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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 10 **FOR THE COUNTY OF LOS ANGELES**

11 MIA TRETТА, through her guardian ad litem
 12 Tiffany Shepis-Tretta,

13 Plaintiff,

14 vs.

15 TERRANCE J. OSMAN, an individual a/k/a
 16 1911builders.com; MAMI MATSURA-
 17 BERHOW, an individual; and DOES 1 through
 18 50,

19 Defendants.

CASE NO.: 20STCV48910

[Complaint filed: 12/22/2020]

JUDGE: STEPHEN P. PFAHLER
DEPT.: F-49

DEFENDANT TERRENCE J. OSMAN DBA
1911 BUILDERS' NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT, OR IN THE ALTERNATIVE,
SUMMARY ADJUDICATION;
MEMORANDUM OF POINTS &
AUTHORITIES

[Filed Concurrently with Separate Statement
of Undisputed Facts, Declaration of Sean R.
Ferron, Declaration of Terrence J. Osman
and [Proposed] Order]

Date: April 6, 2022
Time: 8:30 a.m.
Dept: F-49

Reservation No.: 716019033796

1 **TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:**

2 YOU ARE HEREBY NOTIFIED THAT on **April 6, 2022 at 8:30 a.m.** in Department F-49 of
3 the above-entitled court, Defendant, **TERRENCE J. OSMAN DBA 1911 BUILDERS** (hereinafter
4 “Defendant”), through his attorneys of record herein, will and hereby does move this Court for an Order
5 for Summary Judgment, or in the Alternative, Summary Adjudication in favor of Defendant, as to
6 Plaintiff **MIA TRETТА’s** (hereinafter “Plaintiff”) causes of action for Negligence, Negligent
7 Entrustment, and Public Nuisance, and for costs of suit incurred herein and such other and further relief
8 as may be just.

9 All of Plaintiff’s causes of action are dependent upon the statutorily created “duties” when
10 selling a “firearm.” The “1911 80% Officer Build Kit” sold by Defendant does not meet the definition
11 of “firearm” so all of Plaintiff’s causes of action against Defendant fail as a matter of law. This Motion
12 is made pursuant to California Code of Civil Procedure section 437c, on the following grounds:

- 13 1. Defendant did not owe any legal duty to Plaintiff relating to the sale of the subject “1911 80%
14 Officer Build Kit” because the kit does not meet the definition of “firearm” and therefore
15 Defendant is entitled to judgment as a matter of law as to Plaintiff’s Negligence cause of action;
- 16 2. Defendant did not owe any legal duty to Plaintiff relating to the sale of the subject “1911 80%
17 Officer Build Kit” because the kit does not meet the definition of “firearm” and therefore
18 Defendant is entitled to judgment as a matter of law as to Plaintiff’s Negligent Entrustment cause
19 of action; and
- 20 3. Plaintiff’s cause of action for Public Nuisance is based on the same facts as her Negligence
21 causes of action and Defendant was not a substantial factor in causing her harm and is therefore
22 entitled to judgment as a matter of law.

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1 This Motion will be based upon this Notice, the attached Memorandum of Points and
2 Authorities, the Separate Statement of Undisputed Material Facts, the Declaration of Sean R. Ferron, the
3 Declaration of Terrence J. Osman, as well as all exhibits thereto, all of which are attached hereto and/or
4 served and filed concurrently herewith, and upon such additional evidence as may be presented to the
5 Court at the time of the hearing of this Motion.

6
7
8 DATED: January 13, 2022

LAW OFFICES OF ADRIENNE D. COHEN

9 By: 

10 **ADRIENNE D. COHEN,**
11 **SEAN R. FERRON,**
12 Attorney for Defendant,
13 **TERRENCE J. OSMAN DBA 1911**
14 **BUILDERS**

