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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** **REPLY MEMORANDUM OF POINTS AND AUTHORITIES OF POLYMER80, INC. IN FURTHER SUPPORT OF ITS MOTION TO DISMISS OR, ALTERNATIVELY, STRIKE SCANDALOUS MATERIAL** **Date: December 6, 2021** **Time: 1:30 p.m.** **Courtroom: 9A** **Honorable Percy Anderson**

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Defendant Polymer80, Inc. ("Polymer80" or "Company") respectfully submits this Reply Memorandum of Points and Authorities in further support of its motion ("Motion") to: (i) dismiss plaintiffs' First Amended Complaint For Damages ("FAC") 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 grant it.

ARGUMENT

I

THE COURT SHOULD GRANT THE INSTANT MOTION.

A. The PLCAA Clearly Bars This Action, As Plaintiffs Have Not Plausibly Alleged A Predicate Exception.

Plaintiffs do not seriously contest that the Protection Of Lawful Commerce In Arms Act ("PLCAA") applies to this proceeding in the absence of a predicate exception. Yet, plaintiffs feign "puzzle[ment]" by the notion that Polymer80 is "entitled to protections" under the PLCAA for "manufacturing products" that the Company simultaneously and correctly "contends are not firearms" under the federal Gun Control Act ("GCA"). Plaintiffs' Opposition To Defendant Polymer80, Inc.'s Motion To Dismiss Or Alternatively, Strike Scandalous Material ("Opp.") at 6 n. 5. No indecipherable riddle, the GCA quite simply does *not* apply to components that are not specified in that Act. *See* Motion at 13-16. The PLCAA, on the other hand, by its express language, *does cover* "manufacturer[s]" of "a component part of a firearm." 15 U.S.C. §§ 7903(2), (4). Indeed, the Texas Supreme Court easily solved this supposedly intractable puzzle, when it explained that "component parts . . . are 'qualified products' subject to the PLCAA's general prohibition against qualified civil liability actions, but . . . [a]s used in the Gun Control Act, 'firearm' is a term of art that includes some

component parts but not others," and "only 'firearms' are subject to the Gun Control Act's restrictions." *In re Academy, Ltd.*, 625 S.W.3d 19, 29 (Tex. 2021).[1] Thus, the PLCAA applies here and bars this action, since plaintiffs, as explained further below, have not plausibly alleged violation of a predicate statute that proximately caused them harm.[2]

[1] Plaintiffs' attempt to distort the holding of *Ileto v. Glock, Inc.* is transparently contrived. *See* Opp. at 6 n. 5. In *Ileto*, defendant China North was sued "as a manufacturer and seller of firearms." The Ninth Circuit found that the PLCAA did not preempt claims against China North, because that statute "preempts only actions brought against federally licensed manufacturers and sellers of firearms," and "China North concede[d] that it is not a federally licensed manufacturer or seller of firearms." 565 F.3d 1126, 1145 (9th Cir. 2009). China North cleverly argued that it was also "a seller of ammunition," and insofar as the PLCAA "preempts actions brought against *all* sellers of ammunition," that Act should preempt claims against China North as a manufacturer and seller of firearms despite China North not being federally licensed. *Id.* The Ninth Circuit rejected this argument and held that China North's status as an ammunition seller did not protect them under the PLCAA for their sales of firearms. The Court found that the PLCAA only covers federally licensed firearms sellers and manufacturers, and that there must be a "a nexus between the basis of the allegations and the nature of the defendant's business." *Id.* The situation here could not be farther afield. Polymer80 is a manufacturer of "a component part of a firearm," 15 U.S.C. §§ 7903(2)-(4), and is being sued specifically for the component parts it manufactures. The fact that Polymer80 happens to have a federal firearms license for *other* products not at issue herein is a prototypical red herring and an utter irrelevancy. In sum, the PLCAA preempts actions against *all* manufacturers of a component part of a firearm regardless of their status as a federal firearms licensee.

[2] Plaintiffs cite a slew of out-of-Circuit and State case law for the proposition that "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." Opp. at 7 & n. 7. Unfortunately for plaintiffs, this Court will have to analyze all of their deficient claims to determine whether or not this suit must be dismissed. And, in any event, plaintiffs offer no good reason why the Court should not dismiss its inadequately pleaded claims, even if the Court were to find -- and it should not -- that certain of them survive.

