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Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

MIA TRETTA, through her guardian ad litem Tiffany Shepis-Tretta,

Plaintiff,

v.

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

Defendants.

Case No. 20STCV48910

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT TERRENCE J. OSMAN'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION

Date: June 29, 2022
Time: 8:30 a.m.
Dept.: F-49
Reservation No.: 716019033796

Action Filed: December 22, 2020
Trial Date: January 30, 2023

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TABLE OF CONTENTS: **Page(s)**

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TABLE OF AUTHORITIES

Page(s)

Cases

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Statutes

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I. INTRODUCTION

Defendant Terrance J. Osman ("Defendant"), operating as the online business 1911Builders.com, sells to anybody with a credit card build-it-yourself gun kits from which fully functioning, lethal firearms known as "ghost guns" can be easily assembled. Defendant distributes these ghost gun kits without taking any reasonable steps to prevent legally prohibited individuals from buying them. He sold one such ghost gun kit–so-named because they lack serial numbers and are thus very difficult to trace–to Mark Berhow, a man prohibited by law from possessing firearms. Mr. Berhow's sixteen-year-old son later took the assembled firearm to his high school and used it to shoot then fifteen year-old Plaintiff Mia Tretta in the stomach, murder two of her friends, and wound two other children. Plaintiff seeks recompense for her injuries and to halt Defendant's dangerous and unlawful activity.

Defendant's Motion for Summary Judgment (the "Motion") rests almost entirely on a misunderstanding of Plaintiff's Complaint and the law of negligence. Defendant's Motion repeatedly contends that he "did not owe any legal duty to Plaintiff relating to the sale of the [ghost gun kit] because the kit does not meet the definition of 'firearm'" (Motion at 13.) According to Defendant, "[i]f the [kit] does not meet the definition of a 'firearm,' Plaintiff's Complaint fails as a matter of law." (Motion at 8.) This is wrong. None of Plaintiff's causes of action, for ordinary negligence, negligent entrustment, and public nuisance, requires proving that Defendant's ghost gun kits meet the statutory definition of "firearm" because such causes of action do not require proving any statutory violations at all.

Defendant conflates the concept of negligence with negligence per se. The law of negligence mandates that Defendant owed to Plaintiff a duty of care, regardless of whether he violated a statute in selling the ghost gun kit to the Shooter's father. (*See* Civ. Code § 1714, subd. (a)) ("Everyone is responsible… for an injury occasioned to another by his or her want of ordinary care…"). The Complaint does contain allegations of statutory violations–like those implicating the requirements of the sale of "firearms" under the Gun Control Act–because they give rise to a *presumption* of negligence pursuant to a theory of negligence per se, not because such allegations are necessary to Plaintiff's causes of action. (*See* Compl. ¶¶ 91-93.) Because he marketed and sold all the parts and

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tools necessary to construct a lethal instrumentality to anyone, regardless of age or prohibited status, Defendant owed to Plaintiff a duty of care–indeed, a *heightened* duty of care, as set forth below–mandated by the law of negligence. Thus, the Motion should be denied for the simple reason that even *if* Defendant had met his burden of showing that the ghost gun kit sold by him was not a "firearm" under federal law–and he did not–such a finding would not dispose of any of Plaintiff's causes of action. (*See, e.g.,* Code Civ. Proc. § 437, subd. (c)(f)(1)) ("A motion for summary adjudication shall be granted only if it completely disposes of a cause of action.".)

At trial, Plaintiff will nevertheless also prove that Defendant's ghost gun kits easily meet the federal definition of "firearm," and thus she is entitled to a presumption of negligence. The kits are plainly both "designed to or may readily be converted to expel a projectile by the action of an explosive." (18 U.S.C. § 921(a)(3).) Their purpose is to fire bullets (and thus are "designed to" do so), and they are "readily convertible" to operational form as well. Defendant himself markets them as easily convertible, declaring, "It's Never Been Easier to Build Your Own Custom 1911" along with pictures of his kit. Defendant's arguments to the contrary rest on (1) an irrelevant, inadmissible, and now-invalidated letter issued to Defendant by the Bureau of Alcohol, Tobacco, Firearms and Explosives (the "ATF") *after* the sale in this case, relating to a stand-alone firearm frame, rather than the all-parts-included kit at issue here; as well as (2) his argument that it takes an "expert" (i.e., himself) 8 hours to construct the kit, which merely raises a triable issue of fact as to whether they are "readily convertible," and all but concedes that his kit is "designed to" expel a projectile, an independent basis for holding that the kit is a "firearm." (*See* 18 U.S.C. § 921(a)(3).) In other words, even with respect to the erroneous basis of Defendant's motion, he fails to meet his burden. The Motion fails on this ground as well.

Furthermore, Defendant's Motion fails to properly address the alleged state law violations. (*See* Compl. ¶¶ 55-66.) Plaintiff alleges violations of California's Unsafe Handgun Act (the "CUHA"), which prohibits in California handguns that–like the gun assembled with Defendant's kits–lack certain safety features or are not on California's roster of safe and acceptable handguns. The CUHA prohibits people from "caus[ing] to be manufactured" such unsafe handguns, and Defendant does precisely that by selling the tools, parts, and instructions needed to build such

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handguns. (*See* Pen. Code § 32000, subd. (a); Compl. ¶¶ 55-66.) Thus, even if Defendant's argument regarding "firearms" were correct, it would not foreclose a finding of negligence per se based on violation of the CUHA, let alone negligence itself. The Motion fails on this ground as well.

Finally, Defendant's remaining arguments related to breach and public nuisance all rest on his erroneous argument related to the definition of "firearm," or otherwise raise issues of triable fact–namely, as to whether his behavior was a "substantial factor" in Plaintiff's injuries. (Motion at 17-18.) The Court can and should deny the Motion for any and all of the above reasons.

