

2ND CIVIL NO. _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION _____

TERRENCE J. OSMAN DBA 1911 BUILDERS
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
Respondent.

MIA TRETТА
Real Party in Interest

Los Angeles County Superior Court Case No. 20STCV48910
Honorable STEPHEN P. PFAHLER, Judge

PETITION FOR IMMEDIATE STAY;
PETITION FOR WRIT OF
MANDATE AND/OR OTHER
APPROPRIATE RELIEF;
MEMORANDUM OF POINTS AND AUTHORITIES
(Supporting Exhibits Filed Under Separate Cover)

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Document received by the CA 2nd District Court of Appeal.

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In accordance with Rules 8.208 and 8.488 of the California Rules of Court, the undersigned, as counsel of record for Petitioner Terrence J. Osman dba 1911 Builders, certifies that she knows of no other entity that has an ownership interest of 10 percent or more in 1911 Builders and knows of no other entity or person other than the parties to this proceeding who has a financial or other interest in its outcome.

Executed this 25th day of July, 2022, at Irvine, CA



ADRIENNE D. COHEN

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**INTRODUCTION - WHY EXTRAORDINARY RELIEF IS
NECESSARY**

This case presents issues of urgent and significant legal importance that, if not corrected, will subject Petitioner Terrence J. Osman dba 1911 Builders (hereinafter “Petitioner”) to potential liability and expense in this matter. This case involves the sale of “1911 80% Officer Build Kits” (hereinafter “80% Kits”) referred to by Plaintiff Mia Tretta (hereinafter “Plaintiff”) and the press as “ghost guns” which have been the subject of many political speeches and much media attention. The legal question involved in Petitioner’s subject Motion for Summary Judgment, or in the Alternative, Summary Adjudication that was denied by the Respondent Court should not be left to a jury to decide because of the emotional nature of firearms issues, as well as the natural sympathy any juror would feel for Plaintiff.

Petitioner is a lawful seller of certain firearm parts that are not subject to the same laws as the sale of what are considered “firearms” under California law. Petitioner is a sole proprietor who made every effort to comply with the then existing laws regarding the sale of “80% Kits.” The United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (“hereinafter “ATF”) examined the relevant kit parts and determined that the kits did not meet the definition of a “firearm” under

Federal law. The laws that only apply to the sale of “firearms” are being applied to Petitioner in this matter to keep him from removing himself from this litigation pursuant to summary judgment. This is the legal equivalent of a referee changing the rules of a game after it is played. The question of whether the “80% Kit” was a “firearm” is a legal question that should not be left to the jury because the Respondent Court wishes to avoid a politically unpopular result.

This matter involves a tragic shooting that took place on November 14, 2019 at Saugus High School in Santa Clarita, California. (Ex. 1, P. 64). The shooter was sixteen-year-old Nathaniel Berhow. (Ex. 1, P. 64). Petitioner runs a small business that lawfully sells certain firearm parts or “80% Kits” online. (Ex. 1, P. 65, 73). Plaintiff alleges that an “80% Kit” sold by Petitioner was later completed into a firearm then was used in the shooting. (Ex. 1, P. 69). The sale of the “80% Kits” are not subject to the same laws as the sale of completed “firearms.” Plaintiff’s causes of action against Petitioner in this matter for negligence, negligent entrustment, and public nuisance all depend on a finding that the “80% Kit” that was sold was a “firearm.” The “80% Kits” are not firearms as a matter of law.

The Honorable Stephen P. Pfahler of the Los Angeles County Superior Court denied Petitioner’s Motion for Summary Judgment, or in the Alternative, Summary Adjudication on June 29, 2022. (Ex. 4). The Respondent Court relied on the finding that the “80% Kits” sold by Petitioner meet the definition of “firearms” under California law because they can be “readily converted” to an operable “firearm,” even though the undisputed evidence presented by Petitioner with its Motion for Summary Judgment showed that the “80% Kits” sold by Defendant are not “readily converted” to “firearms.” Petitioner’s “80% Kits” must meet the definition of “firearm” for there to be a duty owed under California law to Plaintiff and for Plaintiff’s causes of action to have survived summary judgment.

