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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 1-50,

Defendants.

CASE NO.: 2:21-cv-08401-PA-PVC

MEMORANDUM OF POINTS AND AUTHORITIES, ALONG WITH THE DECLARATION OF GERMAIN D. LABAT, ESQ., DATED OCTOBER 29, 2021, ("LABAT DECLARATION"), OF DEFENDANT POLYMER80, INC. IN SUPPORT OF ITS MOTION TO DISMISS OR, ALTERNATIVELY, STRIKE SCANDALOUS MATERIAL

Date: November 22, 2021
Time: 1:30 p.m.
Courtroom: 9A
Honorably Percy Anderson, United States District Judge

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Defendant Polymer80, Inc. ("Polymer80" or "Company") respectfully submits this Memorandum of Points and Authorities in support of its motion ("Motion") to: (i) dismiss plaintiffs' First Amended Complaint For Damages ("FAC")[1] for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), or, alternatively, (ii) strike from the FAC certain scandalous material pursuant to Fed. R. Civ. P. 12(f). For all of the reasons set forth below and in the remainder of the record of this matter, this Motion is meritorious, and the Court should wholly grant it.

PRELIMINARY STATEMENT

The FAC -- premised as it is upon a truly sorrowful and despicable ambush shooting of two dedicated law enforcement officers -- propounds but two claims against Polymer80 under California law, one sounding in negligence and the other in public nuisance. The major and, in reality, dispositive legal roadblock confronting plaintiffs is the Protection Of Lawful Commerce In Arms Act ("PLCAA"), which the Ninth Circuit has made clear requires dismissal of all "qualified civil liability actions," including negligence and nuisance suits, against manufacturers or sellers of a "qualified product." It is incontestable that this action qualifies for PLCAA protection, and that the Company is such a manufacturer or seller. While there certainly are exceptions to the PLCAA's prophylaxes, the one upon which plaintiffs must rely here -- the "predicate exception" -- does not apply in the premises, as we elucidate below.

In sum, to benefit from that exception, plaintiffs need establish, *inter alia*, that Polymer80 "knowingly violated a State or Federal statute applicable to the sale or marketing of the product" that caused the harm alleged to have befallen plaintiffs. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132 (9th Cir. 2009). That, plaintiffs simply cannot do. The four statutes that the FAC maintains that the Company has violated are, each and

[1] For the Court's ease of reference, the FAC is attached as Exhibit A to the concurrently filed Labat Declaration.

all, plainly of no assistance to plaintiffs in the unique factual setting of this case. Polymer80, as detailed in the ensuing pages, has run afoul of neither the federal Gun Control Act, nor California's Unsafe Handgun Act, nor California's Assembly Of Firearms Law, nor California's Unfair Competition Law. In actuality, plaintiffs cannot possibly aver or prove that Polymer80 has engaged in any illegal conduct of any kind in its commercial activities. Consequently, because plaintiffs do not and cannot plausibly allege that the Company knowingly has contravened a "predicate" statute and in so doing became the proximate cause of the harm described in the FAC, the PLCAA wholly bars this action. This Court, as a result, could hardly be on a firmer legal footing in dismissing the FAC, with prejudice, for failure to state a claim upon which relief can be granted under Fed R. Civ. P. 12(b)(6).

Should the Court decline to take that step, it should, at minimum and pursuant to Fed. R. Civ. P. 12(f), strike the various scandalous, groundless, and highly prejudicial averments in the FAC to the effect that Polymer80 has somehow been involved in, or is responsible for, other (school and Courthouse) shootings with which the Company had and has no link whatsoever. The inclusion of such distasteful averments in the FAC serves to underscore the lack of merit in both of plaintiffs' overreaching and baseless claims against Polymer80.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. Polymer80 Is A Purveyor Of Numerous Legal Gun-Related Products, Components, And Accessories, Including Its "Unfinished" PF940C Pistol Frames.

Polymer80 is a Dayton, Nevada-based company that designs, develops, and distributes innovative gun-related products, components, and aftermarket accessories, including certain frames and receivers. These frames and receivers can, with skill and tooling and after time and machining, be transformed into "working frames and receivers that form the core component of a functioning firearm." FAC ¶ 63. A core

principle of Polymer80's business is the empowerment of its customers to "engage their freedom," that is, to exercise their Constitutional right to gun ownership and enjoy lawful engagement with the Company's products. A material part of Polymer80's commercial activities is the distribution of components "that provide ways for [its] customer[s] to participate in the build process, while expressing their right to bear arms," as enshrined in the Second Amendment to the Constitution of the United States. *See* About Polymer80, https://www.polymer80.com/about-us (last accessed October 29, 2021).

As the FAC begrudgingly concedes but attempts to gloss over, Polymer80 has received multiple determinations from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") that its frames and receivers do not qualify as "firearms" under federal law. *See* FAC ¶ 103. Of primary importance here, the Company received such a determination regarding "two Glock-type 'PF940C Blank[s].'' In this regard, on January 18, 2017 during the Obama Administration, ATF's Firearms Technology Industry Service Branch ("FTISB") found as follows:

> As a result of this FTISB evaluation, the submitted '**PF940C**' is not sufficiently complete to be classified as the frame or receiver of a firearm and thus is not a 'firearm' as defined in the GCA. Consequently, the aforementioned items are therefore not subject to GCA provisions and implementing regulations.
>
> To reiterate the conclusion of FTISB's evaluation, our Branch has determined that the submitted Polymer 80, Incorporated Glock-type receiver blanks incorporating the aforementioned design features are not classified as the frame or receiver of a weapon designed to expel a projectile by the action of an explosive, thus each of these items are not a 'firearm' as defined in GCA, 18 U.S.C. § 921(a)(3)(B).