II. FACTS

At 7:30 A.M. on November 14, 2019, then 15-year-old Plaintiff Mia Tretta, a high school freshman, arrived on the quad of Saugus High School and walked over to see her best friend, 14-year-old Dominic Blackwell. (Plaintiffs' Separate Statement of Additional Undisputed Material Facts ("PMF") No. 1.) Unbeknownst to them, at the same time, a 16-year-old fellow student Nathaniel Berhow (the "Shooter") walked onto the quad with an unmarked, 1911-style "Officer Frame" ghost gun, and opened fire.[1] (PMF No. 2.) Dominic and another student, Gracie Ann Muehlberger, were killed; Mia was shot in the stomach; and two other children were wounded. (PMF No. 3.) Mia was airlifted to a hospital where she spent the next six days recovering from a gunshot wound and subsequent surgery. (PMF No. 4.) She survived but continues to suffer both physical pain and psychological repercussions. (PMF No. 5) After killing two students and seriously injuring three others, the Shooter took his own life with the last round. (PMF No. 6.)

The Shooter was able to obtain the ghost gun because Defendant negligently sold an easy-to-assemble gun kit to his father, Mark Berhow (the "Shooter's Father"), despite the fact that the Shooter's Father was at the time of the purchase prohibited by law from possessing firearms. (PMF Nos. 7, 9.) Between 2013 and 2015, the Shooter's Father had numerous contacts with law enforcement, including an arrest stemming from physical abuse of his daughter and a psychiatric episode during which the Shooter's Father was found wandering the street in his underwear

[1] A "1911" frame is so named because it is based on the Colt 1911, a firearm originally used by the United States military in World War I.

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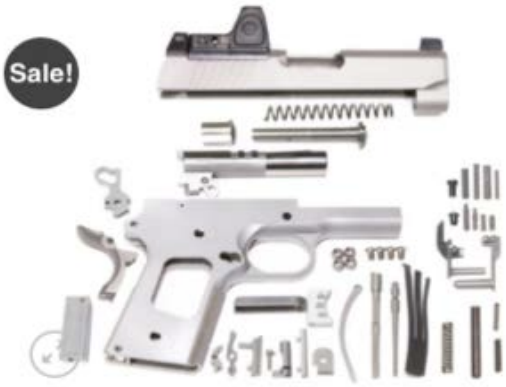
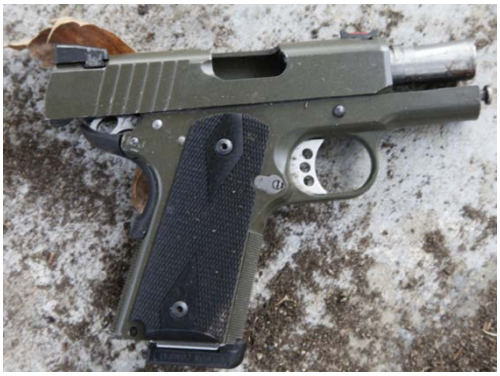
intoxicated, demanding firearms from a neighbor. (PMF No. 8.) Following the latter incident, police took the Shooter's Father to a psychiatric hospital for a review pursuant to California Welfare and Institutions Code Section 5150, rendering him a prohibited possessor of firearms. (PMF No. 9.) The police thereafter confiscated 42 guns from his home and destroyed them. (PMF No. 10.)

Despite being a prohibited possessor, and knowing he could not lawfully obtain a firearm, the Shooter's Father ordered the gun used in the shooting from 1911Builders.com, a website operated by Defendant. (PMF Nos. 7, 9–11.) Defendant is the sole proprietor of 1911Builders.com. (PMF No. 11.) He sells the kits, along with the tools and instructional materials necessary to quickly and easily assemble them into homemade firearms. (PMF Nos. 13–15.) The kit includes the frame of the gun, as well as all of the component parts necessary to complete it. (PMF Nos. 13–15.)



Defendant's Ghost Gun Kit (Ex. L)



Crime Gun Used to Shoot Plaintiff (Ex. D.)

Defendant does not do any investigation, background checks or otherwise, into the purchasers of his ghost gun kits before selling them. (PMF No. 16.) He does not request that they even identify whether they have a criminal history or whether they are prohibited by law from owning firearms. (PMF No. 16.) Nor does Defendant inscribe serial numbers, or even markings identifying the weapons as 1911Builders, rendering the firearms difficult to trace and more attractive to purchasers who are prohibited from owning firearms. (PMF Nos. 17, 27.)

The purpose of background checks or other confirmation that someone is eligible to possess firearms is to prevent dangerous and irresponsible persons from owning firearms. (PMF No. 18; *see also Daniel v. Armslist LLC.* (E.D. Wisc. 2016) U.S. Dist. LEXIS 19657, *4) (purpose of background checks "is to prevent sales to individuals prohibited from possessing firearms. In enacting this requirement, Congress recognized and sought to address the inherent danger to the

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public posed by certain individuals possessing firearms.")). A lack of background checks renders the sale of such weapons attractive to otherwise prohibited persons who have been determined to fall into a category that is too dangerous or irresponsible to possess a lethal weapon, making it reasonably foreseeable that the firearm will be used or possessed in an unsafe manner. (PMF Nos. 19, 27.)