The Respondent Court has denied Petitioner’s Motion for Summary Judgment, or in the Alternative, Summary Adjudication, on incorrect grounds and abused its discretion by determining that the “80% Kits” that Petitioner sells and at issue in this matter are “firearms” under California law and therefore Petitioner is subject to the regulations governing the sale of “firearms.”

Petitioner has no adequate legal remedy, other than this Petition, to obtain relief from the Respondent Court’s ruling denying his Motion for Summary Judgment, or in the Alternative Summary Adjudication, and the

ruling is not directly appealable. Thus, any appeal must occur after the litigation to a final judgment and the costs and expenses of such litigation up to and including a full trial that are not recoverable by Defendant. Accordingly, unless a writ of mandate is issued and the Respondent Court is directed to vacate its prior Order denying Defendant's Motion for Summary Judgment, or in the Alternative, Summary Adjudication, Petitioner will be irreparably harmed and have no adequate legal remedy to obtain relief and dismissal from this case without the delay, burden and expense of a full trial.

Petitioner respectfully petitions this Court for a writ of mandate directing the Respondent Court to: (1) vacate its Order denying Petitioner's Motion for Summary Judgment, or in the Alternative, Summary Adjudication; and (2) enter a new Order granting Petitioner's Motion for Summary Judgment, or in the Alternative, Summary Adjudication.

PETITION

By verified petition, Petitioner alleges and shows:

RELIEF SOUGHT

1. Petitioner petitions this Court for an immediate stay of this matter and for a writ of mandate directing the Respondent Court to vacate its June 29, 2022 Order denying Petitioner's Motion for Summary Judgment, and to enter a new Order granting Petitioner's Motion for Summary

Judgment.

AUTHENTICITY OF EXHIBITS

2. All exhibits accompanying this petition are true copies of original documents on file with the Respondent Court. The exhibits are incorporated herein by reference as though fully set forth in this petition.

THE PARTIES

3. Petitioner is an individual defendant in an action in Respondent Court entitled *Mia Tretta v. Terrance J. Osman, an individual a/k/a 1911builders.com; Mami Matsura-Berhow, an individual*; and Does 1 through 50, Los Angeles County Superior Court, Case Number 20STCV48910.

4. The Respondent Court is now and at all times mentioned herein has been a Superior Court exercising judicial functions in connection with the above-described action.

5. Mia Tretta, (the Plaintiff), is the real party in interest in this action.

TIMELINESS OF PETITION

6. This Petition is timely filed after receiving the Respondent Court's Order denying Petitioner's Motion for Summary Judgment of June 29, 2022, which was sent by the Respondent Court through regular mail to

all parties on July 1, 2022.

RELEVANT FACTS AND PROCEDURAL BACKGROUND

7. This matter involves a shooting that took place on November 14, 2019 at Saugus High School in Santa Clarita, California. (Ex. 1, P. 64). The shooter was sixteen-year-old Nathaniel Berhow. (Ex. 1, P. 64). Plaintiff Mia Tretta was injured during the shooting. (Ex. 1, P. 64). Plaintiff now seeks damages for her injuries she suffered as a result of the shooting. (Ex. 1, P. 65, 85).

8. Defendant sells “80% Kits” online through a website entitled 1911builders.com. (Ex. 1, P. 65, 73). Nathaniel Berhow’s father, Mark Berhow, purchased an “80% Kit” on August 2, 2016 from Defendant online through the 1911builders.com website. (Ex. 1, P. 50, 53). Mark Berhow purchased tools to use in the assembly of the 1911 firearm from Defendant at other times. (Ex. 1, P. 50). Plaintiff alleges that the firearm that was completed by Mark Berhow was used in the shooting that injured her. (Ex. 1, P. 69).

9. The “80% Kits” sold by Defendant cannot be fired until they are machined and further assembled using tools that are not sold as part of the kit. (Ex. 1, P. 50). It takes an expert an estimated eight (8) hours to put together a completed 1911 firearm using all of the required parts and tools.

(Ex. 1, P. 50).