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

Plaintiffs do not dispute that Congress -- as evidenced both through its enactment of the GCA and statements by certain legislators during its passage -- removed "part or parts of [a] weapon" from the federal definition of a "firearm." *See* Motion at 13. Instead, plaintiffs endeavor to rewrite the GCA to achieve their policy goals. According to plaintiffs, it does not matter that the language "may readily be converted" appears in subsection (A) of 18 U.S.C. § 921(a)(3) but not in subsection (B). Plaintiffs simply want to read the differences between the two subsections out of the statute. *See* Opp. at 9. To be sure, such sleight of hand does not comport with the law. "Material within an indented subpart relates only to that subpart." A. Scalia & B.A. Garner, *Reading Law: The Interpretation of Legal Texts* 156-58 (2012), citing *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005). In *Jama*, the petitioner sought to apply language from subsection (vii) of a statute to subsection (iv), and the United States Supreme Court balked at the patent sophistry. As Scalia and Garner have explained in plain English, "what happens in subpart (vii) stays in subpart (vii)." Scalia & Garner at 157.[3]

Similarly, here, what happens in subpart (A) -- the verbiage "may readily be converted" -- stays in subpart (A) and does not modify the language "frame or receiver" in subpart (B). *See also* Motion at 13-15. (explaining additional principles of statutory interpretation that compel this result).[4] Moreover, ATF itself has contended in two

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[3] *Ocean Advocates v. United States Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005), is not to the contrary. There, the term "any such facility" was in precisely the same statutory subsection as the phrase "terminal, dock, or other facility" to which it was referring. *Id.* at .872. Here, the phrase "may readily be converted" is in a different subsection from "frame or receiver."

[4] Notably but not surprisingly, plaintiffs do not even attempt to contest that longstanding principles of statutory construction, such as *expressio unius est exclusio alterius*, require the result that the Company's kits do not qualify as firearms under the GCA. *Compare* Motion at 13-16, *with* Opp. at 8-12.

separate pending actions that "the GCA unambiguously excludes unmachined frames or receivers from the statutory definition of a firearm." *See* Memorandum Of Law In Support Of Defendants' Motion For Summary Judgment And In Opposition To Plaintiffs' Motion For Summary Judgment at 19-29, in *City of Syracuse v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, No. 20-cv-06885, ECF No. 98 (S.D.N.Y.). *See also* Defendants' Reply In Support Of Their Motion To Dismiss at 5-8, in *State of California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, No. 20-cv-06761, ECF No. 64 (N.D. Cal.). Precedent interpreting the GCA buttresses the rudimentary principle that that Act's language in subsection (A) does not apply to subsection (B). *Cf. United States v. Rowald*, 429 F. Supp. 3d 469, 471-76 (N.D. Ohio 2019) (dismissing Indictment, where lower receiver was not deemed to be a "frame" or "receiver" under the GCA); *United States v. Jimenez*, 191 F. Supp. 3d 1038, 1039-46 (N.D. Cal. 2016) (same).

Indeed, Congress knew (and knows) how to apply federal law to component parts of a firearm not specified in the GCA and deliberately chose not to do so in that legislation. The PLCAA itself refers to "component part[s] of a firearm." 15 U.S.C. § 7903(4). The Brady Handgun Violence Prevention Act defines a "handgun" as "(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and *(B) any combination of parts from which a firearm described in subparagraph (A) can be assembled.*" 18 U.S.C. § 921(a)(29) (emphasis supplied). And, the National Firearms Act of 1934 ("NFA") defines "machinegun" to include "*any combination of parts from which a machinegun can be assembled* if such parts are in the possession or under the control of a person." 26 U.S.C. § 5845(b) (emphasis supplied). Revealingly, the GCA incorporates the NFA definition of "machinegun." *See* 18 U.S.C. § 921(a)(23).[5] This incorporation once more confirms that if Congress

[5] The GCA and NFA are *in pari materia* and therefore "should if possible be interpreted harmoniously." Scalia & Garner, *supra*, at 252. *See United States v. Stewart*, 311 U.S. 60, 65 (1940) ("It is clear that 'all acts in pari materia are to be taken together, as if they were one

wanted the GCA definition of "firearm" to subsume "parts" that could be "assembled" into a weapon (such as a weapon parts kit), Congress knew how to make that happen.[6] Plainly, Congress chose *not* to do so. Notwithstanding all of plaintiff's discussion of Polymer80s' "kits," the GCA does not cover those products.[7] As a consequence, the FAC does not plausibly allege that Polymer80 ran afoul of the GCA and proximately caused plaintiffs harm.[8]

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law." (internal quotation marks and citations omitted)). *See also United States v. Moss*, 872 F.3d 304, 308-10 (5th Cir. 2017) ("It is a hornbook principle of interpretation that when two provisions operate in pari materia, they should not be read in isolation, but must be construed together." (internal quotation marks and citations omitted)). Consequently, there is an indisputable statutory distinction between the terms "convert" and "assemble." In other words, one would not "convert" Polymer80's kits into a weapon; one would "assemble" them. This further demonstrates that the GCA does not extend to the Company's kits, given that the word "assemble" is not included in the statutory definition of a firearm thereunder.