Defendant touts the ease with which his kits can be converted to usable firearms as a marketing strategy. (PMF No. 22.) His website explains that only four operations are "left to be completed" in order to have a fully functioning firearm, that his kits "contain[] all parts needed to finish your 80% 1911," and that only the magazine (which is also available for purchase on the website) must be purchased separately. (PMF No. 20.) Defendant provides direct customer service to assist his customers with the builds, as well as instructional videos on his website. (PMF Nos. 21 and 35.) As noted, he advertises that it's "never been easier" to build the weapon. (PMF No. 22.)

Ghost guns, like the ones sold by Defendant, have been increasingly found at crime scenes in California. (PMF No. 23.) According to a 2019 report, a full 30 percent of guns recovered by ATF in California are unserialized. (PMF No. 24.) One ATF special agent in Los Angeles cited an even higher recovery rate at the local level: "Forty-one percent, so almost half our cases we're coming across are these ghost guns." (PMF No. 25.) A recent news report revealed that "the number of untraceable 'ghost guns' [recovered by LAPD] saw a similar jump from 813 recovered in 2020 to 1,921 in 2021." (PMF No. 26.)

Plaintiff filed her Complaint on December 22, 2020, which also alleges claims against the Shooter's mother, Mami Matsuura-Berhow. On April 2, 2021, Defendant filed a demurrer based on two arguments: (1) as here, that his products are not "firearms" and therefore he did not violate the law, and (2) he has a Federal Firearms License ("FFL"), and therefore has immunity from Plaintiff's claims under the Protection of Lawful Commerce in Arms Act ("PLCAA"). (15 U.S.C. §§ 7901, *et seq.*[2] ; *see* Defendant Terrance J. Osman Demurrer to Plaintiff's Complaint ("Demurrer"), filed Apr.

[2] PLCAA protects FFLs from "qualified civil liability actions," defined as "[a] civil action . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages . . . or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or

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1, 2021, pp. 6-13.) As to the latter point, the Court denied the Demurrer because Plaintiff argued Defendant did not have an FFL and therefore there was a "dispute over the… licensing status" of Defendant. (*See* Opinion on Demurrer (the "Opinion"), filed June 28, 2021, at 7) (Later, at his deposition, now under oath, Defendant admitted that he did not, in fact, have an FFL, thereby disposing of his earlier, frivolous position that he was entitled to immunity under PLCAA.) (PMF No. 12.) As for his claim that his kits were not "firearms," the Court also agreed with Plaintiff and held that, "[t]he gun as described, fits the statute definition for a 'firearm,' as either a 'starter gun' to be converted into a fully operational gun, or a frame. Plaintiff additionally and specifically alleges the sale of 'kits' requiring 'only 4 operations' to utilize a 'fully functioning firearm.'" (Opinion at 6).

Defendant filed the instant Motion on January 13, 2022. He has abandoned all claims that he has an FFL and is therefore entitled to protection under PLCAA.

III. STANDARDS GOVERNING SUMMARY JUDGMENT

Summary judgment is a "drastic" procedure that must be "used with caution." (*Y.K.A. Indus., Inc. v. Redevelopment Ag'y of City of San Jose* (2009) 174 Cal.App.4th 339, 352.) Summary judgment "may not be invoked unless it is clear from the declarations that there are no triable issues of material fact." (*Johnson v. Superior Court*, (2006) 143 Cal.App.4th 297, 304.) A triable issue of material fact exists if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

The moving defendant bears the "burden of persuasion" throughout the summary judgment process. (*Aguilar v. Atlantic Richfield Co.*, supra, 25 Cal.4th at 850.) Thus, the moving party "has the burden of producing evidence showing that one or more elements of the plaintiff['s] cause of action cannot be established, or that there is a complete defense to that cause of action." (*Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1443.)

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a third party." 15 U.S.C. § 7903(5)(A); *see also id.* § 7903(6)(B) (defining who qualifies as a seller).

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To shift the burden, the defendant must (1) present affirmative evidence to "conclusively negate an element of the plaintiff['s] cause of action," or (2) "show that the plaintiff cannot establish at least one element of the cause of action." (*Aguilar*, 25 Cal.4th at 853.) In determining whether the defendant has shifted the burden, this Court may consider only admissible evidence. (Code Civ. Proc. § 437c, subd. (d); *Hayman v. Block* (1986) 176 Cal.App.3d 629, 639) ("hearsay, conclusions or impermissible opinions must be disregarded")). If the motion presents sufficient admissible evidence, the "burden then shifts to the plaintiff to produce specific facts showing a triable issue." (*Id.)* On summary judgment, the Court must view the evidence in the light most favorable to plaintiff. (*Ganoe v. Metalclad Insul. Corp.* (2014) 227 Cal.App.4th 1577, 1582.)

IV. LEGAL ARGUMENT

Nearly the entirety of Defendant's Motion rests on his repeated argument that Plaintiff must prove that the kit sold to the Shooter's Father was a "firearm" under state or federal law, and that Plaintiff has failed to do so.[3] This argument fails for three reasons, any of which disposes of the Motion: (1) no statutory violations are necessary to prove Plaintiff's causes of action; (2) even if such violations were necessary, there are triable issues of material fact as to whether the ghost gun kits are, in fact, "designed to or may readable be converted to expel a projectile," 18 U.S.C. § 921(a)(3), the federal definition of "firearm"; and (3) Plaintiff alleges additional statutory violations.

Finally, with respect to Defendant's remaining argument, related to public nuisance, Defendant's conclusory assertions in his Motion fail to meet his burden of showing that his actions were "not a substantial factor in causing Plaintiff's harm," a clear issue of triable fact. (Motion at 20). Defendant's argument that the Shooter was a "substantial factor" means little, as it is black letter law there can be more than one substantial factor in a public nuisance analysis. (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1025.) These points are addressed in turn.

