously classifies as "firearms" unfinished frames and receivers sold as parts of kits so long as they are either (1) intended to become operable firearms or the frame or receiver of an operable weapon as reflected by their design ("designed to") and/or (2) are sold in a manner such that they can be turned into an operable firearm or the frame or receiver of an operable firearm without much difficulty ("may readily be converted"). The fact that the frames sold

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2013) (concluding that a separate analysis of the plaintiff's negligent entrustment and negligence per se exceptions is unnecessary after determining that the predicate exception applies); *Englund v. World Pawn Exch.*, No. 16CV00598, 2017 WL 7518923, at *4 (Or. Cir. June 30, 2017) ("[T]he Court notes that the predicate exception's broad language provides that an entire 'action' survives—including all alleged claims. . . .").

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as part of Defendant's PF940C Buy Build Shoot and pistol frame kits are *unfinished* and require some minimal additional machining to become the frame of an operable weapon does not change the analysis under the GCA. *See United States v. Stewart*, 451 F.3d 1071, 1072-73 & n.2 (9th Cir. 2006) (affirming district court probable cause finding that "parts kits" for "Maadi-Griffin .50 caliber rifles" sold over internet, which included receivers that "had not yet been completely machined," could "readily be converted" and thus were firearms under 18 U.S.C. § 921(a)(3)); *United States v. Wick*, No. CR 15-30-M-DLC, 2016 WL 10637098, at *1 (D. Mont. July 1, 2016) (explaining that "a plain reading of § 921(a)(3) indicates that if the receiver of a weapon can be readily converted to expel a projectile, then that receiver can be considered a 'firearm' under the statute," and upholding jury's verdict where "the receiver pieces in Wick's parts kits were readily convertible to Uzi receivers" where they could be welded together in "30 to 45 minutes"), *aff'd on other grounds*, 697 F. App'x 507 (9th Cir. 2017) (finding that "complete Uzi parts kits that could 'readily be converted to expel a projectile' . . . meet[] the statute's definition of a firearm").

Defendant makes much of the placement of "frame or receiver" in subsection (B), purportedly detached from the "designed to" and "may be readily converted" language in subsection (A). Mtn. ¶ 14:11-23. But in attempting to artificially separate these subsections, and suggesting they do not operate together, Defendant ignores how they are inextricably connected. When Subsection (B) references the "frame or receiver of any such weapon," it can only be referring to the "weapon" in subsection (A), which of course includes those that are not complete or functional but nevertheless are "designed" to be or "may readily be converted" into a functional weapon. *See Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 872 (9th Cir. 2005) ("'[a]ny such facility' refers back to the phrase 'terminal, dock, or other facility'"). Stated differently, because subsection (A) clearly includes unfinished or inoperable weapons in its definition of firearm (so long as it is

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"designed to or may readily be converted" to be a functional weapon), it follows logically and directly that the frame or receiver of "any such weapon" that qualifies as a firearm under subsection (B) may be unfinished or not yet operable as well.

Defendant also errs in arguing that any finding "that a kit containing an 'unfinished' frame and parts to 'complete' it is a firearm" pursuant to subsection (A) would render subsection (B) "superfluous." Subsection (A) captures as a firearm any gun-building kit that contains *all the parts* needed to complete a functioning weapon including, as relevant here, Defendant's PF940C Buy Build Shoot Kit.[8] Subsection (B) captures as firearms stand-alone frames and receivers, including kits limited to the parts needed to make a complete frame such as Defendant's PF940C pistol frame kit, so long as that frame kit is "designed" to be or "may be readily converted" into the frame of a functional weapon specified in subsection (A). In other words, it is the combination of subsections (A) and (B) that brings Defendant's PF940C pistol frame kit within the definition of firearm, whereas subsection (A) on its own clearly captures Defendant's all-inclusive PF940C Buy Build Shoot kit.

For the same reasons, Defendant misses the mark in seeking dismissal based on Plaintiffs' inability to specify, at the pleading stage, "from which PF940C kit the shooter's firearm was actually built," because Plaintiffs clearly allege that both kits satisfy the GCA definition of "firearm." Mtn. 16:11-12; FAC ¶¶ 61-63, 73-75.