TABLE OF CONTENTS

1

2

3 I. INTRODUCTION7

4 II. SUMMARY OF ARGUMENT7

5

6 III. STATEMENT OF UNDISPUTED FACTS.....10

7 IV. LEGAL ARGUMENT.....12

8

9 A. SUMMARY JUDGMENT IS APPROPRIATE WHERE A DEFENDANT

10 DEMONSTRATES THAT THERE ARE NO TRIABLE ISSUES OF MATERIAL FACT

11 AND THAT DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF

12 LAW.....12

13

14 B. DEFENDANT DID NOT OWE ANY LEGAL DUTY TO PLAINTIFF RELATING TO

15 THE SALE OF THE SUBJECT “80% KIT” BECAUSE THE KIT DOES NOT MEET THE

16 DEFINITION OF “FIREARM” AND THEREFORE DEFENDANT IS ENTITLED TO

17 JUDGMENT AS A MATTER OF LAW AS TO PLAINTIFF’S NEGLIGENCE AND

18 NEGLIGENT ENTRUSTMENT CAUSES OF ACTION

1913

20 C. DEEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW AS TO

21 PLAINTIFF’S PUBLIC NUISANCE CAUSE OF ACTION AS IT IS BASED ON THE

22 SAME FACTS AS HER NEGLIGENCE CAUSES OF ACTION AND DEFENDANT WAS

23 NOT A SUBSTANTIAL FACTOR IN CAUSING HER

24 HARM.....18

25

26

27

28 V. CONCLUSION20

TABLE OF AUTHORITIES

Cases

Cabral v. Ralphs Grocery Company (2011) 51 Cal.4th 764, 784.....17

Citizens for Odor Nuisance Abatement, 8 Cal.App.5th 350, 359.....9, 18, 19

Coyle v. Historic Mission Inn Corp., (2018) 24 Cal.App.5th 627,643.....17

Hunter v. Pacific Mechanical Corp., (1995) 37 Cal.App.4th 1281, 1286.....12

Johnson v. Superior Court (2006) 143 Cal.App.4th 297, 305.....17

Koepke v. Loo (1993) 18 Cal.App.4th 1444, 1448-14498, 13

Kuriniy v. Hanna & Morton (1997) 55 Cal.App.4th 853, 864.....9, 19

McEvoy v. American Pool Corp. (1948) 32 Cal.2d 295, 298-299.....13

Melton v. Boustred (2010) 183 Cal.App.4th 521, 542.....9, 18, 19

Merrill v. Nvegar, Inc. (2001) 26 Cal.4th 465, 477.....13

Padilla v. Rodas (2008) 160 Cal.App.4th 742, 752.....20

Ramirez v. Plough, Inc. (1993) 6 Cal.4th 539, 547)14

Rio Linda Unified School District v. Superior Court (1997) 52 Cal.App.4th 732, 73512

Saelzler v. Advanced Group (2001) 25 Cal.4th 763, 768.....20

Sangster v. Paetkau (1998) 68 Cal.App.4th 151, 163.....12

Torres v. Reardon (1992) 3 Cal.App.4th 831, 836.....12

Union Bank v. Superior Court (1995) 31 Cal.App.4th 573, 590.....12

Statutes

1 18 U.S.C. § 9218, 10, 14, 15
2 California Civil Code § 1714(a)14
3 California Civil Code § 3480.....18
4 California Code of Civil Procedure § 437c7
5 California Code of Civil Procedure § 437c(a)12
6 California Code of Civil Procedure § 437c(f)(1)7
7 California Code of Civil Procedure § 437c(o)(2)7, 12
8 California Code of Civil Procedure § 437c(p)(2)7, 12
9 California Penal Code § 16520.....8, 15
10 California Penal Code § 16520(b).....8, 15
11 California Penal Code § 16520(g).....8, 15
12 California Penal Code § 26710.....16
13 California Penal Code § 29180.....16
14 California Penal Code § 32000(a).....16, 17
15 California Welfare and Institutions Code § 5150.....16
16

17 **Jury Instructions**

18 CACI 41114
19 CACI 2020.....18, 19
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21
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23
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This matter involves a shooting that took place on November 14, 2019 at Saugus High School in
4 Santa Clarita, California. The shooter was sixteen-year-old Nathaniel Berhow (“the shooter”).
5 Defendant Terrence J. Osman (hereinafter “Defendant”) runs a small business that lawfully sells “1911
6 80% Officer Build Kits” (hereinafter “80% Kit”) online. Plaintiff alleges that an “80% Kit” sold by
7 Defendant was used in the shooting. The sale of the “80% Kit” is not subject to the same Federal and
8 State Laws as the sale of completed “**firearms.**” The shooter intentionally caused the shooting and
9 engaged in criminal activity that has caused Plaintiff’s alleged injuries. The shooter’s responsibility for
10 Plaintiff’s injuries is clear. Plaintiff’s sole basis for liability against Defendant in this matter involves
11 allegations that Defendant unlawfully sold a “**firearm**” to the shooter or to his father and makes claims
12 against Defendant for damages that were solely caused by the criminal actions of the shooter. Plaintiff’s
13 causes of action in this matter depend on a finding that the “80% Kit” that was sold to the shooter’s
14 father was a “**firearm.**” The “80% Kits” are not firearms as a matter of law. If the “80% Kits” that
15 Defendant sells are not firearms and the statutes that Plaintiff uses to support her causes of action against
16 Defendant do not apply, there can be no duty owed to Plaintiff as a matter of law relating to the sale of
17 the “80% Kit” and Defendant could not have been negligent and/or committed any public nuisance.

18 II. SUMMARY OF ARGUMENT

19 California Code of Civil Procedure section 437c provides that a motion for summary judgement
20 shall be granted “if all the papers submitted show that there is no triable issue as to any material fact and
21 that the moving party is entitled to a judgement as a matter of law.” In the alternative, a party can move
22 for summary adjudication as to one or more causes of action. California Code of Civil Procedure section
23 437c(f)(1). Defendants can prove that a critical element of Plaintiff’s causes of action cannot be
24 established, and therefore, the burden shifts to Plaintiffs to demonstrate a triable issue of fact based upon
25 a showing supported by “specific facts”, not mere “allegations or denials of its pleadings.” California
26 Code of Civil Procedure section 437c(o)(2). The burden is on Plaintiffs to “set forth specific facts
27 showing that there is a genuine issue for trial” California Code of Civil Procedure section 437c(p)(2).
28