[6] For this reason, plaintiffs' attempt to distinguish *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. 2021) is unavailing. *See* Opp. at 10-11. In that case, the Texas Supreme Court unambiguously held that "that the term 'firearm'" does not "include[] those component parts that . . . are bundled and packaged inseparably" under the GCA. *Id.* at 29. By the same logic, the Company's kits cannot be considered "firearms" under that statute.

[7] *Wick* is not to the contrary. In that non-precedential and unpublished decision, the Uzi kits "contained *all* of the necessary components to assemble a fully functioning firearm with relative ease." 697 F. App'x 507, 508 (9th Cir. 2017) (emphasis supplied). Here, by contrast, plaintiffs admit that "[d]efendant's PF940C pistol frame kit is not an all-parts-included gun building kit." Opp. at 2-3. Moreover, in *United States v. Stewart*, the defendant was convicted over "machineguns" that had already "been machined and assembled," and significantly "*[n]o charges were brought against [the defendant] regarding the advertised parts kits that were initially the subject of the investigation*" -- "kits" in which "the receivers on the rifles had not yet been completely machined and the rifles were thus not usable as firearm." 451 F.3d 1071, 1072-73 (9th Cir. 2006) (emphasis supplied).

[8] Plaintiffs' discussion of the Company's purported "knowledge" ignores the extent to which the GCA is uncertain. *See* Opp. at 11-12. "[K]nowledge of the facts that constitute the offense" is not enough, where the statute itself fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited. *See, e.g.*, *Johnson v. United States*, 576 U.S. 591, 595 (2015) ("[T]he Government violates [the Fifth Amendment's Due Process] guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so

(2) Plaintiffs' CUHA And CAFL Contentions Must Fail For Many Of The Same Reasons.

Plaintiffs do not and cannot dispute that both CUHA and CAFL are inapplicable to "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). The California Legislature decided that an "unfinished" frame or receiver would constitute a firearm in certain circumstances, but not under CUHA and CAFL. Plaintiffs do not enjoy the right to usurp the California Legislature's determinations in order to facilitate and implement their policy preferences. In addition, the California Legislature recently decided to expand the State's laws to apply to "firearm precursor part[s]," which "means a component of a firearm that is necessary to build or assemble a firearm" and expressly includes "[a]n unfinished receiver" and "[a]n unfinished handgun frame." Cal. Penal Code §§ 16532(a)(1)-(2), 30400 *et seq*. This expansion further concretizes that the Company's parts kits, which do not contain completed frames or receivers, are not covered by *current* California law.

Sensing that their CUHA and CAFL arguments are doomed, plaintiffs attempt to fall back on an "aiding and abetting" theory. *See* Opp. at 12-15. However, plaintiffs proffer no actual *facts* to support this theory as it applies to this case. They merely maintain that "[t]his 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." Opp. at 15, quoting FAC ¶ 94. This construct is an impermissible "bridge too far" that does not establish or substantiate a cause of action as a matter of law. Plaintiffs do not aver how the Company supposedly aided and abetted the creation of the gun in *this* action in derogation of CUHA and CAFL. They only allege the actions the Company purportedly took in general, and that allegation is

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standardless that it invites arbitrary enforcement. The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law . . . .'").

insufficient to sustain that theory. *See Travieso v. Glock Inc.*, 526 F. Supp. 3d 533, 539 (D. Ariz. 2021) ("'[L]egal 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.'"), quoting *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

Furthermore, plaintiffs' CAFL argument is untenable for the additional reason that the statute only "came into effect in July 2018." Opp. at 14. Plaintiffs claim that they "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." *Id.* at 15. The claim ignores that plaintiffs do not allege that the firearm used in *this* case was sold "as of and after July 2018." Whereas Polymer80 has been in existence since 2013, plaintiffs have no sound hypothesis as to how a product sold in 2013 would subject the Company to liability based on a statute that went into effect in 2018.

(3) Plaintiffs Do Not Plausibly Allege That Polymer80 Knowingly Contravened The CUCL And So Proximately Caused The Substantial Harm Alleged In The FAC.