[3] Plaintiff's Complaint does not allege that the ghost gun kit met the California definition of "firearm" as it was defined at the time of the sale, so Defendant's arguments to the contrary (regarding the California definition pursuant to Cal. Penal Code § 16520) are irrelevant and not addressed here. (*See* Motion at 15-16).

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A. Plaintiff's Claims Do Not Rest on Whether or Not the Ghost Gun Kit is a "Firearm"; Defendant Owes a Duty of Care Regardless

In Defendant's view, "the '80% kit' does not meet the definition of 'firearm' as a matter of law. **Therefore, Defendant did not owe a duty to Plaintiff relating to the sale**." (Motion at 14) (emphasis in original). In other words, in his view, Defendant's duty of care flows exclusively from a finding that he violated the Gun Control Act, 18 U.S.C. § 922, by selling "firearms" without having a license, conducting a background check, and other legal requirements related to "firearms." (*Id.)* However, that is not how the law of negligence works. Defendant owed a duty of care to Plaintiff regardless of any statutory violations he may *also* have committed. Indeed, due to the dangerous nature of Defendant's products, he owed a *heightened* duty of care to Plaintiff.

1. Defendant Owed Plaintiff, At A Minimum, the Generally-Applicable Duty of Care

As California courts have often explained, "the general rule is and should be that, *in the absence of statute or some compelling reason of public policy,* where there is negligence proximately causing an injury, there should be liability." ((*Self v. Self* (1962) 58 Cal. 2d 683, 689) (emphasis added); *see also Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 711.) In other words, by arguing that he owed Plaintiff a duty only if his products were "firearms," Defendant has it exactly backwards. While a statute (or public policy) may create an *exception* to the general duty set forth in Cal. Civ. Code Section 1714, a statute is not necessary to establish the duty in the first place. Duty is the default.

The elements of a negligence claim are a legal duty of care, breach of that duty, and proximate cause resulting in injury. (*Hernandez v. Jensen* (2021) 61 Cal.App.5th 1056, 1063, citing *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.) Duty is a question of law for the court, whereas the elements of breach of duty and causation are ordinarily questions of fact for the jury's determination. (*Id.)* (citations omitted).

Pursuant to California Civil Code section 1714, subdivision (a) ("Section 1714"), "[e]veryone 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 ordinary care or skill in the management of his or her property or person…" "In other words, each person has a duty to use ordinary care and is liable for

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injuries caused by his failure to exercise reasonable care in the circumstances." (*Garcia v. Becker Bros. Steel Co.* (2011) 194 Cal.App.4th 474, 482, citing *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472.) This is true even where a third party caused the harm–so long as that third party's conduct was foreseeable. ((*See Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716) ("It is well established that one's general duty to exercise due care includes not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct… of a third person.") (citations omitted); (*see also Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531).) The duty of care codified in Section 1714 applies to sellers of chattels and products manufacturers, including the sellers of guns. (*See Ileto v. Glock* (9th Cir. 2003) 349 F.3d 1191, 1202 (applying Section 1714 to manufacturer and seller of pistols); *Bettencourt v. Hennessy Industries* (2012) 205 Cal. App. 4th 1103, 1118 ("[T]he general duty to take ordinary care in the conduct of one's activities indisputably applies to product manufacturers…").)[4]

Defendant's general negligence duty is obviated only if he identifies a statutory exception (or public policy) allowing for him to deviate from that duty. Defendant does not identity any such statute or even argue that a public policy exception should be crafted. The Motion should be denied on this basis alone.[5]

By failing to argue that a statutory or public policy exception to the general duty of care should apply, Defendant has waived any such argument; but even if he had attempted to so argue,

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[4] The analysis in *Ileto v. Glock, Inc.* (9th Cir. 2003) 349 F.3d 1191 ("*Ileto I*") is instructive for the duty analysis conducted here, as the Ninth Circuit, applying California law, found that Glock, a gun seller, owed a duty of care pursuant to Section 1714 to a decedent killed by a third party with a Glock gun, and reversed dismissal of claims of negligence and public nuisance. Two years after *Ileto I,* Congress passed PLCAA, which, as noted above, granted immunity to holders of FFLs; the case thereafter returned to the Ninth Circuit, whereupon the defendants with FFLs (including Glock) were dismissed pursuant to PLCAA. (*Ileto v. Glock, Inc.* (9th Cir. 2009) 565 F.3d 1126 ("*Ileto II*").) The PLCAA is not applicable to the instant case because Defendant does not have an FFL, and thus the analysis in *Ileto I,* as applied to the non-FFLs, is instructive.

[5] Defendant's Motion groups together his arguments related to negligence and negligent entrustment. (*See* Motion at 9). His arguments related to negligent entrustment fail for the same reason as those with respect to negligence, namely, that he did owe a duty to Plaintiff, as established here. (*See White v. Inbound Aviation* (1999) 69 Cal.App.4th 910, 920) ("Liability for negligent entrustment is determined by applying the principles of negligence…").