Labat Decl. Ex. B (emphasis in original).[2]

The FAC acknowledges, as it must, that not all "unfinished" PF940C frames are (or were) sold as "Buy Build Shoot" kits. *See* FAC ¶ 21 (mentioning "a PF940c frame kit *or* Buy Build Shoot Kit" (emphasis supplied)). Moreover, the FAC is forced to admit that not all kits contain *all* components necessary to build a working firearm. *See id.* ¶ 10 (alleging that Polymer80 "manufactured, advertised, and sold firearm kits that included *some or all* the components necessary to quickly and easily build complete and fully functional frames and weapons, including Glock-style semi-automatic handguns like the one used to ambush Plaintiffs" (emphasis supplied)). The FAC also makes much of its averment that "Polymer80 is currently under federal criminal investigation for its sale of ghost gun kits" after the government's execution of a December 2020 search warrant. FAC ¶ 18. To date, no federal (or State) criminal charge of any kind has been filed against the Company or any of its officials, and there has been no indication that any such charge will ever be filed. In any event, for all the FAC's bluster and references to ATF correspondence regarding the PF940v2, that product is not at issue in this action. *See* FAC ¶¶ 104-09.

B. According To The FAC, A Polymer80 Model PF940C Was Used In The Ambush Of Plaintiffs, But Plaintiffs Have Alleged Few, If Any, Details As To The Use And Acquisition Of That Product.

The FAC alleges that "the firearm used in the attack of [Plaintiffs] has been identified as a Polymer80 handgun, model PF940c. *Upon information and belief*, the firearm had no serial number and bore no identifying characteristics save for a 'P80'

[2] The Court can consider this ATF letter, because "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss." *Prescott v. Slide Fire Solutions, LP*, 341 F. Supp. 3d 1175, 1181 (D. Nev. 2018) (internal quotation marks and citation omitted). The FAC undeniably makes allegations as to the substantive contents of this document. FAC ¶ 103 (discussing "ATF determination letters to Polymer80 between 2015 and 2017").

logo—the insignia of Defendant Polymer80—stamped on the gun." FAC ¶ 12 (emphasis supplied). The FAC does not allege how, when, and/or from whom the shooter obtained this item and instead merely avers that "[*u]pon information and belief*, the unserialized Polymer80 firearm used in the ambush attack of Sheriff's Deputies Apolinar and Perez was originally purchased as a kit in California from either Polymer80 or one of Polymer80's third party distributors, who sold it without performing a background check." *Id.* ¶ 13 (emphasis supplied). The FAC does not say whether or not the shooter deployed a "Buy Build Shoot," or another type of, kit.

Moreover, the FAC maintains that "[*u]pon information and belief*, the shooter chose to shoot the Deputies with this Polymer80 ghost gun in substantial part because he knew it was unserialized and untraceable by normal means." *Id.* ¶ 45 (emphasis supplied). However, the FAC alleges neither that the shooter sought out a Polymer80 product in particular nor received any assistance from the Company in obtaining the item allegedly used or in machining a PF940C "unfinished" frame into an operable weapon.

C. The FAC Alleges Violations Of Four Predicate Statutes In Furtherance Of Its Negligence And Public Nuisance Claims.

The FAC alleges two causes of action, one for negligence and the other for public nuisance. To avoid prohibition by the PLCAA and as more fully explained below, plaintiffs claim that Polymer80 violated four "predicate" statutes: (i) the federal Gun Control Act ("GCA"), 18 U.S.C. § 921 *et seq.*; (ii) California's Unsafe Handgun Act ("CUHA"), Cal. Penal Code § 31900 *et seq.*; (iii) California's Assembly of Firearms Law ("CAFL"); and (iv) California's Unfair Competition Law ("CUCL").

(i) The Federal GCA

The FAC's arguments concerning Polymer80's purported violations of the GCA rise and fall on its assertion that the Company's "Buy Build Shoot kits" and other "frame and receiver kits" constitute "firearms" pursuant to 18 U.S.C. § 921(a)(3). *See* FAC ¶¶

72-73. That pleading avers that "Buy Build Shoot kits consisting of all component parts of a firearm, including unfinished handgun frames . . . are 'designed to' be and 'may readily be converted' into an operable weapon," and that "frame and receiver kits containing an unfinished 'frame' or 'receiver' along with jigs and drill bits designed to enable a customer to complete the frame or receiver . . . too are 'designed to' be and 'may readily be converted' into the finished frame or receiver of an operable weapon." *Id.* ¶ 73, quoting 18 U.S.C. § 921(a)(3)(A). "Because the kits that Polymer80 sold are firearms under federal law," the FAC states, "a number of requirements and obligations arise." *Id.* ¶ 74. The FAC proceeds to maintain that the Company violated these requirements and obligations by supposedly selling firearms "without serial numbers and without conducting or requiring background checks . . . to purchasers residing in other states, including California." *Id.* ¶ 75.