10. The “80% Kits” sold by Petitioner are not firearms and the frames that are contained in the “80% Kits” like the one sold and at issue in this matter need to be machined and drilled with tools not included in the kit prior to the kit being completed and made into a firearm. (Ex. 1, P. 50).

11. Petitioner previously submitted a sample “1911-style frame” like the one sold in this matter to The United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (“hereinafter “ATF”) for approval pursuant to the standard in the industry and to confirm that it does not qualify as a “firearm” under the law (Petitioner submitted the frame for approval by the ATF after the sale of the subject “80% Kit” to Mr. Berhow, but it was an identical frame as was sold to Mr. Berhow on August 2, 2016). (Ex. 1, P. 50).

12. The ATF determined in a letter dated September 15, 2017 that the “1911-style frame” sold with the “80% Kits” by Defendant does not meet the definition of a “firearm” under Federal law and was not “readily converted” to what would constitute a “firearm” under Federal law (Ex. 1, P. 50, 56-59).

13. The “1911-style frame” that the United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives determined

does not meet the definition of “firearm” pursuant to the Federal Gun Control Act of 1968 or 18 U.S.C. § 921 is the same frame that was sold by Defendant to Mark Berhow with the subject “80% Kit” which is at issue in this matter. (Ex. 1, P. 50).

14. On December 22, 2020, Plaintiff filed her Complaint with the Los Angeles County Superior Court against Terrance J. Osman, an individual a/k/a 1911 builders.com, Mami Matsura-Berhow and DOES 1 through 50, alleging causes of action for negligence, negligent entrustment, and public nuisance. (Ex. 1, P. 63).

15. Plaintiff alleges in her Complaint that Defendant was negligent by “Willfully designing, constituting, packaging, marketing, advertising, and selling the product in such a manner that it was at least as dangerous as a finished firearm, but removing it from the legal protections, background checks, and serialization requirements that are mandatory in the context of firearms.” (Ex. 1, P. 76). Plaintiff further alleges in the Complaint that Defendant was negligent by “Willfully failing to take reasonable steps, or indeed any steps at all, to ensure that the purchaser was not legally prohibited from purchasing or possessing a firearm, and/or unfit to safely possess a firearm.” (Ex. 1, P. 76). Plaintiff alleges in the Complaint that Defendant was negligent by “Failing to take reasonable steps, or indeed any steps at all,

to ensure that law enforcement could trace the firearm if it were used in a crime.” (Ex. 1, P. 76).

16. Plaintiff alleges certain violations of Federal Law by Defendant to support her negligence causes of action, specifically that Defendant sold “firearms” without a Federal Firearms License, without serial numbers, and without conducting background checks. (Ex. 1, P. 77).

17. Plaintiff also alleges certain violations of California Firearms Law to support her negligence causes of action, specifically that Defendant manufactured handguns that did not meet the requirements of the California Unsafe Handgun Act. (Ex. 1, P. 77).

18. Plaintiff makes the same allegations regarding alleged violations of certain Federal and California laws in the Complaint against Defendant in support of her Public Nuisance Cause of Action as her Negligence causes of action. (Ex. 1, P. 81, 84).

19. Petitioner filed and served his Motion for Summary Judgment, or in the Alternative, Summary Adjudication, on January 13, 2022 as to Plaintiff’s causes of action for negligence, negligent entrustment, and public nuisance on the grounds that Petitioner did not owe a duty to Plaintiff as a matter of law because the “80% Kit” does not meet the definition of “firearm” and Petitioner was not a substantial factor in causing any harm to

Plaintiff. (Ex. 1, Pages 5-108). Therefore, Petitioner argued that he cannot be found liable for Negligence, Negligent Entrustment, and Public Nuisance, and his Motion for Summary Judgment should be granted.

20. Plaintiff filed and served her Opposition and supporting documents to Petitioner's Motion for Summary Judgment, or in the Alternative, Summary Adjudication, on June 15, 2022. (Ex. 2, P. 110-442).

21. Petitioner filed and served his Reply Brief in support of his Motion for Summary Judgment, or in the Alternative, Summary Adjudication, on June 24, 2022. (Ex. 3, P. 444-486).