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it would be meritless. In determining whether an exception to the duty of care should be crafted, courts must consider (1) the "foreseeability of the relevant injury" and (2) "public policy concerns that might support excluding certain kinds of plaintiffs" from relief. (*Hernandez v. Jensen* (2021) 61 Cal.App.5th 1056, 1065) (citation omitted). Here, tragedies like the shooting that injured Plaintiff and murdered her classmates are the eminently foreseeable result of selling the parts, tools and instructions needed to construct a handgun to anybody, regardless of age, criminal history, or mental health background. ((*See Ileto*, 349 F.3d at 1204) ("the kind of harm suffered (death, serious gunshot wounds, and trauma from witnessing gun violence) is the kind of harm that is reasonably foreseeable when a person who is forbidden under federal law from purchasing guns is able to purchase an arsenal as a result of the manufacturer's distribution system.").) As for public policy concerns, both federal and state laws exist requiring background checks for the sale of lethal weapons or otherwise prohibit possession by persons with felonies or commitments to mental health institutions precisely because there exists public policy in keeping firearms out of the hands of dangerous individuals. (*See* 18 U.S.C. § 922(t); Cal. Welf. and Inst. Code §§ 8101-2.) Indeed, courts have often recognized firearm-specific public policy considerations in establishing a duty of care. ((*See Ileto I*, 349 F.3d at 1205) ("The social value of manufacturing and distributing guns without taking basic steps to prevent these guns from reaching illegal purchasers and possessors cannot outweigh the public interest in keeping guns out of the hands of illegal purchasers…"); (*Jensen*, 61 Cal.App.5th at 15) (affirming policy support for establishing "a duty to exercise reasonable care for the safety of others when one knows firearms are present. Public policy supports the safe storage and handling of guns…").) Thus, Defendant could not establish an exception to general duty of care mandated by Section 1714 even if he hadn't waived the argument by failing to raise it.

2. Defendant Owed Plaintiff a Heightened Standard of Care

Indeed, not only did Defendant owe Plaintiff the ordinary duty of care established by Section 1714, Defendant owed Plaintiff a *heightened* duty of care due to his sale of dangerous instrumentalities. When "dealing with dangerous instrumentalities in general, and explosive or highly inflammable materials in particular . . . [t]he cases are clear that the care required of a reasonable person in dealing with such instrumentalities, because of the great risks involved, is so

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great that even a slight deviation from the standards of care will constitute negligence." ((*Borenkraut v. Whitten* (1961) 56 Cal.2d 538, 546) (citations omitted); (*Warner v. Santa Catalina Island Co.* 1955 44 Cal.2d 310, 317) ("The risk incident to dealing with fire, firearms, explosive or highly inflammable matters… requires a great deal of care to be exercised. In other words, the standard of care required of the reasonable person when dealing with such dangerous articles is so great that a slight deviation therefrom will constitute negligence.").)[6]

Here, at issue is are do-it-yourself, at-home gun building kits that, once assembled, fire lethal projectiles. (PMF No. 15.) They therefore rank among the most dangerous instrumentalities, as they can be used, as was the case here, to murder and maim innocent children. Rendering the kits even more dangerous, Defendant sold them without taking any steps to confirm the purchaser was legally permitted to own a gun and without serial numbers or even any marks identifying Defendant or his company 1911Builders as the seller of the product. (PMF Nos. 16–17.) This made them more attractive to people who either were prohibited from possessing firearms, more likely to store the guns illegally or irresponsibly, or who intended to use them illegally. (PMF No. 27; *see also United States v. Marzzarella* (3rd Cir. 2010) 614 F.3d 85, 95.) Under these circumstances, Defendant owed a heightened standard of care, and therefore should have exercised a "great deal of care" before selling them to anybody who wanted them. (*Warner v. Santa Catalina Island Co*, supra, 44 Cal.2d 310 at 317.) He did not, with tragic results.

The premise of Defendant's Motion–that he only owed Plaintiff a duty of care if the kits meet the statutory definition of "firearm"–misses the mark entirely. Defendant owed Plaintiff a duty of care–indeed, a heightened duty of care–regardless of any statutory violations. The Motion should be denied on this basis alone, though there are additional reasons to do so.

[6] The heightened standard of care is reflected in California standard jury instruction 4141, which Plaintiff will request at trial in this case. *See* CACI 414 ("Amount of Caution Required in Dangerous Situations": "People must be extremely careful when they deal with dangerous items or participate in dangerous activities. [*Dangerous item*] is dangerous in and of itself. The risk of harm is so great that the failure to use extreme caution is negligence.").

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B. There Are Triable Issues of Material Facts as to Whether Kits Sold By Defendant Are "Firearms"

Despite his arguments to the contrary, the kits sold by Defendant also easily meet the federal definition of "firearm"; at the very least, there remain triable issues of material fact. We note at the outset however, as explained above, that Defendant's kits meeting the definition of "firearm" is relevant to whether he committed negligence per se, not, as he believes, as to whether he owed a duty of care in the first place.[7]

The definition of firearm under federal law includes, "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." (18 U.S.C. § 921(a)(3) (emphasis added.) As explained below, the kits sold by Defendant meet both of these standards. Defendant asserts two arguments as to why he believes his kits are not "firearms": (1) they are not "readily converted to the functional condition of a finished 'firearm or receiver' [sic] and still requiring assembling…"; and (2) he received a letter from the ATF (the "ATF Letter") providing that a stand-alone *frame* not part of any kit was not a "firearm." (Motion at 15–16.) Neither of these arguments establish that the kits are not "firearms" (nor does Defendant address the "designed to" prong at all.) We address the ATF Letter first.