1 Plaintiff's Complaint against Defendant hinges on the allegation that the "80 Kit" that was sold
2 by Defendant meets the definition of "firearm." If the "80% Kit" does not meet the definition of a
3 "firearm," Plaintiff's Complaint fails as a matter of law. The Federal Gun Control Act of 1968 or 18
4 U.S.C. § 921, defines a firearm as "(A) any weapon (including a starter gun) which will or is designed to
5 or may readily be converted to expel a projectile by the action of an explosive; (B) **the frame or**
6 **receiver of any such weapon;** (C) any firearm muffler or firearm silencer; or (D) any destructive
7 device. Such term does not include an antique firearm." [Emphasis added] California Penal Code section
8 16520 defines a firearm as follows:

9
10 (a) As used in this part, "firearm" means a device designed to be used as a weapon, from which
11 is expelled through a barrel, a projectile by the force of an explosion or other form of
12 combustion.

13 (b) As used in the following provisions, "firearm" includes the frame or receiver of the weapon.

14 Although California Penal Code section 16520(b) states that "firearm" includes the frame or
15 receiver of the weapon, California Penal Code section 16520(g), states "'firearm" includes the
16 unfinished frame or receiver of a weapon that can be readily converted to the functional condition of a
17 finished firearm or receiver." Defendant's kits cannot be fired until they are machined and drilled using
18 tools and other parts purchased separately and therefore the only applicable portion of the product that
19 could be potentially governed by the Federal Gun Control Act of 1968 or 18 U.S.C. § 921 and California
20 Penal Code section 16520 would be the frame included in Defendant's "80% Kits." The frames in
21 Defendant's "80 Kits" like the one sold and at issue in this matter have been determined to not qualify as
22 a firearm. [SSUF 22, 23]. Defendant is a parts company and not a seller of "firearms."

23 Negligence requires, (1) the existence of a legal duty to exercise due care, (2) the breach of that
24 duty, (3) the breach being the proximate or legal cause of injury, and (4) the extent of damages. (*Koepke*
25 *v. Loo* (1993) 18 Cal.App.4th 1444, 1448-1449.) The issue of whether there is a legal duty in a
26 negligence case is a matter of law for the Court to decide. (*Ky. Fried Chicken of Cal. v. Superior Court*
27 (1997) 14 Cal.4th 814, 819.)
28

1 In the present matter, the undisputed evidence shows that the “80% Kit” does not meet the
2 definition of “firearm” and therefore the statutes that Plaintiff uses to support her causes of action in this
3 matter do not apply and there was no duty owed to Plaintiff as a matter of law. Accordingly, Defendant
4 cannot be found liable for negligence and negligent entrustment and is entitled to summary judgment as
5 a matter of law.

6 “The elements ‘of a cause of action for public nuisance include the existence of duty and
7 causation.’ ” (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542, internal citations omitted.)
8 “Causation is an essential element of a public nuisance claim. A plaintiff must establish a ‘connecting
9 element’ or a ‘causative link’ between the defendant’s conduct and the threatened harm.” (*Citizens for*
10 *Odor Nuisance Abatement*, 8 Cal.App.5th 350, 359). “‘Where negligence and nuisance causes of action
11 rely on the same facts about lack of due care, the nuisance claim is a negligence claim.’ The nuisance
12 claim ‘stands or falls with the determination of the negligence cause of action’ in such cases.” (*Melton v.*
13 *Boustred* (2010) 183 Cal.App.4th 521, 542). Plaintiff relies on the same facts in her Public Nuisance
14 cause of action as in her causes of action that involve negligence. Plaintiff is unable to prove that
15 Defendant owed her any duty as a matter of law and therefore is unable to succeed on any cause of
16 action requiring a showing of negligence.

17 Even if it were determined that Plaintiff’s cause of action for Public Nuisance alleges different
18 facts than her negligence claims and therefore Plaintiff does not have to prove negligence, Plaintiff’s
19 cause of action for Public Nuisance requires a showing that Defendant’s conduct was a substantial factor
20 in causing her harm. The issue of causation, though ordinarily a question of fact, may be decided as a
21 question of law if, under the undisputed facts, “there is no room for a reasonable difference of opinion.”
22 (*Kurini v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 864). In the present matter, Defendant is
23 entitled to judgment as a matter of law as to Plaintiff’s cause of action for Public Nuisance, as there is no
24 question of fact that Defendant was not a substantial factor in causing Plaintiff’s harm.

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1 **III. STATEMENT OF UNDISPUTED FACTS**

2 This matter involves a shooting that took place on November 14, 2019 at Saugus High School in
3 Santa Clarita, California. [SSUF 1]. The shooter was sixteen-year-old Nathaniel Berhow. [SSUF 2].
4 Plaintiff Mia Tretta was injured during the shooting. [SSUF 3]. Plaintiff now seeks damages for her
5 injuries she suffered as a result of the shooting. [SSUF 4].