(ii) The CUHA

The FAC also alleges that "Polymer80-assembled handguns . . . do not comply with CUHA because, among other reasons, they do not meet CUHA's chamber load indicator and magazine disconnect requirements" and "are not listed on the Roster of Certified Handguns maintained by the State of California." *Id.* ¶¶ 77-83, citing Cal. Penal Code §§ 31910, 32000(a), 32005(b), 32015. The FAC further asserts that "[d]efendants knowingly aided and abetted the manufacture of handguns that do not meet the safety requirements of CUHA by marketing, selling, and transferring all of the components, parts, materials, tools, instructions and instructional videos needed to build an unsafe handgun in the state." *Id.* ¶ 84. The FAC additionally avers, again "on information and belief," that defendants "aid[ed] and abett[ed] the manufacture in California of the Polymer80 PF940c handgun used to shoot [p]laintiffs" but does not explicate how the Company (or any unnamed defendant) aided and abetted the manufacture of that specific product. *Id.* ¶ 85.

(iii) <u>The CAFL</u>

Plaintiffs contend that pursuant to the CAFL, "as of July 1, 2018, any person 'manufacturing or assembling a firearm' was required, prior to manufacturing or assembling that firearm, to apply to the California Department of Justice 'for a unique serial number or other mark of identification.'" *Id.* ¶ 86. They allege that defendants sold kits that did "not contain a unique serial number engraved or permanently affixed as required under California law," and that even after "Polymer80 began to include blank serialization plates in its PF940 unfinished frames" in or around January 2017, they "did not weigh anywhere near the 3.7 ounces of embedded steel on which a serial number could be affixed." *Id.* ¶¶ 88-91. Plaintiffs also aver that "Polymer80 therefore knew and intended that, as of and after July 1, 2018, any PF940 pistol frame kits it sold into its largest market – California – would be completed and assembled into operable firearms that were unlawful to possess in that state." *Id.* ¶ 93. And, they further posit that "on information and belief, [defendants] aid[ed] and abet[ed] the manufacture in California of the illegal PF940c handgun used to shoot [p]laintiffs." *Id.* ¶ 94. Nonetheless, plaintiffs do not elucidate in any way how Polymer80 (or any unnamed defendant) aided and abetted the manufacture of that specific handgun, *and* they further do not maintain that this purported aiding and abetting happened before July 1, 2018.

(iv) <u>The CUCL</u>

The FAC alleges that "[d]efendants violated [the CUCL] in multiple ways, including by falsely and misleadingly representing, expressly and by implication, that it was legal to purchase and build a Polymer80 PF940c frame kit or Buy Build Shoot Kit in California, when, as [d]efendants knew, it was not." FAC ¶¶ 21, 95-114. Yet, the FAC does not allege that the shooter (or anyone else) accessed the "homepage of [Polymer80's] website" and read anything about the legality of the exact PF940C product at issue in this litigation. *See id.* ¶¶ 99-103. The FAC further avers that "[d]efendant's business practices are also unfair in violation of the CUCL, including

because they are deceptive and sharp, threaten violations of California law, violate the policy and spirit of federal and California gun laws, and have the same or comparable effect as violations of those laws." *Id.* ¶¶ 110-14.

* * * * * * * * * * * *

Poylmer80's purported violations of these four predicate statutes undergird the FAC's two common law causes of action. The cause of action for public nuisance alleges that "[d]efendants created a public nuisance by marketing, selling and distributing ghost gun kits to California residents without serial numbers, without background checks, without complying with California gun laws, and without taking any reasonable steps to ensure that purchasers and transferees were not prohibited from purchasing or possessing firearms." FAC ¶ 128. Similarly, the other (negligence) cause states, *inter alia*, that "[d]efendants are subject to the highest duty of care" and supposedly "breach[ed]" this duty "when they sold and injected into the market the firearm kit and components that were thereafter finished and assembled into the operable firearm used to ambush and shoot Sheriff's Deputies Apolinar and Perez," including because "[d]efendants knowingly violated the requirements of federal law . . . as well as California firearms law." FAC ¶¶ 117-22 (discussing purported violations of the GCA, CUHA, CAFL, and CUCL).

D. The FAC Contains Redundant, Immaterial, Impertinent, And Scandalous Allegations That Demonstrably Have Zero To Do With The Allegations Of This Case.

To be sure, the FAC contains scandalous allegations that have nothing to do with this action or Polymer80. Most notably, the FAC discusses school and Courthouse shootings that indisputably did *not* involve Polymer80 products, as follows:

> In November 2019, a 16-year-old student at Saugus High School in Santa Clarita brought a home-assembled ghost gun to school and used it to shoot five of his classmates, killing two before turning the gun on himself. In May of 2020, two far-right anti-government activists used a ghost gun to murder a security officer for the Oakland federal courthouse and a Sheriff's Deputy in Santa Cruz.

FAC ¶ 56.

Whereas the FAC contains allegations that Polymer80 products purportedly have been used in connection with criminal activity generally, it conspicuously contains no allegation that Polymer80 products -- as plaintiffs concede, stamped with the Company's logo -- were employed in the course of these two specific shootings. *See id.* ¶ 12. These scurrilous references transparently and shamelessly are designed to tar Polymer80 by association and are redundant of at least a dozen other Paragraphs in the FAC. *See, e.g.*, *id.* ¶¶ 15-16, 46-55, 57.