22. On June 29, 2022, the hearing on Petitioner's Motion for Summary Judgment, or in the Alternative Summary Adjudication, took place. (Ex. 5, P. 495-507). After oral argument, the Respondent Court took the matter under submission. The Respondent Court thereafter adopted its tentative ruling as its final ruling and denied Petitioner's Motion for Summary Judgment in its entirety. (Ex. 4, P. 488-493).

23. The Respondent Court's ruling is based on the "80% Kits" that Petitioner sells qualifying as "firearms" under California law and therefore found that Petitioner owed a duty to Plaintiff to comply with the firearm regulations of the State of California. (Ex. 4, P. 493).

24. The Respondent Court declined to analyze the language of the

Federal regulations regarding whether the “80% Kits” constitute firearms under Federal law and based its ruling solely on the “80% Kits” qualifying as firearms under California law. (Ex. 4, P. 492-493).

BASIS FOR RELIEF

25. Petitioner has no plain, speedy or adequate remedy at law other than the relief sought by this petition. Absent this Court’s intervention, Petitioner will suffer irreparable harm. Petitioner has no adequate legal remedy, other than this Petition, to obtain relief from the Respondent Court’s ruling denying his Motion for Summary Judgment, or in the Alternative Summary Adjudication, and the ruling is not directly appealable. Thus, any appeal must occur after the litigation to a final judgment and the cost and expense of such litigation up to and including a full trial, are not recoverable by Defendant. Accordingly, unless a writ of mandate is issued and the Respondent Court is directed to vacate its prior and improper Order denying Defendant’s Motion for Summary Judgment, or in the Alternative, Summary Adjudication., Petitioner will be irreparably harmed and have no adequate legal remedy to obtain relief and dismissal from this case without a full trial.

26. Exhibits “1” through “5” are true copies of original documents on file with the Respondent Court and are incorporated herein by reference. Exhibit “1” is Defendant Terrence J. Osman dba 1911 Builders’ Notice and

Motion for Summary Judgment, or in the Alternative Summary Adjudication, Memorandum of Points and Authorities in Support Thereof, Separate Statement of Undisputed Facts in Support Thereof, Compendium of Evidence, Declaration of Sean R. Ferron, Declaration of Terrence J. Osman, [Proposed] Order, Proof of Service. Exhibit “2” is Plaintiff Mia Tretta’s Opposition to Motion for Summary Judgment, or in the Alternative, Summary Adjudication of Terrence J. Osman dba 1911 Builders, Separate Statement of Additional Undisputed Facts, Response to Separate Statement of Undisputed Facts, Index of Evidence and Evidence, Declaration of Mark Weiner, Objections to Defendant’s Evidence, [Proposed] Order, and Proof of Service. Exhibit “3” is Defendant Terrence J. Osman dba 1911 Builders’ Reply to Opposition and in Support of Motion for Summary Judgment, or in the Alternative, Summary Adjudication, Reply to Plaintiff Mia Tretta’s Separate Statement of Additional Undisputed Facts, Objections to Plaintiff’s Evidence, [Proposed] Order Ruling on Written Objections to Plaintiff’s Evidence. Exhibit “4” is the Los Angeles County Superior Court Order, dated June 29, 2022 Ruling on Defendant Terrence J. Osman dba 1911 Builders’ Motion for Summary Judgment. Exhibit “5” is the Reporter’s Transcript of Hearing on June 29, 2022.

PRAYER

Wherefore, Petitioner, Terrence J. Osman dba 1911 Builders prays:

1. That this Court issue an immediate stay of this matter, while this Writ of Mandate is pending before this Court;
2. That in the first instance this Court issue a preemptory Writ of Mandate or other appropriate relief commanding the Honorable Stephen P. Pfahler to vacate his order denying Petitioner’s Motion for Summary Judgment, or in the Alternative, Summary Adjudication, and instead enter a new Order granting Petitioner’s Motion for Summary Judgment, or in the Alternative, Summary Adjudication;
3. That Petitioner be awarded the cost of suit in this petition; and
4. That this Court award such other additional relief as may be just and proper.