6 Defendant sells “80% Kits” online through a website entitled 1911builders.com. [SSUF 5].
7 Nathaniel Berhow’s father, Mark Berhow, purchased a “80% Kit” on August 2, 2016 from Defendant
8 online through the 1911builders.com website. [SSUF 6]. Mark Berhow purchased tools to use in the
9 assembly of the 1911 firearm from Defendant at other times. [SSUF 7]. Mark Berhow passed away
10 from natural causes in December 2017. [SSUF 8]. Plaintiff alleges that the firearm that was completed
11 by Mark Berhow was used in the shooting that injured her. [SSUF 9]. The “80% Kits” sold by
12 Defendant cannot be fired until they are machined and further assembled using tools that are not sold as
13 part of the kit. [SSUF 10]. It takes an expert an estimated eight (8) hours to put together a completed
14 1911 firearm using all of the required parts and tools. [SSUF 11].

15 The “80% Kits” sold by Defendant are not firearms. The frames that are contained in the “80%
16 Kits” like the one sold and at issue in this matter need to be machined and drilled with tools not included
17 in the kit prior to the kit being completed and made into a firearm. [SSUF 21]. The United States
18 Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (“hereinafter “ATF”)
19 previously determined that the “1911-style frame” sold with the “80% Kits” by Defendant **does not**
20 meet the definition of a "firearm." [SSUF 22]. The “1911-style frame” that the United States
21 Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives determined does not meet
22 the definition of “firearm” pursuant to the Federal Gun Control Act of 1968 or 18 U.S.C. § 921 is the
23 same frame that was sold by Defendant to Mark Berhow with the subject “80% Kit” which is at issue in
24 this matter. [SSUF 23].

25 On December 22, 2020, Plaintiff filed her Complaint with the Los Angeles County Superior
26 Court against Terrance J. Osman, an individual a/k/a 1911 builders.com, Mami Matsura-Berhow and
27 DOES 1 through 50, alleging causes of action for negligence, negligent entrustment, and public
28 nuisance. [SSUF 12]. Plaintiff alleges in her Complaint that Defendant was negligent by “Willfully

1 designing, constituting, packaging, marketing, advertising, and selling the product in such a manner that
2 it was at least as dangerous as a finished firearm, but removing it from the legal protections, background
3 checks, and serialization requirements that are mandatory in the context of firearms.” [SSUF 13].
4 Plaintiff further alleges in the Complaint that Defendant was negligent by “Willfully failing to take
5 reasonable steps, or indeed any steps at all, to ensure that the purchaser was not legally prohibited from
6 purchasing or possessing a firearm, and/or unfit to safely possess a firearm.” [SSUF 14]. Plaintiff
7 alleges in the Complaint that Defendant was negligent by “Failing to take reasonable steps, or indeed
8 any steps at all, to ensure that law enforcement could trace the firearm if it were used in a crime.”
9 [SSUF 15].

10 Plaintiff alleges certain violations of Federal Law by Defendant to support her negligence causes
11 of action, specifically that Defendant sold “**firearms**” without a Federal Firearms License, without
12 serial numbers, and without conducting background checks. [SSUF16]. Plaintiff also alleges certain
13 violations of California **Firearms** Law to support her negligence causes of action, specifically that
14 Defendant manufactured handguns that did not meet the requirements of the California Unsafe Handgun
15 Act. [SSUF 17]. Plaintiff further alleges that Defendant violated California law by selling a “1911 80%
16 Officer Build Kit” to Mark Berhow as he was prohibited from owning a **firearm**. [SSUF 18].

17 Plaintiff makes the same allegations regarding alleged violations of certain Federal and
18 California laws in the Complaint against Defendant in support of her Public Nuisance Cause of Action
19 as her negligence causes of action. [SSUF 19]. Plaintiff alleges in support of her Public Nuisance cause
20 of action that Defendant “created a public nuisance by marketing, selling, and distributing ghost gun kits
21 and/or components to California residents without serial numbers, without background checks, and
22 without taking any reasonable steps to ensure that the purchasers were not prohibited from purchasing or
23 possessing **firearms**, despite knowing that he was distributing “ghost gun kits” to dangerous persons
24 who are prohibited from purchasing or possessing firearms under federal and state law. [SSUF 20].

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1 **IV. LEGAL ARGUMENT**

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3 **A. SUMMARY JUDGMENT IS APPROPRIATE WHERE A DEFENDANT**
4 **DEMONSTRATES THAT THERE ARE NO TRIABLE ISSUES OF MATERIAL**
5 **FACT AND THAT DEFENDANT IS ENTITLED TO JUDGMENT AS A**
6 **MATTER OF LAW**

7 California Code of Civil Procedure section 437c(a) allows a party to move for summary
8 judgment in an action or proceeding if the party contends that action has no merit. In reviewing a
9 motion for summary judgement or adjudication, the trial court must “first identify the issues framed by
10 the pleadings, since it is these allegations to which the motion must respond.” (*Torres v. Reardon* (1992)
11 3 Cal.App.4th 831, 836). As the moving party, if the defendant shows that an element of plaintiff’s case
12 cannot be established, then the burden shifts to plaintiff to demonstrate a triable issue of fact based upon
13 a showing of “specific facts”, not mere “allegations or denials of its pleadings.” (California Code of
14 Civil Procedure section 437c(o)(2)). In doing so, the “moving party is not limited to supporting its
15 motion with affirmative evidence. It may also establish its prima-facie entitlement to judgement by
16 demonstrating its opponent’s discovery responses are devoid of evidence to support an element of
17 opponent’s case” (*Rio Linda Unified School District v. Superior Court* (1997) 52 Cal.App.4th 732, 735;
18 *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590 (stating factually devoid answers to
19 Judicial Council form interrogatories were sufficient to shift the burden of proof to opposing party)).