E. This Motion Is Timely Made Seven Days After Removal.

On October 22, 2021, Polymer80 timely removed this action from the Superior Court of California, County of Los Angeles. *See* ECF Nos. 1-2. Therefore, this motion has been timely propounded, filed, and served "7 days after the notice of removal is filed." Fed. R. Civ. P. 81(c)(2)(C).

ARGUMENT

I

THE COURT SHOULD GRANT POLYMER80'S MOTION TO DISMISS.

"Dismissal under Rule 12(b)(6) 'can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Travieso v. Glock Inc.*, 526 F. Supp. 3d 533, 539 (D. Ariz. 2021), quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). "To survive a motion to

dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although "well-pled factual allegations are taken as true and construed in the light most favorable to the nonmoving party . . . legal conclusions couched as factual allegations are not given a presumption of truthfulness, and 'conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss.'" *Travieso*, 526 F. Supp. 3d at 539, quoting *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). Significantly, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 557.

A. The PLCAA Bars This Action, Since Plaintiffs Have Not Plausibly Alleged The Violation Of A Predicate Statute That Has Proximately Caused The Harm Described In The FAC.

The PLCAA requires dismissal of any "qualified civil liability action," which is defined as follows:

> [A] civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include [specified enumerated exceptions.]

Ileto v. Glock, Inc., 565 F.3d 1126, 1131 (9th Cir. 2009) (citation omitted), quoting 15 U.S.C. § 7903(5)(A).

The PLCAA undoubtedly applies to Polymer80 and this action. Polymer80 is a "manufacturer or seller of a qualified product" -- "a component of a firearm."[3] And, as the FAC concedes, the Company "holds a Federal Firearms License." 15 U.S.C. § 7903(4); FAC ¶ 27. *See also Jefferies v. District of Columbia*, 916 F. Supp. 2d 42, 45 n.3 (D.D.C. 2013) ("The PLCAA also prohibits suits against the manufacturers of firearm components and ammunition."). Moreover, the Ninth Circuit has expressly held that the PLCAA applies to "qualified civil liability actions," such as "classic negligence and nuisance" suits, "if none of the specified exceptions applies." *Ileto*, 565 F.3d at 1132, 1135-38.[4]

The FAC does not plausibly set forth any of these "specified exceptions" and for that reason must be dismissed. Indeed, it purports to rely upon the "'predicate exception,'" which states that the PLCAA does not preempt the following:

> [A]n action in which a manufacturer or seller of a qualified product *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, including—
>
> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact

[3] The PF940C "unfinished" frame that was eventually machined and used by the shooter was certainly a "component part" of a gun pursuant to the PLCAA, since after sufficient machining and "upon installation" with other component parts, it "becomes an integral part of a [handgun]." *Prescott*, 341 F. Supp. 3d at 1187-89 (holding a bump stock is a component part of a firearm covered by the PLCAA as opposed to a mere accessory). *See* FAC ¶¶ 47-48 (explaining how a receiver can "be 'finished' and then assembled into an operable firearm," and averring that a frame is a firearm's "core building block[]").

[4] There can be no reasonable dispute that the shooter's actions have constituted "criminal or unlawful misuse of a qualified product by the person or a third party." 15 U.S.C. § 7903(5)(A).

> material to the lawfulness of the sale or other disposition of a qualified product; or
>
> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18[.]

Id. at 1132 (emphasis and alteration in original), quoting 15 U.S.C. § 7903(5)(A)(iii).

Pursuant to the predicate exception, "a plaintiff not only must present a cognizable claim, he or she also must allege a knowing violation of a 'predicate statute.'" *Id.*, quoting *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 390 (2d Cir. 2008). In addition, a plaintiff "must plausibly allege that . . . the violation proximately caused [p]laintiffs' alleged harm." *Prescott v. Slide Fire Solutions, LP*, 410 F. Supp. 3d 1123, 1139-40 (D. Nev. 2019). Accordingly, Courts will grant a Rule 12(b)(6) motion, where plaintiffs fail to adequately and plausibly allege that a knowing violation of a predicate statute proximately caused their harm. *See, e.g.*, *Prescott*, 341 F. Supp. 3d at 1190-92 (granting dismissal, since "[p]laintiffs have not pointed to a statutory violation that would permit the Court to find that an exception to the PLCAA applies"); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1224 (D. Colo. 2015) (granting defendants' motion to dismiss, where "[p]laintiffs have not pleaded facts that support their allegation that the [predicate] federal statute was 'knowingly' violated"). This Court should grant the instant Motion, insofar as the FAC does not adequately and plausibly allege that the Company violated the: (i) GCA, (ii) CUHA, (iii) CAFL, or (iv) CUCL, or that any purported statutory violation proximately caused the harm alleged to have been visited upon plaintiffs.

(1) Plaintiffs Do Not Plausibly Aver That Polymer80 Has Knowingly Violated The GCA And Thereby Proximately Caused The Harm Alleged In The FAC.