Plaintiffs and defendant agree on one thing -- plaintiffs' "unlawful practices" argument rises and falls on whether or not "[d]efendant's conduct violated . . . the GCA, CUHA, and CAFL." Opp. at 16. Since plaintiffs do not sufficiently allege these violations as explained above, their "unlawful practices" claim is fatally defective.

Plaintiffs are demonstrably incorrect that Polymer80 "entirely overlooks Plaintiffs' allegations of unfair practices" and "provided no responses." Opp. at 16-17. Quite clearly, at Page 19 of its opening Memorandum, the Company asserted 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)."[9] Motion at 19. Understandably, plaintiffs may not wish to grapple with this point on its merits, but it compels dismissal in Polymer80's favor.

Furthermore, plaintiffs' stance regarding purported "misleading advertising" is faulty, because none of the challenged statements was or is misleading. Opp. at 17-20. As demonstrated above, the Company's sales of kits were perfectly legal, precluding the possibility that any statements attesting to the kits' legality could be misleading as a matter of law. Moreover, where, as here, "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). Plaintiffs have not plausibly anywhere set forth such causation and reliance.

In a similar vein, plaintiffs cannot adequately propound that any supposed violation of CUCL proximately caused *them* harm pursuant to that statute. CUCL provides remedies solely for "consumers and competitors." *Kwikset*, 51 Cal. 4th at 319. Although what befell plaintiffs was truly tragic, they were not injured as customers or competitors. In fact, they do *not* allege that they purchased Polymer80 products or competed with Polymer80. CUCL does not provide a remedy for any member of the public injured by a specific product, ensuring that plaintiffs cannot establish that California statute as a predicate exception to the PLCAA. *See Kwikset*, 51 Cal. 4th at 320-26 ("In 2004, the electorate substantially revised the UCL's standing requirement; where once private suits could be brought by 'any person acting for the interests of itself, its members or the general public' now private standing is limited to any 'person

[9] *See id.* (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 "to specific constitutional, statutory, or regulatory provisions"); *Graham v. Bank of Am., N.A.*, 226 Cal. App. 4th 594, 613 (2014) ("appl[ying] a more rigorous test for unfairness in consumer UCL actions . . . requir[ing] that the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory, or regulatory provisions").

who has suffered injury in fact and has lost money or property' as a result of unfair competition. The intent of this change was to confine standing to those actually injured by a defendant's business practices and to curtail the prior practice of filing suits on behalf of 'clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant.'").

B. The Court Should Dismiss Plaintiffs' Negligence Cause As Not Plausibly Alleging That The Company Breached A Duty To Them Proximately Causing The Harm Alleged In The FAC.

Plaintiffs' negligence argument is essentially academic. They tacitly agree that if Polymer80's actions were -- as they truly were -- legal, the PLCAA bars their negligence claim. But, even without the PLCAA, that claim would still be meritless for the reasons set forth in *In re Firearms Cases*, 126 Cal.App.4th at 980-85. In brief, plaintiffs cannot sustain a negligence cause based upon legal sales of firearms or their components.[10]

[10] Moreover, as explained in its initial submissions upon this Motion, Polymer80 cannot be held liable for the intervening criminal acts of a third party. *See* Motion at 20-21.

C. The Court Should Dismiss Plaintiffs' Public Nuisance Cause, Since Plaintiffs Do Not Plausibly Aver Any Unlawful Action By Polymer80 Causing The Harm Alleged In The FAC.

For all the reasons set out in the Company's opening Memorandum, plaintiffs' nuisance claims fails, given that they do not plausibly aver any unlawful conduct by the Company. *See* Motion at 22.

II

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

Plaintiffs invent a reason out of whole cloth as to why their scandalous averments should not be struck from the extant record. They contend that their allegations regarding school and Court shootings "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." Opp. at 25. This is a shamelessly fabricated, *posthoc* rationalization, where the FAC nowhere asserts that these unrelated shootings should have put Polymer80 on notice of anything. *See* FAC ¶ 56. In reality, these averments were included simply to tar Polymer80 by association and "cast a cruelly derogatory light" on the Company. *U-Haul Co. of Nev. v. Gregory J. Kamer, Ltd.*, 2013 WL 800695, at *1 (D. Nev. Feb. 21, 2013). Otherwise put, there are plenty of other allegations in the FAC regarding Polymer80's purported "notice." The Court should not countenance this gamesmanship and should strike the subject allegations.

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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 besmirch Polymer80 with school and Courthouse shootings to which it was and is in no way connected.

Dated: November 22, 2021

Respectfully Submitted,

GREENSPOON MARDER LLP

/s/ *Germain D. Labat*
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Counsel to defendant Polymer80, Inc.