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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CLAUDIA APOLINAR and EMMANUEL PEREZ-PEREZ,

Plaintiffs,

v.

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

Defendants.

Case No. 21STCV29196
Related Case: 21STCV06257 (Lead)

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

Judge: Hon. Daniel S. Murphy
Date: February 2, 2022
Time: 8:30 a.m.
Dept.: 32

Reservation ID: 643766285648

Action Filed: August 9, 2021
Trial Date: Not yet assigned

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Defendant Polymer80 sells "ghost gun" kits used to build home-assembled firearms. Such firearms are called ghost guns because they lack serial numbers and are sold, over the internet, without a background check. Increasing violent crime in Los Angeles and across the state is due in part to the spread of ghost guns, which pose a lethal threat to the safety of all Californians.

That threat materialized on September 12, 2020, when a felon used the gun he could easily procure and knew would be nearly impossible to trace—a Polymer80 ghost gun—to ambush Plaintiffs. He shot Deputy Claudia Apolinar multiple times, including in the jaw and both arms; he shot Deputy Emmanuel Perez-Perez five times, including in the head and hand.

Though Defendant relies on the Protection of Lawful Commerce in Arms Act ("PLCAA") as a shield from liability, PLCAA protection exists only when a defendant has not violated state or federal gun laws. Because Plaintiffs adequately plead violations of multiple such laws—when only one is necessary—Defendant's PLCAA-based arguments should be rejected.

Without PLCAA protection, Defendant bears liability for Plaintiffs' injuries under negligence and nuisance theories. 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.

I. FACTUAL BACKGROUND

Defendant Polymer80 manufactures, advertises, and sells do-it-yourself firearm-assembly kits. First Am. Compl. for Dmgs. ("FAC") ¶ 10. These kits contain the instructions and components necessary for the quick and easy 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 pistol. *Id*. ¶¶ 61, 62 (including photo). Defendant's PF940C pistol frame kit is not all-parts-included, but includes a nearly finished frame that can quickly and easily be completed. *Id*. ¶ 63. It comes

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with a jig, drill bits, and other components to assemble a functioning weapon when combined with other parts sold separately. *Id.* ¶ 63 (including photo). Polymer80 sells both kits without background checks or serial numbers, making them basically untraceable. *Id.* ¶¶ 11, 60. As Polymer80 knows, ghost gun kits are therefore attractive to criminals and others barred from legally possessing firearms. *Id.* ¶ 14. Ghost guns—especially Polymer80's—are found increasingly often at crime scenes, nationwide but especially in Los Angeles. *Id.* ¶¶ 15-16. Polymer80, by far the largest ghost gun maker, accounted for 86% of the 1,475 ghost guns entered into ATF's ballistics database in 2019. *Id.* ¶ 17.

A Polymer80 ghost gun is at the center of this case. On September 12, 2020, a convicted felon legally barred from possessing a firearm ambushed two Los Angeles County Sheriff's deputies, grievously wounding them with a Polymer80 gun. *Id.* ¶¶ 1-3, 9, 12. The deputies suffered severe and lasting injuries. *See id.* ¶¶ 35-42. They seek damages from Polymer80 because its promotion and sale of ghost gun kits violated federal and state gun laws, was "negligent, reckless, despicable, and malicious" and done with "conscious disregard for the health and safety of others," and created a public nuisance. *See id.* ¶¶ 22-23, 119-20.

II. LEGAL ARGUMENT

A demurrer tests whether the complaint states a cause of action. *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747. When considering demurrers, courts read the allegations liberally and in context. *Taylor v. City of Los Angeles Dept. of Water and Power* (2006) 144 Cal.App.4th 1216, 1228. The Court must accept as true not only the Complaint's factual allegations but also "facts that reasonably can be inferred from those expressly pleaded." *Fremont Indemn. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 111. In a demurrer proceeding, the defects must be apparent on the face of the pleading or by proper judicial notice. Code Civ. Proc. § 430.30(a). The only issue involved in a demurrer hearing is whether the complaint, as it stands, states a cause of action. *Hahn*, 147 Cal.App.4th at 747.