Plaintiffs' efforts to argue that Polymer80 violated the GCA are unavailing, given that kits containing PF940C "unfinished" frames do not qualify as "firearms" under the GCA. Unlike the PLCAA, which explicitly does apply to "a *component* of a firearm," the GCA's definition of a "firearm" is much more limited owing to the patent fact that Congress did not want it to apply to components and unenumerated parts. The precursor statute to the GCA -- the Federal Firearms Act of 1938 -- defined "firearm" to "mean[] any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, *or any part or parts of such weapon*." Pub. L. No. 75–785, 52 Stat. 1250 (1938) (repealed 1968) (emphasis supplied). With passage of the GCA, Congress resolved to remove "part or parts" from the definition of a "firearm," as follows:

> During debate on the GCA and related bills introduced to address firearms trafficking, Congress recognized that regulation of all firearm parts was impractical. Senator Dodd explained that "[t]he present definition of this term includes 'any part or parts' of a firearm. It has been impractical to treat each small part of a firearm as if it were a weapon. The revised definition substitutes the words 'frame or receiver' for the words 'any part or parts.'" *See* 111 Cong. Rec. 5527 (March 22, 1965).

ATF, Notice of Proposed Rulemaking, Definition of "Frame or Receiver" and Identification of Firearms, ATF 2021R-05, 86 Fed. Reg. 27,720, at 27,720 (May 21, 2021) ("Proposed Rule").

As it stands now, the GCA's definition of "firearm" applies to one of only four things: "(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

1 destructive device." 18 U.S.C. § 921(a)(3). This definition does *not* include an
2 "unfinished frame or receiver," nor does it include any "kits" containing undefined
3 "parts." And so, the GCA does not -- and cannot be said to -- cover these items. *See*
4 *United States v. Vonn*, 535 U.S. 55, 65 (2002) ("expressing one item of [an] associated
5 group or series excludes another left unmentioned."); *Nat'l R.R. Passenger Corp. v.*
6 *Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("'When a statute limits a
7 thing to be done in a particular mode, it includes the negative of any other mode. . . . .'
8 This principle of statutory construction reflects an ancient maxim—*expressio unius est*
9 *exclusio alterius*."), quoting *Botany Worsted Mills v. United States*, 278 U.S. 282, 289
10 (1929).

11 In these premises, the Court should reject plaintiffs' contention that the product
12 made from the Polymer80 kit at issue here, which allegedly included a PF940C
13 "unfinished" frame, constituted a "firearm." Plaintiffs misguidedly argue that PF940C
14 "frame and receiver kits containing an unfinished 'frame' or 'receiver' along with jigs
15 and drill bits designed to enable a customer to complete the frame or receiver . . . too
16 are 'designed to' be and 'may readily be converted' into the finished frame or receiver
17 of an operable weapon." FAC ¶ 73, quoting 18 U.S.C. § 921(a)(3)(A). This
18 interpretation contravenes the language, structure, and purpose of the GCA. The
19 "designed to" or "may be readily converted to" verbiage in 18 U.S.C. § 921(a)(3) is
20 located in subsection (A) but not subsection (B), indicating that it does not apply to the
21 latter subsection -- "the frame or receiver of any such weapon," -- pursuant to
22 elementary principles of statutory interpretation. *See, e.g.*, *Vonn*, 535 U.S. at 65; *Nat'l*
23 *R.R. Passenger Corp.*, 414 U.S. at 458; *Travieso*, 526 F. Supp. 3d at 542-43.

24 Consequently, it is of no moment that plaintiffs allege that "unfinished" PF940C
25 frames in kits can be converted into finished frames, because Congress expressly and
26 purposely left such components that could allegedly "convert" them out of the GCA's
27 definition of "firearm." *See Am. for Clean Energy v. Envtl. Prot. Agency*, 864 F.3d 691,
28

713 (D.C. Cir. 2017) (Kavanaugh, J.) ("Congress's decision to drop the 'distribution capacity' language counsels against EPA's reading in this case, which in effect would add that kind of language back into the waiver provision . . . ."). *See also* A. Scalia & B. A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012) ("Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered."). And, plaintiffs cannot salvage their sophistry by contending that a kit containing an "unfinished" frame and parts to "complete" it is a firearm pursuant to 18 U.S.C. § 921(a)(3)(A), since this would render 18 U.S.C. § 921(a)(3)(B) superfluous and contradict Congress's decision not to include the "designed to" or "may readily be converted to" language in that subsection.

The Texas High Court recently confronted a similar situation in *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. 2021). There, plaintiffs argued that a magazine constituted a "firearm" under the GCA because it was "inseparably packaged with a rifle." Plaintiff further claimed that "a 'firearm' includes unlisted component parts like magazines 'when they are packaged and sold together with the weapon itself.'" *Id.* at 28. The Supreme Court of Texas rejected these assertions, noting that "both firearms and magazines (along with other component parts) are 'qualified products' subject to the PLCAA's general prohibition against qualified civil liability actions, but only 'firearms' are subject to the Gun Control Act's restrictions on sales to out-of-state residents." *Id.* at 29 (citations omitted). As such, the Court found that plaintiffs were incorrect in "their assertion that the term 'firearm' includes those component parts that . . . are bundled and packaged inseparably for purposes of the sale of a trigger-and-hammer skeleton," since "[a]s used in the Gun Control Act, 'firearm' is a term of art that includes some component parts but not others," and "[u]nder the applicable statutory definition, which makes no mention of packaging, a magazine simply is not a firearm." *Id.* (citations and internal quotation marks omitted). The GCA similarly makes no mention of "kits" or

"unfinished frames" and, as a result, the Polymer80 kit at issue here was and is not a "firearm" thereunder.