July 25, 2022

Respectfully Submitted,

By: _____



Adrienne D. Cohen,
Sean R. Ferron,
Attorney for Petitioner,
Terrence J. Osman dba
1911 Builders

VERIFICATION OF ADRIENNE D. COHEN

I, Adrienne D. Cohen, declare as follows:

1. I am counsel for Defendant and Petitioner herein, Terrence J. Osman dba 1911 Builders. I have read the foregoing Petition for Writ of Mandate and know its contents. The facts alleged in the Petition are true to my own knowledge.

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

Executed this 25th day of July, 2022, at Irvine, CA



ADRIENNE D. COHEN, ESQ.
Declarant

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

On December 22, 2020, Plaintiff Mia Tretta (hereinafter “Plaintiff”) filed her Complaint with the Los Angeles County Superior Court against Terrance J. Osman, an individual a/k/a 1911 builders.com, Mami Matsura-Berhow and DOES 1 through 50, alleging causes of action for negligence, negligent entrustment, and public nuisance. (Ex. 1, P. 63).

Plaintiff alleges certain violations of Federal and California Law by Petitioner Terrence J. Osman dba 1911 Builders (hereinafter “Petitioner”) in her Complaint to support her negligence causes of action, specifically that Defendant sold “firearms” without a Federal Firearms License, without serial numbers, and without conducting background checks. (Ex. 1, P. 76-77).

A. Petitioner’s Motion for Summary Judgment

Petitioner filed his Motion for Summary Judgment, or in the Alternative, Summary Adjudication, on January 13, 2022 as to Plaintiff’s causes of action for negligence, negligent entrustment, and public nuisance on the grounds that Petitioner did not owe a duty to Plaintiff as a matter of law because the “80% Kit” does not meet the definition of “firearm” and Petitioner was not a substantial factor in causing any harm to Plaintiff. (Ex. 1, Pages 5-108). Therefore, Petitioner argued that he cannot be found liable

for Negligence, Negligent Entrustment, and Public Nuisance, and his Motion for Summary Judgment should be granted. Plaintiff filed her Opposition and supporting documents to Petitioner’s Motion for Summary Judgment, or in the Alternative, Summary Adjudication, on June 15, 2022. (Ex. 2, P. 110-442). Petitioner filed and served his Reply Brief in support of his Motion for Summary Judgment, or in the Alternative, Summary Adjudication, on June 24, 2022. (Ex. 1, P. 444-486).

B. The Respondent Court’s Ruling on Petitioner’s Motion for Summary Judgment, or in the Alternative, Summary Adjudication

On June 29, 2022, the hearing on Petitioner’s Motion for Summary Judgment, or in the Alternative Summary Adjudication, took place. (Exhibit 5, P. 495-507). After oral argument, the Respondent Court took the matter under submission. The Respondent Court thereafter adopted its tentative ruling as its final ruling and denied Petitioner’s Motion for Summary Judgment in its entirety. (Ex. 4, P. 488-493).

The Respondent Court’s ruling is based on the “80% Kits” that Petitioner sells qualifying as “firearms” under California law and therefore the Respondent Court found that Petitioner owed a duty to Plaintiff to comply with the firearm regulations of the State of California. (Ex. 4, P. 493). The Respondent Court declined to analyze the language of the Federal regulations

regarding whether the “80% Kits” constitute firearms under Federal law and based its ruling solely on the “80% Kits” qualifying as firearms under California law. (Ex. 4, P. 492-493).

II. ISSUE PRESENTED

1. Did the Respondent Court abuse its discretion by determining that the “80% Kits” sold by Petitioner qualify as “firearms” under California law?
2. Did the Respondent Court abuse its discretion by finding that Petitioner owed a duty to comply with the firearm regulations within the State of California?

III. STANDARD OF REVIEW

A peremptory writ of mandate is an appropriate avenue to seek review of an order denying a motion for summary judgment. (California Code of Civil Procedure section 437c(m)(1); *Pacific Gas & Electric Co. v. Superior Court* ((2018) 24 Cal.App.5th 1150, 1157.) The denial of a summary judgment is subject to de novo review to determine whether triable issues of material fact exist. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142). The appellate court reviews a summary judgment ruling under the same general principles applicable at the trial level, but the appellate court must independently determine the construction and effect of

the facts presented to the trial judge as a matter of law. (*Saldana v. Globe-Weis Systems, Co.* (1991) 233 Cal.App.3d 1505, 1511-1515.)