Nor is Defendant's reference to *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. 2021), availing. Plaintiffs there argued that a magazine was a "firearm" under the GCA when packaged and sold with a weapon. *Id*. at 27-28. The *In Re Academy* court disagreed. *Id*. at 30. Here, by contrast, Plaintiffs rely on the plain text of the GCA and Congress's decision to expressly include frames and receivers in the definition of firearms and to cross-reference subsection (B) of 921(a)(3) with

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[8] The ATF agrees—having represented to a federal court the conclusion of its General Counsel that the PF940C all-inclusive Buy Build Shoot Kit is indeed a firearm under § 921(a)(3). FAC ¶ 73.

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subsection (A)'s expansive inclusion of not only operable weapons but those that are designed or readily convertible to be operable weapons—including the (unfinished) frames and receivers of "any such" incomplete or inoperable weapon. If anything, *In re Academy* supports Plaintiffs' interpretation of the GCA—not Defendant's—by recognizing that "'firearm' is a term of art that includes some component parts but not others." *Id*. at 29. Frames and receivers are component parts that Congress chose to include in the GCA definition of "firearm," magazines are not.

The FAC also adequately alleges that Defendant's knowingly illegal business model was a proximate cause of Plaintiffs' harm. The shooter in the case had a history of prior felony convictions that made it illegal for him to purchase or possess firearms. FAC ¶ 9. Defendant knew its model of distribution—direct sales of unserialized, untraceable firearms kits to purchasers with neither a background check required nor any reasonable measures to ensure sales only to eligible purchasers—was foreseeably attractive to prohibited users like the shooter in this case. FAC ¶ 70. Defendant also knew its completed kits were illegal to possess in California. FAC ¶ 77-94. Because Defendant violated federal and state laws and took no reasonable steps to prevent their product from ending up in the hands of prohibited users, the "shooter was able to obtain one of Defendants' firearm kit products and chose to ambush [the] Deputies with a Polymer80 firearm." FAC ¶ 71.

Finally, while it is true that ATF sent Defendant a determination letter in 2017 concluding that the unfinished PF940C frame, *on its own*, did not meet the definition of "firearm," ATF has never issued any opinion letter that the PF940C pistol frame *kit* or the Buy Build Shoot Kit is not a firearm. To the contrary, ATF put Defendant on notice in 2018 that such a kit likely would be classified as a firearm, but Defendant chose not to find out. FAC ¶¶ 103-109 (citing 2018 letter from ATF to Polymer80, attached hereto as Ex. A). Accordingly, Defendant's protestations of an innocent state of mind (Mtn. 16:18-17:6), provide no basis for dismissal at the pleading stage where Plaintiffs have clearly alleged knowing

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violations of the GCA (FAC ¶¶ 73-76, 103-109), and are entitled to discovery to support their well-pleaded allegations. In addition, to prove a "knowing" violation of federal or state law to satisfy the predicate act exception under PLCAA, Plaintiffs need only allege—as they clearly have done here—that Defendant had "knowledge of the facts that constitute the offense," not that its actions were unlawful. *See, e.g.*, *Bryan v. United States*, 524 US. 184, 192 (1998) ("The term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law"); *United States v. Johnson*, 459 F.3d 990, 996 (9th Cir. 2006) ("'Knowledge' refers only to the defendant's knowingly possessing the gun, and it does not require knowledge that he is violating the law."). The Complaint clearly alleges that Defendant knew it was advertising and selling ghost gun kits (*see, e.g.*, FAC. ¶ 120), and that is all that is required; Defendant's attempt to evade culpability by suggesting the law was too "nebulous" for it to understand fails. Mtn. 16:18-17:6.[9]

3. Plaintiffs allege violations of the California Unsafe Handgun Act

The CUHA establishes safety standards for all handguns manufactured, imported, and sold in the state. FAC ¶ 77. The requirements of the CUHA apply to any "person in this state who manufactures or causes to be manufactured . . . an unsafe handgun." Cal. Penal Code § 32000(a)(1). An "unsafe handgun" is defined as "any pistol, revolver, or other firearm capable of being concealed upon the person" that does not have certain safety devices, meet firing requirements, or satisfy drop