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

PLCAA protects firearms industry defendants from liability for injuries solely caused by a third party's criminal conduct, provided the gun industry defendant broke no law. *See* 15 U.S.C. § 7901(a)(6). PLCAA, however, does not apply when the gun industry defendant 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[.]" *Id.* § 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.* (9th Cir. 2009) 565 F.3d 1126, 1132; *see Soto v. Bushmaster Firearms Int'l, LLC* (2019) 331 Conn. 53, 117.

Relying on the predicate exception, many courts have held PLCAA does not bar negligence or public nuisance claims when predicated on knowing violations of law applicable to the sale of firearms or ammunition.[1] 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.[2] Here, Plaintiffs more than adequately allege multiple violations of applicable federal and state law that strip PLCAA protection from Polymer80.

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[1] *See, e.g.*, *King v. Klocek* (N.Y.App. Div. 2020) 187 A.D.3d 1614 (permitting negligence case to proceed against gun store because the case fit within PLCAA's predicate exception); *Smith & Wesson Corp. v. City of Gary* (Ind. Ct. App. 2007) 875 N.E.2d 422, 434-35 (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* (D. Kan., July 18, 2016, No. 16-2305-JWL) 2016 WL 3881341, at *4 (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.* (N.Y. Sup. Ct. 2014) 48 Misc.3d 865, 876-78 (permitting plaintiffs' negligence claim to proceed because the complaint had sufficiently alleged knowing violations of gun laws).

[2] *See, e.g.*, *Corporan*, 2016 WL 3881341, at *4, n.4 ("[B]ecause the court finds the predicate

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1. Violations of the Federal Gun Control Act

Defendant does not dispute that if its kits qualify as "firearms" under the GCA, 18 U.S.C. § 921(a)(3), then its sales practices—including no serial numbers and no background checks—were in violation of federal law and PLCAA protection would not apply. Section 921(a)(3) 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 adequately alleged that Defendant's Buy Build Shoot and pistol frame kits are "firearms" by averring they 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.

The GCA unambiguously classifies as "firearms" unfinished frames and receivers sold as parts of kits if they are (1) intended to become operable firearms or the frame or receiver of an operable weapon as reflected by their design ("designed to") or (2) sold 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"). That the frames sold as part of Defendant's PF940C Buy Build Shoot and pistol frame kits are *unfinished* and require minimal additional machining to become the frame of an operable weapon does not change the analysis under the GCA.[3]

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exception applicable to this action, it declines to engage in the claim-by-claim analysis advanced by defendants."); *Williams v. Beemiller, Inc.* (N.Y.App. Div. 2012) 100 A.D.3d 143, 151, *amended by* (N.Y.App. Div. 2013) 103 A.D.3d 1191 (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).

[3]*See U.S. v. Stewart* (9th Cir. 2006) 451 F.3d 1071, 1072-73 & n.2 (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 § 921(a)(3)); *United States v. Wick* (D. Mont., July 1, 2016, No. CR 15-30-M-DLC) 2016 WL 10637098, at *1 (explaining that "a

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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). Mem. of P. & A. in Supp. of Demurrer ("Dem.") 9:8-23. But Defendant ignores how they are inextricably connected: when Subsection (B) references the "frame or receiver *of any such weapon*" (emphasis added) 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. Stated differently, because (A) includes unfinished or inoperable weapons (provided they are "designed to or may readily be converted" to be a functional weapon), it follows that the frame or receiver of "any such weapon" under (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 (A) would render (B) "superfluous." Subsection (A) captures any gun-building kit containing *all the parts* needed to complete a functioning weapon, such as Defendant's PF940C Buy Build Shoot Kit.[4] Subsection (B) captures *stand-alone* frames and receivers, such as Defendant's PF940C pistol frame kit, when they are "designed" to be or "may be readily converted" into the frame of a functional weapon described by (A). In other words, it is the combination of (A) and (B) that brings Defendant's PF940C *stand-alone* pistol frame kit within the definition of firearm, whereas (A) on its own includes Defendant's *all-inclusive* PF940C Buy Build Shoot kit.[5]

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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 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*, (9th Cir. 2017) 697 Fed.Appx. 507 (finding that "complete Uzi parts kits that could 'readily be converted to expel a projectile' . . . meet[] the statute's definition of a firearm").