Writ relief is appropriate where denial of summary judgment “will result in a trial on nonactionable claims.” (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 949-950.) The California Supreme Court has held that to avoid the possibility of irreparable injury and to provide an adequate remedy, a court may entertain a petition for extraordinary relief. (*Roberts v. Superior Court* (1973) 9 Cal.3d 330, 336.) Writ review is also available when the trial court’s order is both clearly erroneous as a matter of law and substantially prejudices petitioner’s case. (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 851).

Mandate is appropriate in the instant case. As evidenced below and from the admissible evidence presented by Petitioner with his Motion for Summary Judgment, or in the Alternative, Summary Adjudication, Respondent Court’s ruling is an abuse of discretion. Unless this Court intervenes, Petitioner will suffer irreparable harm. Petitioner has no adequate legal remedy, other than this Petition, to obtain relief from the Respondent Court’s improper ruling denying his Motion for Summary Judgment and the ruling is not directly appealable.

IV. THE RESPONDENT COURT ABUSED ITS DISCRETION BY FINDING THAT THE “80 KITS” SOLD BY PETITIONER QUALIFY AS FIREARMS UNDER CALIFORNIA LAW WHEN THEY TAKE A MINIMUM OF EIGHT (8) HOURS TO MACHINE AND ASSEMBLE

The Respondent Court made a determination that Petitioner’s “80% Kits” qualify as “firearms” under California law and improperly used this as a basis for denial. If the “80% Kits” that Petitioner sells do not qualify as “firearms” under California law, then Petitioner is not subject to California law regarding firearm regulations. The Respondent Court made the determination that the “80% Kits” sold by Petitioner qualify as “firearms” under California law by finding that the kits can be “readily converted to the functional condition of a finished frame or receiver” and therefore Petitioner owed a duty to abide by the firearm regulations of California. It is undisputed that these “80% Kits” take a minimum of eight (8) hours using additional tools not sold with the “80% Kits” to be made into a functional firearm. This does not meet the definition of “readily converted” as a matter of law.

The evidence presented by Defendant with his Motion made it clear that the “80% Kits” are not “firearms” under the law. Petitioner correctly argued in his Motion for Summary Judgment, or in the Alternative, Summary Adjudication, that the “80% Kits” that he sells are not firearms and the Federal and State statutes that Plaintiff used to support her causes of action

against Defendant do not apply and there can be no duty owed to Plaintiff as a matter of law. All of Plaintiff's causes of action against Petitioner in this matter require a determination that Petitioner owed a duty to Plaintiff. Negligence requires, (1) the existence of a legal duty to exercise due care, (2) the breach of that duty, (3) the breach being the proximate or legal cause of injury, and (4) the extent of damages. (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1448-1449.) The issue of whether there is a legal duty in a negligence case is a matter of law for the Court to decide. (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 819.) If Petitioner did not owe a duty to Plaintiff, then Petitioner cannot be negligent.

Plaintiff's cause of action for public nuisance also requires a finding of a duty owed by Petitioner, as the cause of action is based on the same facts as Plaintiff's negligence causes of action. "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 claim ‘stands or falls with the determination of the negligence cause of action’ in such cases.” (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 542).

The Federal Gun Control Act of 1968 or 18 U.S.C. § 921, defines a firearm as “(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.”

The Respondent Court declined in its ruling to analyze the language of the Federal Gun Control Act of 1968 or 18 U.S.C. § 921 which states that a firearm “may be readily converted to expel a projectile” and did not rest its determination that Petitioner’s ‘80% Kits’ qualify as “firearms” under Federal law. The Federal standard is the same standard as California law which defines a firearm to include the “unfinished frame or receiver of a weapon **that can be readily converted to the functional condition of a finished frame or receiver.**” [Emphasis added]. Respondent Court based its ruling in denying Petitioner’s Motion on Petitioner owing a duty to Plaintiff solely because it determined that Petitioner’s “80% Kits” qualify as “firearms” under California law (Ex. 4, Page 493).