[9] Defendant's citation to the ATF's forthcoming Proposed Rule as evidence of the alleged "murkiness of federal precedent" is equally unpersuasive. In fact, the Proposed Rule makes clear that, as a matter of plain reading of the GCA, "firearm parts kits with incomplete frames or receivers," whether they contain "most or all of the components . . . necessary to complete a functional weapon within a short period time," "are 'firearms' under the GCA because they are *designed to* or *may readily be converted* to expel a projectile by the action of an explosive." 86 Fed. Reg. 27,720 at 27,726 (citing *Stewart* and *Wick*, *supra*, among other cases).

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safety requirements. *Id*. at § 31910.

Defendant at first tries to address its CUHA liability with the strawman that CUHA applies only to "frames" or "kits," and not their "unfinished" counterparts, implying it is inapplicable in this case. Mtn. 17:10-23. The strawman collapses because Plaintiffs do not allege that CUHA applies to "unfinished" frames or receivers. Plaintiffs instead allege that Defendant is *aiding and abetting* the unlawful manufacture of *finished* firearms by persons in California, through Defendant's sales of its kits to California residents. FAC ¶¶ 83-85. The finished firearms are indisputably "firearms" under California law.

Defendant makes no argument that aiding and abetting a violation of law cannot support a predicate exception to PLCAA. Instead, Defendant labels the FAC's aiding and abetting allegations as "conclusory." Mtn. 17:26. It complains they "do not at all illuminate *how* the Company supposedly 'aid[ed] and abett[ed] the manufacture in California of the Polymer80 PF940c handgun used to shoot Plaintiffs." Mtn. 17:28-18:2.

Plaintiffs' allegations easily meet the "above the speculative level" and "plausible" thresholds required by *Twombly*, 550 U.S. at 545. "Aiding and abetting" includes a showing of knowledge, intent, and action:

> [A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.

People v. Beeman, 35 Cal. 3d 547, 561, 674 P.2d 1318 (1984). As the FAC makes abundantly clear, Defendant aided and abetted through knowingly and intentionally acting to assist in the unlawful manufacture of firearms:

- **Knowledge.** Defendant knew its handguns did not comply with the CUHA and are not on the CUHA's approved Roster of Safe Handguns, FAC ¶¶ 81-84, and Defendant does not dispute that once its handguns are manufactured, they constitute illegal "unsafe handguns" under CUHA.

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- **Intent.** Defendant intended that its kits be assembled into handguns, FAC ¶ 83, and sold those kits into California. FAC ¶¶ 13, 33, 61, 63.
- **Action.** Defendant engaged in marketing, selling, and transferring all of the components, parts, materials, tools, instructions, and instructional videos needed to build an unsafe handgun, and also had customer service ready to help customers "complete this product." FAC ¶¶ 64-66, 84.

This aiding and abetting included, "on information and belief, [Defendant's] aiding and abetting the manufacture in California of the Polymer80 PF940c handgun used to shoot Plaintiffs." FAC ¶ 85. This conduct, Plaintiffs allege, was a "proximate cause of the injuries sustained by Plaintiffs during their ambush." FAC ¶ 85. Plaintiffs easily meet their pleading burden for the CUHA predicate exception.

4. Plaintiffs allege violations of the California Assembly of Firearms Law

After July 1, 2018, the CAFL requires that "a person manufacturing or assembling [a] firearm shall . . . [a]pply to the Department of Justice for a unique serial number . . . ." Cal. Penal Code § 29180(b)(1). "If the firearm is manufactured or assembled from polymer plastic, 3.7 ounces of material type 17-4 PH stainless steel shall be embedded within the plastic upon fabrication" into which the serial number can be engraved. *Id*. at § 29180(b)(2)(B).