1. The ATF Letter is Irrelevant, Inadmissible and Invalidated

Defendant argues that the kit sold in this case is not a firearm because he received, on September 15, 2017, a letter from the ATF that concluded that his "1911-style frame blank" was not a "firearm."[8] (Motion at 15; Osman Decl., Ex 2 (the "ATF Letter").) As set forth in the concurrently-

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[7] Negligence per se creates a rebuttable presumption of negligence, codified in Evid. Code § 669, subd. (a):

> The failure of a person to exercise due care is presumed if:
> **(1)** He violated a statute, ordinance, or regulation of a public entity;
> **(2)** The violation proximately caused death or injury to person or property;
> **(3)** The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
> **(4)** The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

[8] For context, sellers of firearms and firearm parts can learn whether ATF views particular frames

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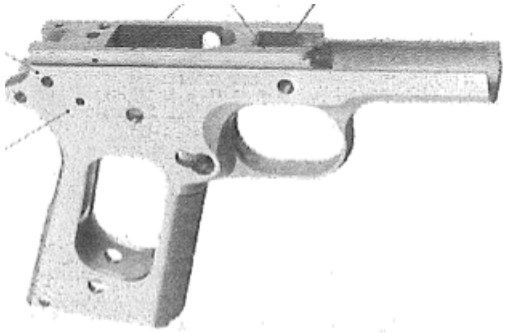
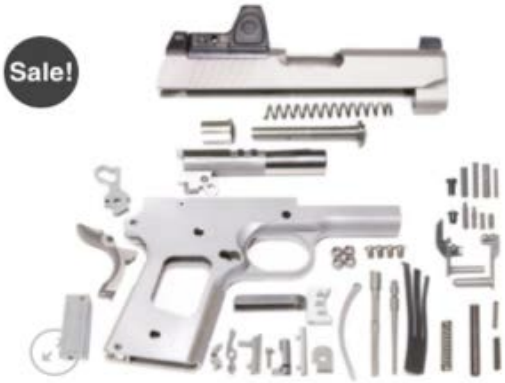
filed Plaintiff's Objection to Evidence Submitted by Defendant Terrence J. Osman in Support of the Motion, this letter is irrelevant, inadmissible and has recently been invalidated.

First, the ATF Letter is merely a determination as to whether a stand-alone 1911Builders frame–which is all Defendant submitted to the ATF–is a "firearm," not whether a complete kit meets the definition.



Frame Submitted to ATF (Osman Decl. Ex. 2)



1911Builders Kit Sold By Defendant

It therefore tells the Court nothing as to whether the ATF believed an entire kit is "designed to or readily convertible" to fire a bullet. Indeed, in 2018, a different company that sells ghost gun kits, Polymer80, tried the same tack by also submitting a single frame for determination. (PMF No. 28.) In that instance, the ATF discovered that the frame was sold as a part of a complete kit. It wrote back to Polymer80:

> Clearly the submitted sample is simply a component of a larger product. [ATF] will not render a classification on a partial product submission. In order to receive an evaluation and classification of your product, please submit the complete Polymer80 Model [] Standard Pistol Frame Kit being marketed by your client.

(PMF No. 28; Ex. R.) (emphasis in original.) Like Defendant, Polymer80 never submitted a complete kit. (PMF No. 29.) However, two years later, in December 2020, the ATF raided Polymer80's headquarters. (PMF No. 30.) In the search warrant authorizing the raid, ATF's Senior Special Agent determined that the complete kit sold by Polymer80 was, in fact, "a 'firearm' as defined under federal law." (Ex. S, Polymer80 Search Warrant, at ¶ 8) The same issue with Defendant's kit is present here: he submitted only a stand-alone frame to the ATF, not a kit. He

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or receivers as "firearms" under the Gun Control Act by submitting a sample frame or receiver and requesting a "determination letter," like the one at issue here.

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therefore cannot rely on the ATF's determination with respect to an altogether different product.

Second, Defendant nowhere mentions that the ATF Letter was sent to him on September 15, 2017, over one year *after* the sale in this case, which took place on August 17, 2016. It is therefore not clear how the ATF's *ex post* determination is relevant to the state of the law at the time of the sale here.

Finally, in April 2022, the ATF issued a new rule (the "New Rule") clarifying the definition of "firearm" under the Gun Control Act. (87 Fed. Reg. 24652.) While the New Rule does not go into effect until August 2022, in issuing the rule, the ATF *immediately* rescinded all of its prior determination letters, including the one Defendant relies on here. (*See Id.* at p. 24741) ("Prior determinations by the [ATF] Director that a partially complete, disassembled, or nonfunctional frame or receiver, including a parts kit, was not, or did not include, a 'firearm frame or receiver' under § 478.11, or 'frame or receiver' under § 479.11 of this subchapter, as those terms were defined prior to April 26, 2022, shall not continue to be valid or authoritative after that date."). Thus, the ATF Letter no longer has any force or effect, and should have no bearing on the Court's analysis. (*Compare, e.g., Da Silva v. Pac. King* (1987) 195 Cal. App. 3d 1, 7) ("Substantive defects in a particular regulation may also affect its use as a standard of care in a civil action for damages") (citations omitted.) In short, ATF issued its determination letter *after* the sale in this case, and then rescinded it *before* summary judgment briefing has been completed. More importantly, the letter was based on an incomplete submission by Defendant of just a stand-alone, unfinished frame – not the full kit it sold here. For all these reasons, the ATF letter has no relevance or persuasive value in this case.

2. There is a Triable Issue of Material Fact as to Whether Defendant's Kits are "Designed To" Fire a Projectile

As for the substance of Plaintiff's claim, Defendant's kits are plainly "designed to... expel a projectile by the action of an explosive," and therefore fall within the federal definition of "firearm," 18 U.S.C. § 921(a)(3); at the very least, that question is a triable issue of material fact. Defendant fails to make any argument with respect to this prong of the definition of "firearm."

Defendant sells all the parts and tools (other than a drill) necessary to complete a firearm.

