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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 1-50,

Defendants.

Case No. 21STCV29196

[Related with Case No. 21STCV06257]

[Assigned for all purposes to Honorable Daniel S. Murphy, Department 32]

REPLY MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT POLYMER80, INC. IN FURTHER SUPPORT OF ITS DEMURRER OR, ALTERNATIVELY, ITS MOTION TO STRIKE SCANDALOUS MATERIAL

Date: February 2, 2022
Time: 8:30 a.m.
Dept.: 32
Res ID: 643766285648

Complaint Filed: August 9, 2021
Trial Date: Not Yet Set

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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"), pursuant to California Code of Civil Procedure Sections 430.10(a), (e), and (f), for an Order: (i) sustaining its Demurrer to plaintiffs' First Amended Complaint For Damages ("FAC") or, alternatively, (ii) striking from the FAC certain scandalous material pursuant to California Code of Civil Procedure Sections 435 and 436. 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 entirely grant it.

ARGUMENT

I

THE COURT SHOULD SUSTAIN POLYMER80'S DEMURRER.

A. The PLCAA Clearly Bars This Action, As Plaintiffs Have Not Plausibly Alleged The Requisite 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. They concede, as they are constrained to do, that the "PLCAA protects firearms industry defendants from liability for injuries solely caused by a third party's criminal conduct" where, as here, "the gun industry defendant broke no law." Plaintiffs' Opposition To Defendant Polymer80, Inc.'s, Demurrer, Or, Alternatively, Motion To Strike Scandalous Material ("Opp.") at 8. As explained further below, plaintiffs have not plausibly averred *any* violation of a predicate statute that has proximately caused them harm, let alone the harm alleged in the FAC. Therefore, the PLCAA bars this deeply flawed action.[1]

[1] Plaintiffs cite a slew of out-of-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 8 & n.2. Unfortunately for plaintiffs, this Court will have to analyze all of their deficient claims to determine whether or not dismissal is necessary here. Moreover, plaintiffs offer no good reason why the Court should not dismiss their inadequately pleaded claims, even if the Court were to find -- and it should not -- that certain of them survive. Indeed, Plaintiffs themselves cite case law in which Courts have invalidated certain theories and claims as barred by the PLCAA but not others. *See Prescott v. Slide Fire Solutions, LP*, 410 F. Supp. 3d 1123, 1139-40 & n.10 (D. Nev. 2019) (cited in Opp. at 15 n.8); *Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 70 & n.14 (2019) (cited in Opp. at 8).

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

Plaintiffs do not dispute that Congress -- as evidenced both through enactment of the GCA and statements by certain legislators during that Act's passage -- removed "part or parts of [a] weapon" from the federal definition of a "firearm." *See* Motion at 8-9. Instead, plaintiffs endeavor to rewrite the GCA to effect 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 9-10. This they cannot do, because 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) ("Scalia and Garner"), 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 learned commentators have explained in plain English, "what happens in subpart (vii) stays in subpart (vii)." Scalia & Garner at 157.

Similarly, here, what happens in Subpart (A) -- the verbiage "may readily be converted" -- stays there and does not modify the language "frame or receiver" in Subpart (B). *See also* Motion at 9-10 (explaining additional principles of statutory interpretation that compel this result). Moreover, ATF itself has as recently as in 2021 contended in two separate pending actions that "[t]he 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.). Furthermore, 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).[2] This incorporation, once more, confirms that if Congress 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.[3] To be sure, Congress chose *not* to do so. Notwithstanding all of plaintiff's rhetoric about Polymer80's

[2] 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 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.

[3] For this reason, plaintiffs' attempt to distinguish *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. 2021) is unavailing. *See* Opp. at 11. There, 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.

"kits," the GCA does not cover them.[4] As a consequence, the FAC does not plausibly allege that the Company has ran afoul of the GCA and/or has proximately caused plaintiffs harm.[5]

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

Plaintiffs do not and cannot dispute that both the 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 the CUHA and CAFL. Plaintiffs do not enjoy the right to usurp that legislative determinations 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 California law does *not* extend to the Company's parts kits, which do not contain completed frames or receivers.

[4] *United States v. 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 all-parts-included." Opp. at 6. Moreover, in *United States v. Stewart*, 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).

[5] Plaintiffs' discussion of the Company's purported "knowledge" and "state of mind" ignores the extent to which the GCA is uncertain. *See* Opp. at 11-12 & nn.6-7. "[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 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 . . . .'").

Lest there be any doubt that this straightforward statutory construction is inexorably correct, the California Legislature recently all but admitted that the products at issue here have been legal under California Law. On January 10, 2022, Assembly Member Gipson introduced a bill entitled "An act relating to firearms." *See* AB-1621 Firearms: unserialized firearms, presently *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1621. The proposed legislation states, *inter alia*, as follows:

> [A] ghost gun is manufactured from components that can be assembled at the home of the purchaser. *There is generally no requirement to pass a background check to obtain the components of a ghost gun.* These parts are sold online as kits that include an '80 percent receiver,' meaning that the frame or receiver is 80-percent complete, and the buyers must complete the final 20 percent themselves. . . . *Under current rules, the Bureau of Alcohol, Tobacco, Firearms and Explosives does not treat these unfinished receivers as traditional firearms.*

Id. (emphasis supplied). Considering the undeniable legality of the products at issue, Polymer80 could not have possibly violated the California Penal Code and thereby have proximately caused plaintiffs harm.