As with the CUHA, Defendant tries to deflect blame by claiming that the CAFL applies only to finished frames, and since Defendant's frames were unfinished, it did not violate the CAFL. But again this is neither Plaintiffs' argument nor what the FAC alleges. As with the CUHA, Plaintiffs allege Defendant violated the CAFL by aiding and abetting the manufacture of firearms that failed to meet CAFL's requirements for serialization and inclusion of 3.7 ounces of steel in a polymer frame. FAC ¶ 94.

Defendant contends that the FAC does not allege that the firearm at issue was manufactured after the CAFL came into effect in July 2018. To the contrary,

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Plaintiffs have alleged both that Defendant knew the kits it sold as of and after July 2018 would be unlawful to possess in California and that the firearm at issue here was illegal under the CAFL requirements. FAC ¶¶ 93-94. Taken together, these paragraphs allege the gun at issue was manufactured after CAFL took effect; any dispute on this point raises factual questions not cognizable on a motion to dismiss.

As for the balance of Defendant's CAFL argument, it again complains that Plaintiffs' allegations are conclusory and fail to show how Defendant aided and abetted in the manufacture of the firearm at issue. Again, Defendant's aiding and abetting has been pleaded in detail:

- **Knowledge.** Defendant knowingly sold kits that contained no unique serial number, as was the case with the gun at issue, and went so far as to market the lack of serial numbers and background checks. FAC ¶¶ 88-89. At the same time, Defendant knew of CAFL's requirements. FAC ¶ 90.
- **Intent.** Defendant intended that its PF940 kits would be completed into operable firearms without complying with the CAFL, and in fact designed the PF940 kits such that there was no feasible way to finish a PF940 kit in compliance with CAFL's serialization requirements. FAC ¶¶ 91-93.
- **Action.** Defendant engaged in marketing, selling, and transferring all of the components, parts, materials, tools, instructions, and instructional videos needed to build an unserialized handgun, with customer service ready to help its customers "to complete this product." FAC ¶¶ 64-66, 94.

This aiding and abetting included, "on information and belief, [Defendant's] aiding and abetting the manufacture in California of the Polymer80 PF940C handgun used to shoot Plaintiffs." FAC ¶ 94. This conduct was a "proximate cause of the injuries sustained by Plaintiffs." FAC ¶ 94. Plaintiffs again have easily met their pleading burden regarding the CAFL predicate exception.

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5. Plaintiffs allege violations of the California Unfair Competition Law

The UCL defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." Cal. Bus. & Prof. Code § 17200. This statute is intentionally broad in scope. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 179 (1999). Written in the disjunctive, it proscribes multiple unfair business practices. *Id.* Pertinent here are those practices that are (a) unlawful, (b) unfair, and (c) fraudulent and unfair, deceptive, untrue, and misleading advertising.

(a) Unlawful practices

The UCL "'borrows' violations of other laws and treats them as unlawful practices . . . ." *Id*. Here, Plaintiffs have alleged that Defendant's conduct violated three "borrowed" statutes—the GCA, CUHA, and CAFL. FAC ¶¶ 72-94. Defendant's only response is to reiterate its claim that kits were in fact legal, and to buttress that claim with a citation to *In re Firearms Cases*, 126 Cal. App. 4th 959 (2005). As to its claim that its kits were legal, the violations of the GCA, CUHA, and CAFL have all been dealt with above. *Supra* at 8-16. Nor is *In re Firearms* on point. There, defendants legally sold non-defective products, 126 Cal. App. 4th at 985, and the court found that "[w]ithout some hint of participation or encouragement of wrongful conduct, there is no connection between defendants and the alleged wrongdoing," *id.* at 982. Here Plaintiffs allege Defendant illegally sold a product both known to be particularly attractive to those who cannot legally possess a gun, like the shooter in this matter, and illegal to own in California in its completed state. FAC ¶¶ 14, 51-53, 66, 70, 72-94. In the context of the UCL, the violations of the other laws mean Defendant has also violated the UCL.