Even assuming, *arguendo*, that plaintiffs could validly contend that as a matter of law certain PF940C "unfinished" frames and related parts kits are "designed to or may readily be converted to expel a projectile by the action of an explosive" pursuant to 18 U.S.C. § 921(a)(3)(A), plaintiffs have in no fashion alleged that such a kit was so used *here* and thus have not sufficiently alleged that the Company committed a violation of the GCA that proximately caused their harm. As noted above, the FAC expressly recognizes that not all Polymer80 kits contain all the components necessary to build a working firearm, and that not all PF940C "unfinished" frames are (or were) sold as "Buy Build Shoot" kits.[5] FAC ¶¶ 11, 21. The FAC does not allege from which PF940C kit the shooter's firearm was actually built. Thus, even assuming that certain PF940C kits could constitute firearms under the GCA, plaintiffs have not alleged that such a product was used *here*. Therefore, the FAC "pleads facts that are 'merely consistent with' [Polymer80's] liability," meaning it "'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 557.

Finally, it bears emphasis that plaintiffs have not adequately alleged, and certainly will never be able to prove, that Polymer80 *knowingly* violated the GCA in a manner that proximately caused them harm, given that ATF in January 2017 expressly told the Company that its PF940C Blank frames were *not* firearms under the GCA. *See* Labat Decl. Ex. B. Moreover, the definition of "firearm" has been so nebulous and

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[5] The Company maintains that its Buy Build Shoot kits were entirely legal and emphasizes that ATF's "determin[ation]" concerning these kits, FAC ¶ 73, has not been tested. To the extent that plaintiffs argue that *United States v. Wick*, 697 F. App'x 507 (9th Cir. 2017) (mem.), is to the contrary, they are mistaken. In that non-published and therefore non-precedential decision, the Court expressly and decidedly declined to reach the question of whether "demilled receivers" constituted "firearms" and instead upheld defendant's conviction on the ground that he was selling "complete Uzi parts kits" that "contained all the necessary components to assemble a fully functioning firearm with relative ease." *Id.* at 508.

unsettled that ATF recently propounded a new 34-page Proposed Rule, which is expressly designed to rectify the vast murkiness of federal precedent and expand the definition of "firearm" to include, *inter alia*, "weapon parts kits." *See, e.g.*, Proposed Rule, 86 Fed. Reg. 27,720 at 27,741. For these and all the reasons stated above, Polymer80 had every good reason to justifiably believe (and, in truth, did so believe) that its products containing PF940C Blank frames were being sold legally.

(2) Plaintiffs Do Not Plausibly Allege That Polymer80 Knowingly Violated CUHA And Thereby Proximately Caused The Harm Alleged In The FAC.

As with its stance on the GCA, plaintiffs' position that Polymer80 violated CUHA is untenable, and for the same reason -- the CUHA provisions plaintiffs have cited do not even apply to *finished* frames or receivers, let alone "unfinished" ones, placing the Company's PF940C product outside the ambit of that statute. *None* of the statutory provisions specifically cited in the FAC -- Cal. Penal Code §§ 31910, 32000(a), 32005(b), and 32015 -- applies to "frames" or "kits." In fact, Cal. Penal Code § 16520 is entitled "Firearm Defined" and provides that that term "includes the frame or receiver of the weapon… [a]s used in the following provisions," none of which are set forth in the FAC. Cal. Penal Code § 16520(b). Further, that same section states that "[a]s used in Sections 29010 to 29150, inclusive, 'firearm' includes the unfinished frame or receiver of a weapon that can be readily converted to the functional condition of a finished frame or receiver." Cal. Penal Code § 16520(g). Again, this language can only mean that "unfinished" frames or receivers do *not* constitute "firearms" under the statutory provisions that Polymer80 supposedly violated.

Therefore, none of the supposed conduct highlighted in the FAC could possibly have run afoul of CUHA considering that the FAC only propounds allegations concerning frames and kits. Additionally, the FAC's conclusory allegations that the Company purportedly aided and abetted a violation of CUHA, which 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 [p]laintiffs," FAC ¶¶ 84-85, are "legal conclusions couched as factual allegations [that] are not given a presumption of truthfulness, and 'are not sufficient to defeat a motion to dismiss.'" *Travieso*, 526 F. Supp. 3d at 539, quoting *Pareto*, 139 F.3d at 699. In short, the FAC does not plausibly and adequately plead a knowing violation of CUHA as a predicate exception.

(3) Plaintiffs Do Not Plausibly Allege That Polymer80 Knowingly Violated The CAFL And Thereby Proximately Caused The Harm Alleged In The FAC.

Plaintiffs' invocation of the CAFL, Cal. Penal Code § 29180(b), suffers from the same malady as afflicts their reliance upon the CUHA. Although under Penal Code § 29180 an *entire* frame or receiver qualifies as a "firearm," the "unfinished frame or receiver of a weapon that can be readily converted to the functional condition of a finished frame or receiver" does not do so. *Compare* Penal Code § 16520(b), citing Penal Code § 29180 as one of the "provisions" in which "'firearm' includes the frame or receiver of the weapon", *with* Penal Code § 16520(b), not including Penal Code § 29180 as a provision in which "'firearm' includes the unfinished frame or receiver." Because its PF940C kits indisputably did not include finished frames, the Company could not have violated the CAFL.