[4] 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.

[5] For the same reason, because both kits satisfy the GCA definition of "firearm," it does not

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Nor is Defendant's reference to *In re Academy, Ltd.* (Tex. 2021) 625 S.W.3d 19 availing. Plaintiffs there argued a magazine was a "firearm" under the GCA when packaged and sold with a weapon. *Id.* at 27-28. The court disagreed. *Id.* at 30. 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 Congress included 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 was a felon legally barred from possessing firearms. FAC ¶ 9. Defendant knew direct sales of unserialized, untraceable kits without background checks was foreseeably attractive to prohibited users like the shooter in this case. *Id.* ¶ 70. Defendant knew its completed kits were illegal to possess in California. *Id.* ¶ 77-94. Because Defendant violated federal and state laws and took no reasonable steps to keep its product from prohibited users, the "shooter was able to obtain one of Defendants' firearm kit products and chose to ambush [the] Deputies with a Polymer80 firearm." *Id.* ¶ 71.

Nor did Defendant have an innocent state of mind about the illegality of its business model. Dem. 11:7-13. While ATF stated in 2017 that an unfinished PF940C frame, *on its own*, was not a "firearm," ATF has never concluded the same regarding any Polymer80 *kit*. To the contrary, when ATF put Defendant on notice in 2018 that a *kit* likely would be considered a firearm, Defendant chose not to find out. FAC ¶¶ 103-109. Plaintiffs have alleged knowing violations of the GCA (*id.* ¶¶ 73-76, 103-109), and are entitled to discovery to support those allegations. In any event, Plaintiffs need only allege—as they did here—that Defendant had "knowledge of the facts that constitute the offense," not that its actions were unlawful.[6] The Complaint

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matter that, at the pleading stage, Plaintiffs cannot allege "from which PF940C kit the shooter's firearm was actually built." Dem. 11:2-3; FAC ¶¶ 61-63, 73-75.

[6] *See, e.g.*, *Bryan v. U.S.* (1998) 524 U.S. 184, 192 ("The term 'knowingly' does not necessarily

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alleges Defendant knew it was advertising and selling ghost gun kits (*see, e.g.*, FAC ¶ 120). This is all that is required.[7]

2. Violations of the California Unsafe Handgun Act

The California Unsafe Handgun Act 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 safety requirements. *Id.* § 31910.

Defendant first addresses its CUHA liability with the strawman that CUHA applies only to "frames" or "kits," and not their "unfinished" counterparts. Dem. 11:16-12:8. 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 "conclusory." Dem. 12:9. Those factual allegations, however, track the required showing for aiding and abetting under California law,

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have any reference to a culpable state of mind or to knowledge of the law"); *U.S. v. Johnson* (9th Cir. 2006) 459 F.3d 990, 996 ("'Knowledge' refers only to the defendant's knowingly possessing the gun, and it does not require knowledge that he is violating the law.").

[7] Defendant's citation to the ATF's forthcoming Proposed Rule as evidence of the alleged "murkiness of federal precedent" is equally unpersuasive. The Proposed Rule shows, as a matter of plain reading of the GCA, that "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* n.3, among other cases).

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and are factual allegations that are liberally construed and accepted as true in the face of a demurrer. *Taylor*, 144 Cal.App.4th at 1228; *Fremont Indemn. Co.,* 148 Cal.App.4th at 111.