20 A non-moving party’s burden requires that it “set forth specific facts showing that there is a
21 genuine issue for trial.” (*Hunter v. Pacific Mechanical Corp.*, (1995) 37 Cal.App.4th 1281, 1286;
22 California Code of Civil Procedure section 437c(p)(2)). Therefore, if the evidence set forth by the non-
23 moving party is “merely colorable” or is “not significantly probative”, a summary judgement or
24 summary adjudication can and should be granted. *Id.*

25 In opposing a motion for summary judgement, Plaintiffs must come forward with substantial
26 responsive evidence (*Id.*, emphasis added). Evidence giving rise to no more than mere speculation is
27 insufficient to establish a triable issue of material fact (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151,
28 163, emphasis added).

1 Plaintiff's causes of action in this matter depend on a finding that the "80% Kit" sold to the
2 shooter's father qualifies as a "firearm." The "80% Kit" sold by Defendant to the shooter's father does
3 not meet the definition of "firearm" as a matter of law. Accordingly, the undisputed facts in this matter
4 show that Defendant is entitled to summary judgment, as a matter of law, as Defendant did not owe any
5 duty to Plaintiff relating to the sale of the "80% Kit" and was not a substantial factor in causing her
6 harm.

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8 **B. DEFENDANT DID NOT OWE ANY LEGAL DUTY TO PLAINTIFF RELATING**
9 **TO THE SALE OF THE SUBJECT "80% KIT" BECAUSE THE KIT DOES NOT**
10 **MEET THE DEFINITION OF "FIREARM" AND THEREFORE DEFENDANT IS**
11 **ENTITLED TO JUDGMENT AS A MATTER OF LAW AS TO PLAINTIFF'S**
12 **NEGLIGENCE AND NEGLIGENCE ENTRUSTMENT CAUSES OF ACTION**

13 Plaintiff's Complaint alleges causes of action for Negligence and Negligence Entrustment
14 against Defendant. Both causes of action require Plaintiff to prove the elements of negligence.
15 Defendants can show that elements of Plaintiff's causes of action for negligence and negligent
16 entrustment cannot be established, and therefore, the burden shifts to Plaintiffs to demonstrate a triable
17 issue of fact based upon a showing supported by admissible evidence.

18 To prevail on a negligence claim, a plaintiff must establish (1) the existence of a legal duty to
19 exercise due care, (2) the breach of that duty, (3) the breach being the proximate or legal cause of injury,
20 and (4) the extent of damages. (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1448-1449). Duty may be
21 imposed by law, be assumed by the defendant, or exist by virtue of a special relationship and the
22 existence of a legal duty depends upon the foreseeability of the risk and a weighing of policy
23 considerations for and against imposition of liability. (*Melton v. Boustred* (2010) 183 Cal.App.4th 521,
24 529-530). A precondition to liability founded upon negligence is the existence of a duty of care owed
25 by the alleged wrongdoer to a plaintiff, or to a class of which a plaintiff is a member. (*McEvoy v.*
26 *American Pool Corp.* (1948) 32 Cal.2d 295, 298-299). The existence and scope of duty are legal
27 questions for the court (*Merrill v. Nvegar, Inc.* (2001) 26 Cal.4th 465, 477).

28 The general rule in California regarding duty is that "everyone is responsible, not only for the
result of his or her willful acts, but also for an injury occasioned to another by his or her want of

1 ordinary care or skill in the management of his or her property or person, except so far as the latter has,
2 willfully or by want of ordinary care, brought the injury upon himself or herself.” (California Civil Code
3 section 1714(a)). The proper conduct of a reasonable person in a particular situation may become
4 settled by judicial decision or may be established by statute or administrative regulation. (*Ramirez v.*
5 *Plough, Inc.* (1993) 6 Cal.4th 539, 547). In California, it is reasonable to expect that others will follow
6 the law and use reasonable care. “Every person has the right to expect that every other person will use
7 reasonable care and will not violate the law, unless that person knows, or should know, that the other
8 person will not use reasonable care and will violate the law.” (CACI 411).

9 The Federal government and California impose certain special duties upon sellers or dealers of
10 “**firearms.**” Plaintiff cites several Federal and California statutes in her Complaint as a basis for her
11 causes of action against Defendant and alleges that Defendant’s alleged violations of these statutes
12 support her causes of action against Defendant (Plaintiff’s Complaint, Page 15, 16). Plaintiff’s
13 negligence causes of action require a finding that the “80% Kit” sold to the shooter’s father by
14 Defendant was a “firearm” **Here, the “80% Kit” does not meet the definition of “firearm” as a**
15 **matter of law.** Therefore, Defendant did not owe a duty to Plaintiff relating to the sale.