California Penal Code section 16520 defines a firearm as follows:

- (a) As used in this part, “firearm” means a device designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of an explosion or other form of combustion.
- (b) As used in the following provisions, “firearm” includes the frame or receiver of the weapon.

Although California Penal Code section 16520(b) states that “firearm” includes the frame or receiver of the weapon, California Penal Code section 16520(g), states ““firearm” includes the unfinished frame or receiver of a weapon **that can be readily converted to the functional condition of a finished frame or receiver.**” [Emphasis added.]

Accordingly, the Respondent Court found that the “80% Kits” sold by Petitioner are subject to California law relating to firearm regulations. (Ex. 4, Page 493). The Respondent Court acknowledged in its ruling that for an unfinished frame like the ones sold by Petitioner to qualify as a “firearm” under California law, it must be “readily converted to the functional condition of a finished frame or receiver.” (Ex. 4, P. 492). The Respondent Court made its determination even though the uncontroverted evidence presented by Petitioner shows that the “80% Kits” sold by Petitioner are not “readily converted to the functional condition of a finished frame or receiver.”

There is no dispute in this matter that the “80% Kits” sold by Defendant cannot be fired until they are machined and further assembled using tools that are not sold as part of the kit. (Ex. 1, P. 50). It takes an expert an estimated eight (8) hours to put together a completed 1911 firearm using all of the required parts and tools. (Ex. 1, P. 50). The frames that are contained in the “80% Kits” like the one sold and at issue in this matter need to be machined and drilled with tools not included in the kit prior to the kit being completed and made into a firearm. (Ex. 1, P. 50).

Plaintiff presented no admissible evidence to controvert the facts presented by Defendant that the “80% Kits” sold by Defendant do not meet the definition of “firearm” under California law. Plaintiff only presented in Opposition several irrelevant and inadmissible articles and a declaration from a retired ATF agent that had no applicability to the Motion and whether the “80% Kit” sold by Defendant is “readily converted” to a “firearm.” (Ex. 2, P. 185-424). Plaintiff presented no admissible evidence to controvert Petitioner’s evidence that the “80% Kits” cannot be fired until they are machined and assembled using tools that are not sold as part of the kit. (Ex. 2, P. 185-424). Also, Plaintiff presented no admissible evidence to controvert the evidence presented by Defendant that it takes an expert an

estimated eight (8) hours to put together a completed “80% Kit.” (Ex. 2, P. 185-424).

Since it is undisputed that it takes an expert an estimated eight (8) hours to put together an “80% Kit” using other parts and tools not sold as part of the kit and the “80% Kit” cannot be fired until they are machined and further assembled using tools not included as part of the “80% Kit,” the kit cannot be “readily converted” to “the functional condition of a finished frame” as required by California law to qualify as a “firearm.” There is no definition that could be interpreted to mean that an additional eight (8) hours of finishing work by an expert including further machining and use of other tools not sold with the “80% Kits” constitutes “readily converted to the functional condition of a finished frame” to qualify as a “firearm” under California law.

Accordingly, the Respondent Court was incorrect in its ruling and abused its discretion by determining that the “80% Kits” sold by Petitioner qualify as “firearms” under California law and using it as a basis to deny Petitioner’s Motion.

V. RESPONDENT COURT ABUSED ITS DISCRETION BY DETERMINING THAT PETITIONER OWED A DUTY TO COMPLY WITH THE FIREARMS REGULATIONS WITHIN THE STATE OF CALIFORNIA AS PETITIONER WAS NOT SELLING FIREARMS UNDER CALIFORNIA LAW

As discussed above, the undisputed evidence presented by Petitioner with his Motion showed that the “80% Kits” sold by Petitioner do not qualify as “firearms” under California law, as they are not “readily converted to the functional condition of a finished frame.” Therefore, if the “80% Kits” do not qualify as “firearms” under California law, they are not subject to California firearm regulations. The Respondent Court relied on the determination of Petitioner’s “80% Kits” qualifying as “firearms” under California law and Petitioner therefore being subject to California firearm laws to determine that Petitioner owed a duty to Plaintiff.