"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 (1984) 35 Cal.3d 547, 561. Here, Plaintiffs clearly allege Defendant aided and abetted the unlawful manufacture of firearms: (1) *knowledge*—Defendant knew its kits would be assembled into handguns that do not comply with the CUHA and are not on the CUHA's approved Roster of Safe Handguns, FAC ¶¶ 81-84; (2) *intent*—Defendant intended that its kits be assembled into handguns, *id*. ¶ 83, and sold those kits into California, *id*. ¶¶ 13, 33, 61, 63; and (3) *action*—Defendant marketed and sold the components, tools, instructions, and videos needed to build an unsafe handgun, all while having customer service ready to help customers "complete this product," *id*. ¶¶ 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." *Id*.

3. Violations of the California Assembly of Firearms Law

After July 1, 2018, the California Assembly of Firearms Law requires "a person manufacturing or assembling [a] firearm" to "[a]pply to the Department of Justice" for a 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" into which the serial number can be engraved. *Id*. § 29180(b)(2)(B). Polymer80 violated these provisions.

As with CUHA, Defendant responds with the strawman that CAFL applies

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only to finished frames. This is neither Plaintiffs' argument nor what the FAC alleges. 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 further contends the FAC does not allege that the firearm at issue was manufactured after the CAFL came into effect in July 2018. To the contrary, Plaintiffs 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*. ¶¶ 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 demurrer.

The balance of Defendant's CAFL argument reprises the complaint that Plaintiffs' allegations are conclusory. Again, Defendant's aiding and abetting is alleged in detail: (1) *knowledge*—Defendant knowingly sold kits for assembling firearms without a serial number, including the gun at issue, going so far as to market the lack of serial numbers and background checks while aware of CAFL's requirements, FAC ¶¶ 88-90; (b) *intent*—Defendant intended for its PF940 kits to be completed into operable firearms without complying with the CAFL, designing them so they could not be completed in compliance with CAFL's serialization requirements, *id*. ¶¶ 91-93; (3) *action*—Defendant marketed and sold the components, tools, and instructions needed to build an unserialized handgun, with customer service ready to help, *id*. ¶¶ 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." *Id*. ¶ 94. This conduct was a "proximate cause of the injuries sustained by Plaintiffs." *Id*. Plaintiffs easily meet their pleading burden regarding the CAFL predicate exception.

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4. 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.* (1999) 20 Cal.4th 163, 181. Written in the disjunctive, it proscribes multiple unfair business practices. *Id.* at 180. Pertinent here are (a) unlawful, (b) unfair, and (c) fraudulent practices and unfair, deceptive, untrue, and misleading advertising.[8]

(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 its kits were in fact legally sold, and to buttress that claim with a citation to *In re Firearms Cases* (2005) 126 Cal.App.4th 959. But the kits were not legal to sell. *Supra* at 5-10. 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 particularly attractive to people barred from possessing guns and illegal to own in California in its completed state. FAC ¶¶ 14, 51-53, 66, 70, 72-94.

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[8] Defendant first objects that Plaintiffs cannot recover under the UCL because they "are neither consumers nor competitors of Polymer80's products." Dem. 13:5-7. This is a red herring. For the UCL to serve as a predicate violation under PLCAA, Plaintiffs only must allege that Polymer80 violated it; Plaintiffs do not need standing to sue under the predicate statute itself. *See, e.g.*, *Prescott v. Slide Fire Sols., LP* (D. Nev. 2019) 410 F.Supp.3d 1123, 1139 n.9.

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(b) Unfair practices

Defendant entirely overlooks Plaintiffs' allegations of unfair practices. *See* FAC at ¶¶ 95, 97, 110-13. A business practice is "unfair" when it "threatens an 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 . . . ." *Drum v. San Fernando Valley Bar Ass'n* (2010) 182 Cal.App.4th 247, 257. Plaintiffs pleaded both versions of "unfair" business practices, and Defendant provided no response.