16 Plaintiff alleges that Defendant was required to obtain a Federal firearms license, sold “unsafe
17 handguns,” sold guns without required serial numbers, and failed to perform a background check.
18 Plaintiff attempts to use these alleged violations to support her causes of action for Negligence,
19 Negligent Entrustment, and Public Nuisance. Plaintiff’s allegations do not allege facts sufficient to
20 support her causes of action though under the law. Plaintiff is alleging violations of Federal and
21 California statutes that apply to sellers of completed or what is considered a completed “**firearm**” and
22 Plaintiff admits in the Complaint that Defendant was selling “80% Kits.” (Plaintiff’s Complaint, Page
23 11). These kits that Defendant was selling and Plaintiff alleges was sold to the shooter’s father do not
24 meet the definition of “**firearm**” and therefore the alleged statute violations Plaintiff attempts to use to
25 plead her causes of action are not applicable to Defendant pursuant to the current law.

26 According to Plaintiff’s Complaint, Federal Law requires the seller (Defendant in this action) to
27 obtain a Federal firearm license prior to engaging in the business of dealing in **firearms.** The Federal
28 Gun Control Act of 1968 or 18 U.S.C. § 921, defines a firearm as “(A) any weapon (including a starter

1 gun) which will or is designed to or may readily be converted to expel a projectile by the action of an
2 explosive; (B) **the frame or receiver of any such weapon**; (C) any firearm muffler or firearm silencer;
3 or (D) any destructive device. Such term does not include an antique firearm.” [Emphasis added]

4 California Penal Code section 16520 defines a firearm as follows:

5
6 (c) As used in this part, “firearm” means a device designed to be used as a weapon, from which
7 is expelled through a barrel, a projectile by the force of an explosion or other form of
8 combustion.

9 (d) As used in the following provisions, “firearm” includes the frame or receiver of the weapon.

10 Although California Penal Code section 16520(b) states that “firearm” includes the frame or
11 receiver of the weapon, California Penal Code section 16520(g), states ““firearm” includes the
12 unfinished frame or receiver of a weapon that can be readily converted to the functional condition of a
13 finished firearm or receiver.” Further, as Defendant’s kits cannot be fired until they are further
14 machined and drilled using tools and other parts purchased separately, the only applicable portion of the
15 product that could arguably be governed by the Federal Gun Control Act of 1968 or 18 U.S.C. § 921 and
16 California Penal Code section 16520 would be the frame included in Defendant’s “80% Kits.”

17 Defendant is not selling “**firearms**” as part of his “80% Kits.” The “80% Kits” sold by
18 Defendant are not “readily converted to the functional condition of a finished “firearm or receiver” and
19 still require assembling, purchasing further parts and completing the holes in the components to
20 complete a “firearm.” [SSUF 10, 21]. The “80% Kits” sold by Defendant cannot be fired until they are
21 machined and assembled using tools that are not sold as part of the kit. [SSUF 10]. It takes an expert an
22 estimated eight (8) hours to put together a completed 1911 firearm using all of the required parts and
23 tools. [SSUF 11].

24 The United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives
25 previously determined that the “1911-style frame” sold with the “1911 Officer Build Kit” by Defendant
26 does not meet the definition of a “firearm”. [SSUF 22]. The “1911-style frame” that the United States
27 Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives determined does not meet
28 the definition of “firearm” pursuant to the Federal Gun Control Act of 1968 or 18 U.S.C. § 921 is the

1 same model frame that was sold by Defendant to Mark Berhow with the subject “1911 Officer Build
2 Kit” and at issue in this matter. [SSUF 23].

3 As indicated by the evidence submitted by Defendant with this motion, there is no dispute in this
4 matter that the frames contained in the “80% Kits” sold by Defendant like the one allegedly sold and at
5 issue in this matter are not **firearms**, are not readily converted to a **firearm**, and need to be machined
6 and drilled further prior to the kit being completed and to be classified as a “**firearm**.”

7 A “**firearm**” made by a Federally licensed manufacturer must be engraved with identifying
8 information: a unique serial number, as well as the make and model. However, under both Federal and
9 California law, this prerequisite is only required for a completed **firearm**. California Penal Code section
10 29180 states, “Prior to manufacturing or assembling a **firearm**, a person manufacturing or assembling
11 the **firearm** shall do all of the following... apply to the Department of Justice for a unique serial number
12 or other mark of identification pursuant to Section 29182...” Accordingly, an unfinished firearm is not
13 required to have a serial number and the person finishing and assembling the firearm is required to later
14 have it registered with a serial number. If a person buys an “80% Kit” like the ones sold by Defendant,
15 they must also buy parts and tools to final assemble the firearm and then that person is required to obtain
16 a serial number. (California Penal Code section 29180).

17 The Complaint also alleges that Defendant failed to perform a background check on the shooter’s
18 father and therefore did not determine that he was prohibited from owning a **firearm** pursuant to
19 California Welfare and Institutions Code section 5150. Defendant was not required by law to perform a
20 background check on the shooter’s father to determine whether he was ineligible to own a firearm, as
21 Defendant sells 80% unfinished kits that do not qualify as **firearms**. (California Penal Code section
22 26710).