Moreover, the FAC acknowledges that the CAFL was implemented "as of July 1, 2018." FAC ¶ 86. However, the FAC does not allege that manufacture of the shooter's firearm occurred after that date and does not say in non-conclusory manner how Polymer80 supposedly "aid[ed] and abet[ed] the manufacture in California of the illegal PF940c handgun used to shoot Plaintiffs" FAC ¶ 94. Accordingly, plaintiffs do not plausibly allege "entitlement to relief" on the theory that the Company's purported

violations of the CAFL constitute a predicate exception to the PLCAA's bar. *Iqbal*, 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 557.

(4) Plaintiffs Do Not Plausibly Allege That Polymer80 Knowingly Violated The CUCL And Thereby Proximately Caused The Harm Alleged In The FAC.

As an initial matter, to the extent that plaintiffs' CUCL claims are derivative of "federal and California gun laws," FAC ¶ 110, those claims should be dismissed for the reasons set forth above. At bottom, their argument that Polymer80's website "continued to misrepresent, expressly and impliedly, that these kits were 'legal,'" FAC ¶ 109, fails, because plaintiffs have not plausibly alleged that the subject kits were *not* legal. Furthermore, in discussing CUCL claims against firearm manufacturers, the California Court of Appeals, First District, has stated that "[p]laintiffs have cited no cases finding a manufacturer has engaged in an unfair practice solely by legally selling a non-defective product based on actions taken by entities further along the chain of distribution." *In re Firearms Cases*, 126 Cal.App.4th 959, 980-85 (2005) (explaining that "the definition of unfairness to competitors under" the CUCL "must be "'tethered to some legislatively declared policy or proof of some actual or threatened impact on competition'" and "tethered to specific constitutional, statutory, or regulatory provisions"). In fact, plaintiffs here have not adequately stated a CUCL violation pursuant to the shooter's actions, since the Company was legally selling a non-defective product.

Furthermore, plaintiffs have not plausibly alleged, as they must, "evidence of a causative link between the unfair act and the injuries or damages," *i.e.*, "some connection between the wrongdoing and the harm." *Id.* at 672. Where, as here, "the plaintiffs' [CUCL] claim sounds in fraud, they are required to prove 'actual reliance on the allegedly deceptive or misleading statements,' and that 'the misrepresentation was an immediate cause of [their] injury-producing conduct.'" *Sateriale v. R.J. Reynolds*

Tobacco Co., 697 F.3d 777, 793 (9th Cir. 2012), quoting *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310 (2011); *In re Tobacco II Cases*, 46 Cal.4th 298 (2009) (affirming District Court's Rule 12(b)(6) dismissal of consumers' CUCL claims based on supposedly misleading advertising). Plainly, the FAC does not aver that the shooter (or plaintiffs) relied on any purported misstatement by the Company that caused plaintiffs' harm. Accordingly, they cannot rely on the CUCL as a predicate statute, insofar as they have not plausibly alleged that Polymer80's contravention of the CUCL proximately *did* cause their harm.

Finally, the Company is unaware of any Ninth Circuit decision after *Ileto* addressing whether the CUCL even qualifies as a "predicate" statute under the PLCAA. Polymer80 maintains that the CUCL is not an appropriate predicate statute, vitiating plaintiffs' attempt to invoke the CUCL on that ground alone.

In the end, because the FAC has not plausibly averred that any of the proposed predicate exceptions to the PLCAA apply, the Court should dismiss the FAC in its entirety.

B. The Court Should Dismiss The Negligence Cause, Because Plaintiffs Do Not Plausibly Allege That The Company Breached A Duty To Them That Proximately Caused The Harm Alleged In The FAC.

"To establish a cause of action for negligence, the plaintiff must show that the defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury." *Brown v. USA Taekwondo*, 11 Cal.5th 204, 213 (2021). The general rule is that "liability . . . based upon . . . negligence extends to damage which is proximately or legally caused by the defendant's conduct, not to damage suffered as a proximate result of the independent intervening acts of others." *Martinez v. Pacific Bell*, 225 Cal.App.3d 1557, 1565 (1990). In *In re Firearms Cases*, the First District of the California Court of Appeals stated that it "[found] the views expressed by the dissenters to the denial of rehearing en banc in

Ileto instructive" when discussing California law such as nuisance. 126 Cal. App. 4th at 990. In that *Ileto* opinion, Judge Calahan wrote as follows:

> [T]he majority of the panel's creative interpretation of California law is wrong and will have a deleterious impact on California, manufacturers, and the federal and state courts in California. Common negligence concepts of duty and causation do not allow the unfortunate victims of the criminal use of a dangerous, but not defective, product to recover from the product's manufacturer simply because the manufacturer's marketing schemes allegedly promoted a secondary market that purportedly facilitated the illegal purchase of the product. California law does not support this imposition of the equivalent of strict liability.

Ileto v. Glock, Inc., 370 F.3d 860, 862 (9th Cir. 2004) (Callahan, J., dissenting from denial of rehg. *en banc*).