(c) Fraudulent practices and unfair advertising

Regarding their fraudulent and deceptive conduct, Defendant argues that Plaintiffs must plead "actual reliance" on Defendant's conduct. Dem. 13:14-18. While 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* (2009) 46 Cal.4th 298, 326; *see also Morgan v. AT&T Wireless Servs., Inc.* (2009) 177 Cal.App.4th 1235, 1258. UCL "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 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, only that it 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. "[M]ateriality 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, "a plaintiff need [not] demonstrate individualized reliance on specific

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misrepresentations to satisfy the reliance requirement." *Id.*

Plaintiffs extensively pled their allegations of Defendant's misrepresentations. Defendant not only claimed its kits were legal, it led consumers to believe the ATF had determined its kits were legal. FAC ¶¶ 98, 100, 102. In fact, the ATF determination letters Defendant received were for "pistol frames and lower receivers *standing alone*," not when sold as part of kit. *Id.* ¶ 103 (emphasis in original). When Defendant submitted its PF940v2 unfinished frame to the ATF in December 2017, Defendant did not disclose that it would be sold as part of a kit along with additional items to finish the frame or gun. *Id.* ¶ 104. The ATF declined to issue a determination letter, because it could tell this was only a component part, not the whole kit. *Id.* ¶¶ 105-106. Instead of submitting the entire kit, as the ATF asked, Defendant submitted nothing and continued selling its kits, all while misrepresenting that its kits had been found to be legal. *Id.* ¶ 108-13.

Defendant's fraudulent conduct encouraged and led consumers to purchase illegal gun-building kits, including the one completed into the firearm used in this case. The claim that a dangerous product is legal when in fact it is illegal is the kind of claim "a reasonable man" buying a gun "would attach importance to" when "determining his choice of action." *See In re Tobacco II Cases*, 46 Cal.4th at 327. This claim gives rise to "a presumption, or at least an inference, of reliance." *See id.* Likewise, falsely asserting its kits were legal was an "immediate cause" of the Plaintiffs' injuries. *See id.* at 326. Had Defendant been truthful with its California consumers that its kits were illegal, it could not have sold them into the state.

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

Defendant contends that the crime perpetrated against Plaintiffs was a superseding intervening cause of harm, overlooking the tight 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 background checks) that

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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. (1970) 10 Cal.App.3d 803, 808. Thus, a defendant is responsible for an injury brought about by its negligence combined with a subsequent independent cause, when that "intervening cause" was either foreseeable or "caused injury of a type which was foreseeable." *Akins v. Sonoma Cty.* (1967) 67 Cal.2d 185, 199. On the other hand, a "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.* (2010) 191 Cal.App.4th 400, 417. That is not the case here.

Martinez v. Pacific Bell (1990) 225 Cal.App.3d 1557, cited by Defendant, only further supports Plaintiffs' argument. 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 the defendant in *Martinez*, Defendant Polymer80 had both a duty and the power to prevent the intervening third-party conduct. *See id.* at 1564.

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

Finally, Defendant argues 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 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.

C. Defendant's motion to strike should be denied.

Motions to strike are appropriate only in limited circumstances when the allegations are irrelevant, false, or improperly pled. Code Civ. Proc. § 436. None of Plaintiffs' allegations approach this standard. Paragraphs 15-16, 46-55, and 57 of the FAC provide background on the recent rapid rise in the use of ghost guns to commit violent crimes, as well as descriptions of how and why ghost guns are dangerous. These allegations contextualize both the public safety threat ghost guns pose and Defendant's culpability in playing a major role in their sale and distribution. In paragraph 56, allegations concerning ghost guns made by other manufacturers illustrate major news events that put Defendant on further notice that ghost guns are being used in murders by people who are barred from legally owning guns. A reasonable manufacturer would alter its practices in response; Defendant, further demonstrating its negligence, did nothing. The motion to strike should be denied.

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III. CONCLUSION

Plaintiffs respectfully request that Defendant's demurrer be overruled.

Dated: January 20, 2022

WALKUP, MELODIA, KELLY & SCHOENBERGER

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PROOF OF SERVICE
Apolinar v. Polymer80
Case No. 21STCV29196 (Lead Case No. 21STCV06257)

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

to:

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

Executed on January 20, 2022, at San Francisco, California.

Stella A. Saephan

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