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(PMF No. 13.) It is a clear and obvious fact that the kits are designed to fire a projectile; that is their primary purpose. (PMF No. 15.) Indeed, the kits come with a diagram showing the inventory of kit parts and where they belong; when confronted with said exhibit, Defendant conceded that when it becomes a fully functional firearm, "what it's designed to do is fire a bullet." (Ex. F, Osman Depo. 118:11-21.) And when Defendant advertises that it has "never been easier to build your own Custom 1911," with an image of one his kits (PMF No. 22), Defendant makes clear that the kits are designed to become fully operational firearms, i.e., fire a projectile. In short, the clear purpose of Defendant's kits – i.e., what they are "designed to" do – is fire bullets. (PMF No. 33; *see also* Webster's 3d New Internat. Dict. (1965) p. 611) (at time of passage of GCA, "design" understood to mean "to plan or have in mind as a purpose".) At the very least, that question remains a triable issue of material fact. Defendant has offered no argument to the contrary.

3. There is a Triable Issue of Material Fact as to Whether Defendant's Kits are "Readily Convertible" to Fire Projectiles

Additionally, an independent basis to find that Defendant's kits are "firearms" are that they are "readily convertible" to fire a projectile. (*See* 18 U.S.C. § 921(a)(3).) Defendant argues that his kits do not meet this prong of the definition because, "[i]t takes an expert an estimated eight (8) hours to put together a completed 1911 firearm using all of the required parts and tools." (Motion at 15.) However, at most this merely raises a triable issue of material fact as to whether a kit that can be completed in a regular workday is "readily convertible" to a firearm. ((PMF No. 33; *see also* Webster's 3d New Internat. Dict. (1965) p. 1189*)* (at time of passage of GCA, "readily" understood to mean "in a ready manner" and "with fairly quick efficiency").)

Indeed, Defendant advertises how readily his kits can be converted to firearms. (PMF No. 22.) His marketing highlights that its kits require only four operations "left to be completed" in order to make a fully functioning firearm. (PMF No. 20.) Defendant also provides instructional videos on his website to assist in the completion of the kits. (PMF No. 35.) He explicitly advertises that, "It's Never Been Easier to Build Your Own Custom 1911." (PMF No. 22.)

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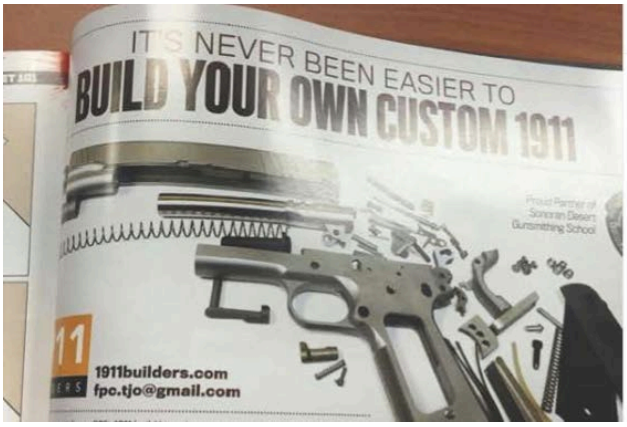

Defendant's Advertisement (Pl.'s Ex. N)

And finally, to render the kits more easily convertible, Defendant provides direct customer assistance to purchasers of his kits to help with their builds. (PMF No. 31.)

Seemingly aware of the problematic nature of these facts, Defendant resorted to preposterous excuses at his deposition. With respect to the above advertisement, Defendant incredibly testified that the ad saying "it's never been easier" actually meant to convey it is hard to build one of his 1911s. (Ex. F, Osman Depo at 128:21-129:3.) With respect to customer service in assembling the kits, Defendant lied and stated that he never provides such assistance. (Ex. F, Osman Depo. 60:17-21) ("Q: Do you ever offer the service of helping people assemble the parts to make a fully operational firearm?" A: Nope.".) However, both of his employees testified at their depositions that in fact Defendant does assist customers with their builds, one of them agreeing that "it's common for [Defendant] to provide customer service to customers seeking assistance on their builds," and the other saying that Defendant answers such questions "everyday." (PMF No. 21; Ex. J, Lease Depo. 90:8-11; Ex. K, Gookin Dep. 108:25-109:2.) Indeed, in online posts Defendant tells his customers he provides "full service and support if needed," (PMF No. 31), and one customer remarked that Defendant "w[as] always available, answering all questions with cheerful patience and excellent detail." (PMF No. 32.) Finally, with respect to the instructional videos on his website, Defendant incredibly testified that these videos are meant not to show how to complete the kits, but only to only show "how to use the tools." (Ex. F, Osman Depo. 116:8-13.)

In short, the kits sold by Defendant "may readily be converted to expel a projectile by the action of an explosive," 18 U.S.C. § 921(a)(3); at the very least, triable issues of material fact exist

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for a jury to decide. Though not a requirement of Plaintiff's claim, Defendant nevertheless fails to meet his burden of demonstrating that the kit sold to the Shooter's Father was not a "firearm" under federal law.

C. Defendant Violated Additional Statutes As Well

As described above, even though Plaintiff need not establish any statutory violations to prove her causes of action, her allegations regarding "firearms" are not the only statutes Defendant violated. Plaintiff alleges state law violations as well–namely, violation of California's Unsafe Handgun Act ("CUHA"). (*See* Comp. ¶¶ 55-61, citing Pen. Code §§ 31900*, et seq.)* Defendant's Motion fails to establish that he did not violate CUHA.

CUHA establishes safety standards for all handguns manufactured, imported, and sold in the state. For example, before being sold, all handguns must be tested and approved by the California Department of Justice and placed on the State's "roster." (*See* Pen. Code § 32015.) Second, handguns must have certain safety features, such as a chamber load indicator ("CLI"), a magazine disconnect mechanism ("MDM"), and microstamping capability. (*Id.* § 31910, subd. (b).) At his deposition, Defendant conceded that his kits have never been submitted to CDOJ for testing. (Ex. F, Osman Depo. 99:14-25.) Nor do his kits have CLIs, MDMs, or microstamping capability. (PMF No. 34.)