23 Plaintiff further alleges that Defendant sold an “unsafe handgun” to the shooter or his father. As
24 discussed above, Defendant did not sell a “**firearm**” and therefore could not have sold an “unsafe
25 handgun” pursuant to California law. According to California Penal Code section 32000(a), “a person
26 who manufactures or causes to be manufactured, imports for sale into the state for sale, keeps for sale,
27 offers or exposes for sale, gives, or lends an unsafe handgun shall be punished by imprisonment in a
28 county jail not exceeding one year.” However, as stated in the Complaint, an “unsafe handgun” is

1 defined as “any [[pistol, revolver, or other **firearm** capable of being concealed upon the person” that
2 does not have certain safety devices, meet firing requirements, or satisfy drop safety requirements. *Id.*
3 Here, the “80% Kit” does not meet the definition of firearm pursuant to the law, let alone an “unsafe
4 handgun”. The “80% Kit” cannot be fired and requires many more hours of completion, tools and parts
5 to become a 1911 firearm that is capable of being fired.

6 Plaintiff relies on Defendant’s alleged violations of Federal and California law relating to the
7 manufacture and sale of “**firearms**” to allege and support her causes of action against Defendant.
8 Defendant was not selling “firearms” firearms as a matter of law because the “80% Kit” sold does not
9 meet the definition of “firearm” as a matter of law and therefore the sale is not subject to the statutes and
10 special duties that Plaintiff cites in her Complaint. Defendant abided by the law and Plaintiff is
11 therefore unable to present any admissible evidence to support her causes of action for Negligence and
12 Negligent Entrustment against Defendant because Defendant did not owe any duty to her relating to the
13 sale of the “80% Kit.”

14 Even if the Court were to find some type of duty owed by Defendant to Plaintiff, Defendant did
15 not breach any duty owed to Plaintiff as a matter of law as well. Breach of a duty may occur through an
16 affirmative action, or failure to perform a specific action that is mandated by either a promise, duty, or
17 law, without excuse or justification. “Breach is the failure to meet the standard of care.” (*Coyle v.*
18 *Historic Mission Inn Corp.*, (2018) 24 Cal.App.5th 627,643; *Johnson v. Superior Court* (2006) 143
19 Cal.App.4th 297, 305.) The question regarding whether a defendant has breached a duty is generally one
20 to be decided by the jury (*Cabral v. Ralphs Grocery Company* (2011) 51 Cal.4th 764, 784). A Court
21 can also find that as a matter of law a defendant did not breach a duty of care under the circumstances
22 shown by the evidence when it is so clear. “On the facts of a particular case, a trial or appellate court
23 may hold that no reasonable jury could find the defendant failed to act with reasonable prudence under
24 the circumstances. Such a holding is simply to say as a matter of law the defendant did not breach his or
25 her duty of care, i.e. was not negligent toward the plaintiff under the circumstances shown by the
26 evidence.” (*Id.* at 773).

27 In the present matter, the evidence presented by Defendant makes it clear that Defendant also did
28 not breach any legal duty to Plaintiff, as Defendant did not sell what would qualify as a “firearm” as a

1 matter of law and therefore the statutes relied on by Plaintiff to support her causes of action do not apply
2 to Defendant. Accordingly, there can be no breach of any duty as a matter of law and Defendant is
3 entitled to judgment as a matter of law on these grounds as well.

4
5 **C. DEEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW AS TO**
6 **PLAINTIFF'S PUBLIC NUISANCE CAUSE OF ACTION AS IT IS BASED ON**
7 **THE SAME FACTS AS HER NEGLIGENCE CAUSES OF ACTION AND**
8 **DEFENDANT WAS NOT A SUBSTANTIAL FACTOR IN CAUSING HER HARM**

9 Public Nuisance is codified by California Civil Code section 3480, which states "A public
10 nuisance is one which affects at the same time an entire community or neighborhood, or any
11 considerable number of persons, although the extent of the annoyance or damage inflicted upon
12 individuals may be unequal." To establish Public Nuisance, Plaintiff must prove all of the following
13 elements against Defendant:

14 Defendant, by acting or failing to act, created a condition or permitted a condition to exist that
15 was:

- 16 1. Harmful to health, or indecent or offensive to the senses;
- 17 2. That the condition affected a substantial number of people at the
18 same time;
- 19 3. That an ordinary person would be reasonably annoyed or
20 disturbed by the condition;
- 21 4. That the seriousness of the harm outweighs the social utility of
22 Defendant's conduct;
- 23 5. That Plaintiff did not consent to Defendant's conduct;
- 24 6. That Plaintiff suffered harm that was different from the type of harm suffered by the
25 general public; and
- 26 7. **That Defendant's conduct was a substantial factor in causing Plaintiff's harm.**
27 **(CACI 2020) [Emphasis added]**

28 "The elements 'of a cause of action for public nuisance include the existence of duty and
causation.'" (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542, internal citations omitted.)
"Causation is an essential element of a public nuisance claim. A plaintiff must establish a 'connecting
element' or a 'causative link' between the defendant's conduct and the threatened harm." (*Citizens for
Odor Nuisance Abatement*, 8 Cal.App.5th 350, 359). "Where negligence and nuisance causes of action
rely on the same facts about lack of due care, the nuisance claim is a negligence claim." The nuisance

1 claim ‘stands or falls with the determination of the negligence cause of action’ in such cases.” (*Melton v.*
2 *Boustred* (2010) 183 Cal.App.4th 521, 542).