The Respondent Court applied the scope of duty in its ruling as being based on the foreseeability allegation that Plaintiff makes in this matter that Defendant “engaged in the sale of “ghost guns” for the purpose of enabling the purchase of readily made firearms to persons otherwise barred from legal purchases through licensed dealers.” (Ex. 4, P. 491). The Respondent Court cited case law in its ruling to determine that California specifically bars any denial of duty on grounds that the specific shooting was not specifically foreseeable and instead considers potential criminal conduct among the

factors for the finding of duty of care.” (Ex. 4, P. 491). (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572 (fn. 6); *Hernandez v. Jensen* (2021) 61 Cal.App5th 1056, 1065-1066; *Jacoves v. United Merchandising Corp.* 1992) 9 Cal.App.4th 88, 114.)

The Respondent Court acknowledged in its ruling that Plaintiff argues in this matter for a duty of care imposed on even sellers of “kits,” but the case law relies upon the finding of an **operational firearm** in the commission of a third-party crime to find a duty of care owed. (Ex. 4, P. 491). As previously outlined, Petitioner’s “80% Kits” do not qualify as “firearms” under California law as they cannot be “readily converted to the functional condition of a frame” to qualify as “firearms” and therefore no duty of care relating to the sale of “firearms” and compliance with the **firearm** regulations of California can be imposed on Petitioner in this matter. Petitioner’s “80% Kits” are not “readily converted the functional condition of a finished frame” and therefore are not “firearms” under California law.

The Respondent Court based the finding of duty in this matter solely on the grounds that Defendant’s “80% Kits” constitute “firearms” under California law and therefore any duty Petitioner owed to Plaintiff would be based on compliance with California “firearm laws.” Since Petitioner was not selling “firearms” as a matter of law, there was no duty by Petitioner to comply with the firearm regulations of the State of California. Accordingly, the Respondent Court further abused its discretion by determining that Petitioner owed a duty to comply with the firearms regulations within the State of California and using this as a basis to deny Petitioner’s Motion.

VI. CONCLUSION

For the reasons detailed above, Petitioner respectfully requests that this Court stay this action and issue a peremptory writ of mandate or other appropriate relief to set aside and vacate the Respondent Court’s prior Order denying Petitioner’s Motion for Summary Judgment and direct Respondent Court to enter a new Order granting Petitioner’s Motion for Summary Judgment.

This request is made on the grounds that Respondent Court abused its discretion in denying Petitioner's Motion for Summary Judgment, the Respondent Court's Order is both clearly erroneous as a matter of law and substantially prejudices Petitioner's case and Petitioner will suffer irreparable injury if a writ is not issued by this Court.

DATED: July 25, 2022

Respectfully submitted,

By:



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Builders

CERTIFICATE OF WORD COUNT

I certify that apart from those portions that may be excluded pursuant to Rule 8.204(c), the text of this brief contains 6,456 words, as counted by Microsoft Word, the program used to create it,

July 25, 2022



ADRIENNE D. COHEN,

PROOF OF SERVICE

I am employed in the county aforesaid; I am over the age of eighteen and not a party to the within action; my business address is 18300 Von Karman Avenue, Suite 410, Irvine, California 92612.

On July 25, 2022, I served the foregoing document described as:

**PETITION FOR IMMEDIATE STAY; PETITION FOR WRIT OF
MANDATE AND/OR OTHER APPROPRIATE RELIEF;
MEMORANDUM OF POINTS AND AUTHORITIES (Supporting Exhibits
Filed Under Separate Cover)**

on each interested party in this action, as follows:

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<p>Hon. Stephen P. Pfahler Los Angeles Superior Court Chatsworth Courthouse 9425 Penfield Ave. Chatsworth, CA 91311</p>	<p><u><i>Via U.S. Mail Only</i></u></p>

I completed service by causing a true copy of the foregoing document to be electronically transmitted by PDF format via TrueFiling, the 2nd District Court of Appeals' eService, to each party as set forth above as well as email service pursuant to agreement by the parties.

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

Executed on July 25, 2022, at Irvine, California.


Justin Turbow