(b) Unfair practices

Defendant entirely overlooks Plaintiffs' allegations of unfair practices. *See* FAC at ¶¶ 95, 97, 110-13. A business practices is "unfair" when it "threatens an

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incipient violation of [a law], or violates the policy or spirit of [a law] . . . or otherwise significantly threatens or harms competition." *Cel-Tech*, 20 Cal. 4th at 187. It may also be unfair when it is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weight the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Drum v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 257 (2010). Plaintiffs plead both variants of "unfair" business practices, and Defendant provided no response. This alone supports the UCL violation as a predicate exception.

(c) Fraudulent practices and unfair, deceptive, untrue, and misleading advertising

Regarding their fraudulent and deceptive conduct, Defendant argues that Plaintiffs must plead "actual reliance" on Defendant's conduct. Mtn. 19:24-28. While the California Supreme Court did conclude that there is an "actual reliance" requirement in the UCL, "[t]his conclusion, however, is the beginning, not the end, of the analysis of what a plaintiff must plead and prove under the fraud prong of the UCL." *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009); *see also Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1258 (2009). Indeed, "reliance" in the context of a UCL fraud claim is a special species of reliance.

In a UCL fraud-based claim, "reliance is proved by showing that the defendant's misrepresentation or nondisclosure was 'an immediate cause' of the plaintiff's injury-producing conduct." *In re Tobacco II Cases*, 46 Cal. 4th at 326. A defendant's misrepresentation is an "immediate cause" if "in all reasonable probability" the injury would not have occurred without it. *Id*. The plaintiff need not prove the defendant's conduct was the only cause of injury—"[i]t is enough that the representation" was a "substantial factor" in causing the harm. *Id*. When the "misrepresentation was material," "a presumption, or at least an inference, of reliance arises . . . ." *Id*. at 327. And since a "misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or

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nonexistence in determining his choice of action in the transaction in question," "materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.'" *Id*. Finally, nor does "a plaintiff need to demonstrate individualized reliance on specific misrepresentations to satisfy the reliance requirement." *Id*.

Plaintiffs extensively pled their allegations of Defendant's misrepresentations. Plaintiffs alleged that Defendant not only claimed its kits were legal, it further led consumers to believe the ATF had determined its kits were legal. FAC ¶¶ 98, 100, 102. Though Defendant received ATF determination letters between 2015 and 2017, these letters were for "pistol frames and lower receivers *standing alone*," not when sold as part of kit.[10] FAC ¶ 103 (emphasis in original). In fact, when Defendant submitted its PF940v2 unfinished frame to the ATF in December 2017, Defendant "hid from and failed to disclose to the ATF that the PF940v2"—like the PF940C—"would be sold as a kit with a finishing jig to guide the minimal drilling and machining" required to finish the gun, as well as certain other parts. FAC ¶ 104. When the ATF declined to issue a determination letter for this frame, it specifically told Defendant that "[i]t is clear . . . that the submitted sample is only a component used in the assembly of an end item" so the ATF would "not render a classification on a partial product submission." FAC ¶¶ 105-106. The ATF then "instructed Polymer80 to 'submit the complete Polymer 80 Model PF940v2 80% Standard

[10] In two federal court lawsuits pending in the Northern District of California and the Southern District of New York, the State of California and multiple cities have challenged these determinations, and contend that ATF erred in deciding that Polymer80's nearly-finished frames and receivers were not firearms even when viewed in isolation, and not as part of any kit. *See State of California v. ATF* 20-CV-06761-EMC (N.D. Cal) and *Syracuse et al. v. ATF et al.* 20-CV-6885(GHV) (S.D.N.Y). This Court need not reach that question here, as Plaintiffs allege that the PF940C used to shoot them was sold as part of a kit.

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Pistol Frame Kit,' if Polymer80 wanted to receive an evaluation and classification of the product." FAC ¶ 107. (The ATF's letter is attached as Ex. A, as noted above.). Instead of submitting the whole kit—which Defendant never did—Defendant elected to continue selling its kits through at least December 2020, all while it "continued to misrepresent, expressly and impliedly, that these kits were 'legal'" when in fact they were not, which Defendant was well aware of. FAC ¶ 108-13.