Defendant argues that CUHA does not apply to his kits because the statute defines "unsafe handgun" as being "any pistol, revolver, or other firearm capable of being concealed upon the person" and his kits are not "firearms" under California law. (*See* Motion at 16-17, citing Pen. Code § 32000, subd. (a).) While Plaintiff does not here dispute that the kits were not "firearms" under California law (again, at the relevant time period, California had a more limited definition of "firearm" than federal law, *see* fn. 3), Defendant misreads CUHA and the Complaint. The operative phrase of CUHA provides that, "[a] person who manufactures **or causes to be manufactured**… an unsafe handgun shall be punished by imprisonment in a county jail not exceeding one year." (Cal. Penal Code § 32000, subd. (a)) (emphasis added). By including the phrase "causes to be manufactured," the legislature sought to prohibit broader behavior than the direct manufacture of unsafe handguns, by also targeting those that provide all of the parts and instructions to build an

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unsafe handgun. In that vein, Plaintiff alleges that by providing all of the necessary parts, tools (other than a drill) and instructions, Defendant caused to be manufactured unsafe handguns. (*See* Compl. § 59.) Defendant does not, and cannot, dispute that that his kits *once assembled* are "firearms" under California law (and are not on California's approved guns roster and do not have CLIs, MDMs, microstamping, or any other CUHA requirements) and are, therefore, "unsafe handguns" that are illegal in the State. Nor does he dispute that he caused to be manufactured such handguns.

Thus Defendant's Motion fails for an additional reason: even if he had met his burden of showing the kits are not "firearms," it would not even dispose of Plaintiff's allegations of negligence per se, let alone negligence itself, because Plaintiff has other California law grounds for her allegations of negligence per se. The Motion can be denied on this ground as well.

D. Defendant's Argument Related to Breach Fails For the Same Reason as His Duty Argument

Defendant briefly argues that even if he did owe a duty to Plaintiff, he did not breach that duty for the same reason he purportedly did not owe a duty in the first place, namely, that he "did not sell what would qualify as a 'firearm' as a matter of law." (Motion at 17-18.) This argument fails for the same reason outlined above: namely, that a statutory violation is not necessary to establish negligence. (*See supra* at 11-12.) This argument also fails for the additional reason that while duty is a question for the Court, determinations over breach are a "fact-specific" analysis "for the jury to make." (*See Chavez v. Glock* (2012) 207 Cal. App. 4th 1283, 1314) (in case alleging firearm manufacturer negligently manufactured and sold gun, question of breach was for the jury). The case relied on by Defendant for the proposition that a Court *may* "hold that no reasonable jury could find the defendant failed to act with reasonable prudence under the circumstances," *Cabral*, supra, 51 Cal.4th at p. 773, offers no support here, as the *Cabral* trial court did not do so, and the appellate court reiterated that breach is a jury question. (*Id.* at 772) ("[A] determination that the defendant did not breach the duty of ordinary care… in a jury trial is for the *jury* to make.") (emphasis in original). Defendant provides no rationale as to why the Court should depart from this fundamental principle.

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E. Defendant's Public Nuisance Arguments Fail for the Same Reason as his Negligence Argument

Finally, Defendant makes two arguments related to Plaintiff's cause of action for public nuisance. First, Defendant argues that Plaintiff's "cause of action for Public Nuisance is essentially a *negligence* claim," and repeats, yet again, that because the kit "sold by Defendant to the shooter's father does not qualify as a 'firearm' as a matter of law" he did not owe any duty to Plaintiff. (Motion at 19-20) (emphasis in original.) This argument was addressed above. (*See supra* at 8-11.)

Defendant's second argument is with respect to causation–namely, Defendant argues that "the undisputed facts in this matter show that Defendant was not a substantial factor in causing Plaintiff's harm." (Motion at 20.) But the Defendant offers no evidence for this conclusory statement. Moreover, whether a defendant's actions were a substantial factor in a plaintiff's injuries, as Defendant concedes, is ordinarily one for the jury. (*See, e.g., Uriell v. Regents of University of California* (2015) 234 Cal.App.4th 724, 744.) Defendant provides no argument as to why the Court should depart from that rule. Defendant sold an all-parts-included, gun building kit, along with tools and instructions necessary to construct a fully operational firearm, without conducting any type of background check, to a man prohibited by law from possessing such a firearm. Without this sale by Defendant, the Shooter, who was a minor, would not have had access to the gun he used to shoot Plaintiff. (PMF Nos. 9, 13–14, 16.) "The substantial factor standard is a relatively broad one, requiring only that contribution of the individual cause be more than negligible or theoretical." (*Uriell,* supra, 234 Cal.App.4th at 744.) Defendant's actions easily surpass that threshold. Indeed, in *Ileto I*, the Ninth Circuit held that pursuant to similar allegations, Glock was sufficiently alleged to be a substantial factor in the decedent's injuries because "Glock was in a position to prevent the harms alleged" by not selling firearms in a manner they were likely to end up in the hands of prohibited buyers. (349 F.3d at 1207.)

Defendant's sole argument as to why he was not a "substantial factor" in Plaintiff's injuries is that "[t]he shooter was the clear substantial factor in causing Plaintiff harm." (Motion at 20.) However, it is black letter law that a defendant "cannot avoid responsibility because some other person, or condition or event was also a substantial factor in causing the harm." (*Raven H. v.*

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Gamette (2007) 157 Cal.App.4th 1017, 1025.) Simply because the Shooter actually committed the crime does not absolve Defendant of his negligent and unlawful activity.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion should be denied.

Dated: June 15, 2022

WALKUP, MELODIA, KELLY & SCHOENBERGER

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