Sensing that their CUHA and CAFL salvos are doomed, plaintiffs attempt to fall back on an "aiding and abetting" theory. *See* Opp. at 12-14. However, plaintiffs proffer no actual *facts* to support this theory as applied 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 13-14, quoting FAC ¶¶ 85, 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 purported derogation of both the CUHA and CAFL. They only rely upon the actions that the Company allegedly took in general. Such reliance is insufficient to sustain that theory, since "[t]o withstand a demurrer, it is not enough that [plaintiffs] could assert a viable theory. A demurrer tests the legal sufficiency of factual allegations *in the complaint*." *JPMorgan Chase Bank, N.A. v. Ward*, 33 Cal. App. 5th 678, 689 (2019) (emphasis in original) (internal quotation marks

omitted). *See also Moran v. Bonynge*, 157 Cal. 295, 299 (1910) (noting "bare and general conclusions of law [are] wholly insufficient in a pleading when challenged by a demurrer"). In addition, even if they were not impermissibly conclusory, allegations that Polymer80 shipped *legal* firearms components could not constitute a predicate exception by definition, or else a mere aiding and abetting argument would vitiate the entire purpose and structure of the PLCAA.

Further, plaintiffs' CAFL argument is also untenable, insofar as that 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.* 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 up to five years prior thereto could or would subject the Company to liability based upon a statute coming into effect in 2018.

(3) Plaintiffs Do Not Adequately Allege That Polymer80 Has Knowingly Violated The UCL, Thereby And Resultingly Proximately Causing The Harm Set Forth 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 15. Since plaintiffs do not sufficiently aver 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. Quite clearly, at Page 13 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)."[6] Motion at 13. Understandably, plaintiffs may not wish to grapple with this point on the merits, but it compels a single result -- that the Court sustain Polymer80's Demurrer.

Additionally, plaintiffs' stance regarding purported "unfair advertising" is faulty, because none of the challenged statements was or is misleading. Opp. at 16-17. 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' [UCL] 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) ("*Sateriale*"), quoting *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310 (2011); *In re Tobacco II Cases*, 46 Cal.4th 298, 326 (2009). Plaintiffs have not adequately alleged such causation and reliance here, as they nowhere assert that a consumer of Polymer80's products relied on any purportedly misleading statements, and "[g]iven the absence of an alleged causal connection between the alleged misrepresentations and the plaintiffs' injuries," the Court should consequently sustain Polymer80's Demurrer. *Sateriale*, 697 F.3d at 793.[7]

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[6] *See id.* (explaining that "the definition of unfairness to competitors under" the UCL "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"); *See also 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"). *But see Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394, 1402 (2006) ("We do not think . . . that the finding, in a consumer case, that the practice is unfair must be 'tethered' to specific constitutional, statutory, or regulatory provisions.").

[7] Plaintiffs repeatedly quote the *In re Tobacco II Cases* but conveniently neglect to inform the Court of the full context making that decision wholly inapposite. The Court there expressly held as follows: "we conclude that a plaintiff must plead and prove actual reliance to satisfy the standing requirement of section 17204 but, consistent with the principles set forth above, is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements *where, as here, those misrepresentations and false statements were part of an extensive and long-term advertising campaign.*" 46 Cal.4th at 328 (emphasis supplied). Plainly, the FAC makes no allegations of any such "extensive and long-term advertising campaign" such as the one in that action, which "allege[d] that the tobacco industry defendants violated the UCL by conducting a decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease." *Id.* at 306.

In a similar vein, plaintiffs cannot adequately propound that any supposed violation of the UCL has proximately caused *them* harm pursuant to that statute. The UCL 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 Company products or competed with Polymer80. The UCL assuredly does not provide a remedy for any member of the public injured by a specific product, ensuring that plaintiffs cannot establish that any purported violation of that statute is cognizable as a predicate exception here.

B. The Court Should Dismiss The FAC's Negligence And Public Nuisance Claims As Insufficient To State Causes Of Action.

Plaintiffs' negligence argument is essentially academic. They tacitly agree that if Polymer80's actions were -- as, in actuality, they 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 979-92. In brief, plaintiffs cannot sustain a negligence cause based upon *legal* sales of firearms or their components. Tellingly, they merely contend that "[t]he cases [d]efendant relies on are easily distinguishable because they address only *legal* sales of firearms." Opp. at 19 (emphasis in original). Moreover, as explained in its initial submissions upon this Motion, Polymer80 cannot be held liable for the intervening criminal acts of a third party misusing its products down the stream of commerce, given that "[c]ommon 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*). *See* Motion at 13-14.

Finally, for all the reasons set out in the Company's opening Memorandum, plaintiffs' public nuisance claim is a nullity, given that plaintiffs do not plausibly aver any unlawful conduct by the Company that has proximately caused them harm. *See* Motion at 14.

II

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

California law expressly provides that the "Court may . . . [s]trike out any irrelevant, false, or improper matter," including "'scandalous and abusive statements in pleadings.'" Code Civ. Proc. §§ 435-436; *Overstock.com, Inc. v. Goldman Sachs Grp., Inc.*, 231 Cal. App. 4th 471, 499-500 (2014), quoting *Oiye v. Fox*, 211 Cal. App. 4th 1036, 1070 (2012). Such scandalous and abusive statements exist in the FAC for no proper reason. Plaintiffs belatedly contend that their allegations regarding school and Court shootings with "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." Opp. at 19. This is a shamelessly fabricated, *posthoc* rationalization, where the FAC nowhere asserts that these unrelated shootings should have put the Company 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 it. *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 meretricious allegations.

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 sustain Polymer80's Demurrer. Alternatively, the Court should grant the Company's Motion to strike the scandalous allegations in the FAC.

Dated: January 26, 2022

GREENSPOON MARDER LLP

/s/ *James J. McGuire*
James J. McGuire