3 In the present matter, Plaintiff relies on the same facts about lack of due care as to Defendant
4 relating to her Public Nuisance cause of action. Plaintiff alleges in support of her Public Nuisance cause
5 of action that Defendant “created a public nuisance by marketing, selling, and distributing ghost gun kits
6 and/or components to California residents without serial numbers, without background checks, and
7 without taking any reasonable steps to ensure that the purchasers were not prohibited from purchasing or
8 possessing firearms, despite knowing that he was distributing ghost gun kits to dangerous persons who
9 are prohibited from purchasing or possessing firearms under federal and state law. [SSUF 20]. These
10 are the same allegations Plaintiff uses to support her negligence causes of action.

11 Accordingly, Plaintiff’s cause of action for Public Nuisance is essentially a *negligence* claim.
12 Therefore, Plaintiff must prove the elements of negligence to succeed on her cause of action for Public
13 Nuisance. As outlined above, as to Plaintiff’s causes of action for Negligence and Negligent
14 Entrustment, Plaintiff’s causes of action in this matter depend on a finding that the “80% Kit” sold to the
15 shooter’s father qualifies as a “firearm.” The “80 Kit” sold by Defendant to the shooter’s father does not
16 qualify as a “firearm” as a matter of law. Accordingly, the undisputed facts in this matter show that
17 Defendant is entitled to summary judgment, as a matter of law, as Defendant did not owe any duty to
18 Plaintiff relating to the sale of the “80% Kit.”

19 Even if it were determined that Plaintiff’s cause of action for Public Nuisance alleges different
20 facts as her negligence claims and therefore Plaintiff does not have to prove negligence, Plaintiff’s cause
21 of action for Public Nuisance requires a showing that Defendant’s conduct was a substantial factor in
22 causing her harm. (CACI 2020). “Causation is an essential element of a public nuisance claim. A
23 plaintiff must establish a ‘connecting element’ or a ‘causative link’ between the defendant’s conduct and
24 the threatened harm.” (*Citizens for Odor Nuisance Abatement*, 8 Cal.App.5th 350, 359).

25 The issue of causation, though ordinarily a question of fact, may be decided as a question of law
26 if, under the undisputed facts, “there is no room for a reasonable difference of opinion.” (*Kuriniij v.*
27 *Hanna & Morton* (1997) 55 Cal.App.4th 853, 864). If a defendant demonstrates in his motion for
28 summary judgement through the evidence presented in the action, that the plaintiff cannot reasonably

1 expect to establish a prima facie case of causation, “the trial court [would be] justified in awarding
2 summary judgement to avoid a useless trial.” (*Saelzler v. Advanced Group* (2001) 25 Cal.4th 763, 768;
3 *Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 752). The shooter was the clear substantial factor in
4 causing Plaintiff harm.

5 Plaintiff relies on the same facts about lack of due care as her negligence claims and therefore
6 her Public Nuisance claims is essentially a negligence claim requiring her to prove that the elements of
7 negligence. The evidence presented by Defendant makes it clear that Defendant did not owe a duty to
8 Plaintiff as a matter of law. Therefore, Plaintiff is unable to prove her Public Nuisance cause of action
9 as well.

10 Even if it is determined that Plaintiff relies on different facts to allege her cause of action for
11 Public Nuisance, the undisputed facts in this matter show that Defendant was not a substantial factor in
12 causing Plaintiff’s harm and Defendant is entitled to judgment as a matter of law as to Plaintiff’s cause
13 of action for Public Nuisance.


14 **V. CONCLUSION**

15 For all of the foregoing reasons, Defendants respectfully request that this Court grant summary
16 judgment in favor of Defendant, as Defendant did not owe a duty to Plaintiff as a matter of law because
17 the “80% Kit” does not meet the definition of “firearm.” Further, Defendant was not a substantial factor
18 in causing any harm to Plaintiff.

19 As such, Defendants cannot be found liable for Negligence, Negligent Entrustment, and Public
20 Nuisance, and this Motion for Summary Judgment should be granted.

21
22
23 DATED: January 13, 2022

LAW OFFICES OF ADRIENNE D. COHEN

24
25 By: 
26 ADRIENNE D. COHEN,
27 SEAN R. FERRON,
28 Attorney for Defendant,
TERRENCE J. OSMAN DBA 1911
BUILDERS



Court Reservation Receipt

Reservation

Reservation ID:
716019033796

Status:
RESERVED

Reservation Type:
Motion for Summary Judgment

Number of Motions:
1

Case Number:
20STCV48910

Case Title:
MIA TRETТА, et al. vs TERRANCE J. OSMAN, et al.

Filing Party:
Terrance J. Osman (Defendant)

Location:
Chatsworth Courthouse - Department F49

Date/Time:
April 6th 2022, 8:30AM

Confirmation Code:
CR-SF97MK57ZNLHJQT95

Fees

Description	Fee	Qty	Amount
Motion for Summary Judgment	500.00	1	500.00
Credit Card Percentage Fee (2.75%)	13.75	1	13.75
TOTAL			\$513.75

Payment

Amount:
\$513.75

Type:
Visa

Account Number:
XXXX7364

Authorization:
04563D

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