Defendant's fraudulent conduct encouraged and led consumers to purchase illegal gun-building kits, including the one that was completed into the firearm used in this case. The assertion that an admittedly dangerous product is legal when in fact it is illegal is precisely the kind of claim "a reasonable man" buying a gun "would attach importance to" when "determining his choice of action in the transaction in question." *See In re Tobacco II Cases*, 46 Cal. 4th at 327. As such, this assertion gives rise to "a presumption, or at least an inference, of reliance." *See id*. Likewise, falsely asserting that its kits were legal was an "immediate cause" of the Plaintiffs' injuries. Had Defendant been truthful with its California consumers that its kits were illegal, it could not have sold them into the State of California.[11]

[11] Defendant makes a passing reference in its motion, unsupported by any authority, questioning whether the UCL could serve as a predicate exception to PLCAA. Mtn. 20:9-12. Contrary to the passage's implication, the Ninth Circuit in *Ileto* indeed contemplated statutes of broad application serving as PLCAA predicate exceptions, provided they were not merely codified common law. Following the Ninth Circuit's logic in *Ileto*, the District of Nevada held that Nevada's unfair competition law—the Nevada Deceptive Trade Practices Act—could form a PLCAA predicate because, like the UCL, the NDTPA "specifically regulates the sale and marketing of goods." *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123, 1138-39 (D. Nev. 2019) (*citing Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 202 A.3d 262, 321 (2019) ("Because [the Connecticut Unfair Trade Practices Act] specifically regulates commercial sales and marketing activities such as those at issue in the present case... it falls squarely within the predicate exception, as Ileto construed the legislative history."). In fact, the *Prescott* case rejected a motion to dismiss a Nevada deceptive trade practices claim on facts very similar to those here—*i.e.*,

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C. Neither of Plaintiffs' causes of action should be dismissed

1. Plaintiffs adequately stated a claim for negligence by alleging that Polymer80 breached its duty to act with reasonable care, foreseeably causing the deputies' injuries

Defendant has a duty not to foreseeably and unreasonably increase the risk of harm to others. Plaintiffs pleaded a viable negligence claim on this basis. Plaintiffs' allegations of negligence, including duty of care and causation, stem from the fundamental fact that the involved firearm was *illegally* sold.

Defendant's argument that it cannot be held liable because there is no duty to affirmatively protect against a third-party criminal act absent a special relationship between the parties misses the point. California law is not nearly so limited. For instance, landowners owe a well-recognized duty to act affirmatively to protect against criminal acts of third parties in certain circumstances. *Isaacs v. Huntington Memorial Hospital*, 38 Cal. 3d 112, 123 (1985). California law also "establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others." *Huang v. The Bicycle Casino, Inc.*, 4 Cal. App. 5th 329, 341 (2016) (citations omitted). This is the duty at issue here. As the California Supreme Court expounded in *Rowland v. Christian*, 69 Cal. 2d 108, 112-13 (1968), no exception to this statutory principle "should be made unless clearly supported by public policy," and any departure from this "fundamental principle" involves consideration of at least the following factors:

> …the **foreseeability** of harm to the plaintiff, the degree of **certainty** that the plaintiff suffered injury, the **closeness** of the connection between the defendant's conduct and the injury suffered, the **moral blame** attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

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based on allegations that the defendant "knowingly made the false statement that the bump stock was 'approved' by the ATF." 410 F. Supp. 3d at 1139-40.

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Here, these factors all favor the recognition of a duty. Selling firearms kits by circumventing legally required safeguards—especially background checks and serialization—is to foreseeably supply firearms to criminals who otherwise could not purchase or possess them. This business model inevitability creates a criminal market for this product, and the foreseeability of criminal use and resulting injury of the nature suffered by Plaintiffs. What better gun for a violent felon or criminal than one without a background check or a serial number, making it impossible to trace—especially to ambush law enforcement? Plaintiffs' injuries were foreseeable, and closely connected with Defendant's conduct.