By this same logic, Polymer80 cannot be held responsible for "the equivalent of strict liability" owing to the shooter's intervening, criminal use of its legal, albeit dangerous, product. *See also Phillips*, 84 F. Supp. 3d at 1220-21, 1227-28 (dismissing negligence claim brought by victim of "mass shooting at the . . . movie theater in Aurora, Colorado," because "Colorado law has long recognized there is no duty to act affirmatively to protect another from criminal attack by a third person unless there is some special relationship between the parties" and "the alleged chain of causation between Defendants and [the shooter's] acts is too attenuated to impose liability"); *Casillas v. Auto-Ordnance Corp.*, 1996 WL 276830, at *1-*4 (C.D. Cal. May 17, 1996) (granting gun manufacturer summary judgment on negligence action brought by shooting victim because "there is no legal authority for imposing a duty in this case" since "Plaintiffs present no evidence of a special relationship between [gun manufacturer] and [shooter] or between [gun manufacturer] and plaintiffs" and because there was no causation where plaintiffs did not "present evidence that the [gun manufacturer's] advertisements were targeted to criminals generally or to [shooter]

specifically, were seen by [shooter], or were somehow the cause of [shooter's] violent behavior").[6] The Court should thus dismiss plaintiffs' negligence claim.

C. The Court Should Dismiss The Public Nuisance Cause, Because Plaintiffs Do Not Plausibly Aver Any Unlawful Or Illegal Action By Polymer80 That Caused The Harm Alleged In The FAC.

In re Firearms Cases succinctly and completely demonstrates that plaintiffs' nuisance cause is defective for failing to plausibly aver any unlawful or illegal action by the Company, as explained above. Plaintiffs, *in re Firearms Cases*, as with plaintiffs here, "alleged that defendants' conduct constitutes a public nuisance because it results in supplying handguns to the criminal market that remain in the hands of criminals for years and causes death and injury to the public." 126 Cal. App. 4th at 986. The Court rejected that theory of nuisance, since "[d]efendants manufacture guns according to federal law and guidelines," and "there is no causal connection between any conduct of the defendants and any incident of illegal acquisition of firearms or criminal acts or accidental injury by a firearm." *Id.* at 989. Similarly here, Polymer80 operates legally pursuant to federal and California law and, accordingly, is "[m]erely engaging in what plaintiffs deem to be a risky practice, without a connecting causative link to a threatened harm, [which] is not a public nuisance." *Id.* at 988. As a result, this Court should dismiss plaintiffs' public nuisance claim.

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[6] A portion (but certainly not all) of the court's analysis in *Casillas* was based on a California statutory provision (Cal. Civil Code § 1714.4) that was later repealed after the California Supreme Court's decision in *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465 (2001).

II

ALTERNATIVELY, THE COURT SHOULD GRANT THE COMPANY'S MOTION TO STRIKE.

Fed. R. Civ. P. 12(f) states that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "Rule 12(f) motions to strike 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." *Citizens for Quality Educ. San Diego v. San Diego Unified Sch. Dist.*, 2018 WL 828099, at *1 (S.D. Cal. Feb. 12, 2018) (alterations in original) (internal quotation marks omitted). "Despite its general disfavor, however, a district court's ruling on a motion to strike is reviewed only for an abuse of discretion." *U-Haul Co. of Nev. v. Gregory J. Kamer, Ltd.*, 2013 WL 800695, at *1 (D. Nev. Feb. 21, 2013).

Notably, the "text of Rule 12(f) does not require a party moving to strike to show prejudice," and "[n]either does Ninth Circuit precedent yet appear to require a showing of prejudice for a party to prevail," but "federal courts generally require a showing of prejudice in weighing whether to favorably exercise their discretion to strike allegations." *Citizens*, 2018 WL 828099, at *3. Under the statutorily enumerated bases for a motion to strike, "[m]atter is considered 'immaterial' if it has no bearing on the controversy before the Court." *U-Haul*, 2013 WL 800695, at *1. "Allegations are 'impertinent' if they are not responsive to the issues that arise in the action and are inadmissible as evidence. 'Scandalous' matter has been described to include allegations that cast a cruelly derogatory light on a party or other person." *Id.* (citations omitted).

The FAC's averments concerning unrelated school and Courthouse shootings fall under all four categories that Rule 12(f) enumerates. *See* FAC ¶ 56. As criminal shootings involving non-Polymer80 products have no bearing on this action, they are utterly irrelevant, and any evidence professedly related thereto is inadmissible. Furthermore, such averments are patently scandalous. There is simply no reason to link

Polymer80 to shootings not involving its products other, of course, than to smear the Company by remote association casting a groundlessly derogatory light on it. Finally, to the extent that plaintiffs mistakenly maintain that these averments bear on their public nuisance claim, those averments are redundant. Indeed, the FAC is replete with at least a dozen other allegations generally concerning so-called ghost guns that do not refer to Polymer80. *See, e.g.*, FAC ¶¶ 15-16, 46-55, 57. Because the Company would be palpably prejudiced by an unfair and unjustified tie to school and Courthouse shootings, the Court should strike the challenge averments. *See Schultz v. Braga*, 290 F. Supp. 2d 637, 654-55 (D. Md. 2003) (granting motion to strike allegations regarding unrelated shooting).

CONCLUSION

For all of the foregoing reasons and those arising from the remainder of the record of this matter, the Court should grant the instant Motion and dismiss the FAC in its entirety with prejudice pursuant to Fed. R. Civ. P. 12(b)(6). Alternatively and in any event, the Court should, pursuant to Fed. R. Civ. P. 12(f), grant the Company's Motion to strike the scandalous and prejudicial allegations that baselessly and inequitably seek to tar Polymer80 with school and Courthouse shootings as to which the Company has no connection whatsoever.

Dated: October 29, 2021

Respectfully Submitted,

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