The other *Rowland* factors similarly support a duty. Plaintiffs' injuries are certain. Defendant's conduct is illegal and morally reprehensible. There is a dire community safety and policy need to prevent future ghost gun shootings. The Defendant, like other gun manufacturers, would bear little burden as it could simply follow the law. Insurance is widely available for gun manufacturers.

The cases Defendant relies on are easily distinguishable because they address only *legal* sales of firearms. *See, e.g.*, *Ileto v. Glock Inc.*, 370 F.3d 860, 862 (9th Cir. 2004) ("Again, Glock is not alleged to have done anything illegal."); *In re Firearm Cases*, 126 Cal. App. 4th 959, 985 (2005) (no evidence "defendant had actual knowledge that specific retailers were illegally supplying guns"); *Casillas v. Auto-Ordnance Corp.*, No. C 95-3601 FMS, 1996 WL 276830, at *1-4 (C.D. Cal. May 17, 1996) (weapon was sold *legally* through a federally licensed firearm dealer). Not only were the sales here illegal, but the statutes violated extended far beyond California's general negligence and nuisance statutes. That distinction makes all the difference.[12]

[12] In *Ileto*, the plaintiffs argued that the defendant firearms manufacturers were liable for legally manufacturing and distributing non-defective firearms, because (1) they sold more firearms than the legitimate market demanded, and (2) their marketing encouraged a secondary, illegal market. *Ileto v. Glock, Inc.*, 349 F.3d

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Furthermore, Defendant cites both *Prescott v. Slide Fire Solutions, LP*, 410 F. Supp. 3d 1123, 1139-40 (D. Nev. 2019), and *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1224 (D. Colo. 2015), for the proposition that a plaintiff must allege that the statutory violations must have proximately caused the harm. That is exactly what Plaintiffs have done—cite myriad statutory violations, including the GCA, CUHA, CAFL and CUCL—the violations of which caused this tragic outcome.

Defendant also contends that the crime perpetrated against Plaintiffs was a superseding intervening cause of harm. However, this contention is undermined by the close connection between Defendant's conduct and the crime committed. Defendant supplied the instrumentality necessary to commit such a crime, in a form (no serialization) suited to the commission of such a crime, and a manner (no

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1191, 1196 (9th Cir. 2003). The Ninth Circuit reasoned that the existence of a duty turned on the factual issue of foreseeability, concluding, "[t]he allegations here that the defendants created an illegal secondary firearms market that was intentionally directed at supplying guns to prohibited gun purchasers like Furrow are more than sufficient to raise a factual question as to whether the defendants owed the plaintiffs a duty of care and whether the defendants breached that duty." *Id.* at 1204. Later, in *In re Firearm Cases*, *supra*, a California court of appeal expressed skepticism, in light of California's proximate causation jurisprudence, regarding *Ileto*'s expansion of liability to an upstream product manufacturer who legally sold a non-defective product. *See In re Firearm*, *supra*, 126 Cal. App. 4th at 991 (agreeing with the public policy arguments stated by the dissenting opinion on the denial of rehearing *Ileto en banc*, and holding that the *In re Firearm* plaintiffs' complaint "attempts to reach too far back in the chain of distribution when it targets the manufacturer of a legal, non-defective product that lawfully distributes its product only to those buyers licensed by the federal government"). On a subsequent appeal in *Ileto*, the Ninth Circuit was confronted with the distinct issue of PLCAA and the predicate exception, and rejected the plaintiffs' argument that, while the defendants had not violated any separate statute, their mere negligence, in violation of California's negligence and nuisance statutes, was sufficient to trigger the predicate exception. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1130 (9th Cir. 2009). The court also acknowledged the *In re Firearm Cases* holding, stating that it "does not conflict with our previous holding" regarding scope of liability. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1131 n.2 (9th Cir. 2009).

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background checks) that enabled purchase by and attracted the group of people most likely to commit such a crime (criminals ineligible to purchase or possess guns). When, as here, there is a close connection between Defendant's conduct and the crime, that a third-party committed the crime does not absolve Defendant:

> If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.

See Campodonico v. State Auto Parks, Inc., 10 Cal. App. 3d 803, 808 (Ct. App. 1970) (quoting Rest., Torts, § 449); *see also* Restatement (First) of Torts § 449, cmt. a (1934). Thus, a defendant is responsible for an injury brought about by its negligence combined with a subsequent independent cause, when that subsequent independent cause, an "intervening cause," was either foreseeable or "caused injury of a type which was foreseeable." *Akins v. Sonoma Cty.*, 67 Cal. 2d 185, 199 (1967). On the other hand, the "superseding cause" is one that produces "harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible." *Lawson v. Safeway Inc*., 191 Cal. App. 4th 400, 417 (2010). That is not the case here.

The *Martinez* case cited by Defendant only further supports Plaintiffs' argument. *Martinez v. Pacific Bell*, 225 Cal. App. 3d 1557 (1990). There, the court held that a telephone company did not proximately cause third-party criminal acts because there were no measures it could have taken to prevent them. *Id*. at 1564-65. The company had no control over the property where the crime occurred, and even if its pay phone attracted the crime of drug sales, liability could not extend to the entirely separate crime of robbery committed by unidentified assailants. *Id*. at 1561. Here, by contrast, Defendant violated both federal and state gun laws and sold a product the seller knew was attractive to criminals and would be illegal to own in California. A criminal, in turn, used those very products to cause the resulting tragedy in the expected manner, not to commit some other, unrelated crime. Unlike

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the defendant in *Martinez*, defendant Polymer80 had both a duty and the power to prevent the intervening third-party conduct. *See id*. at 1565.

2. Plaintiffs adequately stated a claim for public nuisance

Defendants argue that under *In re Firearms Cases*, Plaintiffs' nuisance cause of action fails to plausibly allege any unlawful or illegal action by the Defendant. As per the detailed analysis in prior sections, this is simply not true. In stark contrast to *In re Firearms Cases*, not only has the Defendant violated federal and state laws, but its violations were a proximate cause of the harm suffered by the Plaintiffs. *See* 126 Cal. App. 4th at 989.

D. Defendant's motion to strike should be denied

Defendant's last tack is to ask the Court to strike various portions of the FAC. Of course, as Defendant readily admits, Rule 12(f) motions are "generally disfavored" and "should only be granted when it is clear that [a matter] can have no bearing on the subject matter of the litigation. Mtn. at 23:6-10 (quoting *Citizens for Quality Educ. San Diego v. San Diego Unified Sch. Dist.*, No. 17-cv-1054-BAS-JMA, 2018 WL 828099 at *1 (S.D. Cal. Feb. 12, 2018)). "A court must deny the motion to strike if there is any doubt whether the allegations in the pleadings might be relevant in the action." *Oracle Am., Inc. v. Micron Tech., Inc.*, 817 F. Supp. 2d 1128, 1132 (N.D. Cal. 2011). And even a "scandalous" allegation may only be stricken if, for example, it "cast[s] a cruelly derogatory light on a party or other person." *U-Haul Co. of Nevada v. Gregory J. Kamer, Ltd.*, No. 2:12-CV-00231-KJD-CWH, 2013 WL 800695, at *1 (D. Nev. Feb. 21, 2013).

None of Plaintiffs' allegations approach the standard for being stricken. Paragraphs 15-16, 46-55, and 57 of the FAC provide background on the rapid and recent rise in the use of ghost guns to commit violent crimes, as well as descriptions of how and why ghost guns are dangerous. Far from being "immaterial" or "scandalous," these allegations contextualize not only the public safety threat ghost guns pose, but also Defendant's culpability in playing a major role in selling and

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distributing ghost guns. In paragraph 56, the shootings involving ghost guns made by other manufacturers has a very specific purpose—they illustrate major news events that put Defendant on further notice that ghost guns are being used by people who are barred from legally owning a gun to commit murder. A reasonable manufacturer would alter its practices in response; Defendant, as further evidence of its negligence, did nothing. None of Plaintiffs' pleading should be stricken.

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that Defendant's motions to dismiss and strike be denied.

Dated: November 15, 2021 WALKUP, MELODIA, KELLY & SCHOENBERGER

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