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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

vs.

POLYMER80, INC., a Nevada Corporation; DAVID BORGES, an individual; LORAN KELLEY, an individual,

Defendants.

Case No. 21STCV06257

[Related to Case No. 21STCV29196]

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

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: June 5, 2023
Time: 8:30 a.m.
Department: 32
Reservation ID: 428792836008

Complaint Filed: February 17, 2021
Trial Date: May 30, 2023

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INTRODUCTION

Polymer80, Inc., is a Nevada-based company that designs, manufactures, markets, and distributes firearms, non-firearm products, and other innovative components and accessories. (UMF No. 1). The company has held a Federal Firearms License to conduct business as a manufacturer and dealer of firearms since 2016. (UMF No. 2). Polymer80's aim is to allow customers to "express[] their right to bear arms" by "participat[ing] in the build process."[1]

The People of the State of California, by and through L.A. City Attorney Michael N. Feuer, filed this action against Polymer80, Inc., David Borges, and Loran Kelley (collectively, "Defendants"), asserting claims for violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL"), and California public nuisance law, *see* Cal. Civ. Code § 3480. (Compl. ¶¶ 84, 97). But this lawsuit is not actually about Polymer80. Instead, this lawsuit is about the City of Los Angeles' tragic plague of violent crime. Defendants sympathize with Plaintiff's struggles related to the criminal misuse of firearms and related products by violent offenders, and Defendants unequivocally condemn gun violence and the criminal misuse of firearms and related products.

By pursing this action, Plaintiff seeks without legal basis to levy blame on Polymer80 for independent actors' criminal misuse of Polymer80 firearm components and related products, as well as for violent crime in their city, generally. The judicial assignment of blame upon Polymer80 for the woes that the City of Los Angeles faces would amount to an unprecedented disregard of governing legal principals. This lawsuit must fail as a matter of law.

Defendants move for summary judgment under California Code of Civil Procedure § 437c on two independent grounds.[2] First, federal law—the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901 *et seq.*—preempts and thus bars this lawsuit. Second, Plaintiff's causes of action fail for lack of a triable issue as to causation. Defendants also move for summary adjudication under California Code of Civil Procedure § 437c(f) on Plaintiff's Public Nuisance claim (Count II) based on Plaintiff's inability to show a triable issue as to the existence of a cognizable public right.

[1] *About Polymer80*, https://polymer80.com/about-us (last visited March 12, 2023).

[2] In the alternative, Defendants move for summary adjudication of any causes of action barred by PLCAA or Plaintiff's failure to establish causation under California Code of Civil Procedure § 437c(f).

STATEMENT OF FACTS

Polymer80 designs, manufactures, markets, and distributes firearms, non-firearm products, and other innovative components and accessories. (UMF No. 1). The company holds a federal firearms license to do so. (UMF No. 2). David Borges and Loran Kelley co-founded Polymer80 in 2013. (UMF No. 3). Borges was a part owner of the company from early 2013 until October 2021, and he served as the company's CEO and CFO during that time. (UMF No. 4). Kelley is still a part owner of Polymer80 and currently serves as the company's President and CEO. (UMF No. 5).

I. POLYMER80'S PRODUCTS RELEVANT TO THIS LAWSUIT

Polymer80 has manufactured, marketed, and distributed a variety of products since its 2013 founding, but Plaintiff's Complaint centers on three kinds of Polymer80 products: unfinished frames and receivers, unfinished frame and receiver kits, and Buy Build Shoot kits. (UMF No. 6).

First, Polymer80 has developed and sold unfinished frames and receivers, *i.e.*, the part of a pistol or rifle which houses the hammer, bolt or breechblock, and firing mechanism and to which the slide or the barrel and stock are assembled. (UMF No. 7). Unfinished frames and receivers are unfinished because each lacks (1) drilling, cutting, and machining in necessary places such that the product is unable to accept other components as-sold; and (2) other components, tools, and equipment necessary to machine the product into a functional frame or receiver. (UMF No. 8). Armed with the necessary equipment, tools, components, and know-how, a customer could potentially machine an unfinished frame into a functional frame in around "30 minutes to an hour" of workmanship; an unfinished receiver would take somewhat longer; and the complete build of a functional weapon would take longer still, about "[t]wo to three hours." (UMF No. 9). A finished frame or receiver could then be used as part of a pistol or rifle. (*Id.*)

Second, Polymer80 has developed and sold unfinished frame and receiver kits. Some kits, such as the PF940V2 pistol frame kit, contained an unfinished frame or receiver along with other components (such as a serialization plate, locking block rail system, rear rail module, and pins) and machining tools (such as a jig, drill bits, and end mill) that are used in the machining process. (UMF No. 11). As of August 2022, Polymer80 no longer offered the jig, the attachment that aligned the product for drilling, or drill bits with its kits. (UMF No. 12). Armed with the necessary equipment,

tools, components, and know-how, a customer could potentially machine an unfinished frame into a functional frame in around "30 minutes to an hour" of workmanship; an unfinished receiver would take longer; and the complete build of a functional weapon would take longer still. (UMF No. 13). These kits did not include any other components necessary to assemble a functional weapon. (UMF No. 14). A finished frame or receiver could then be used a part of a pistol or rifle. (UMF No. 13).

Third, in 2019 and 2020, Polymer80 developed and sold the "Buy Build Shoot" pistol kit. (UMF No. 15). This came with an unfinished-frame kit and other components and tools that, with additional machining, equipment, and effort, could be used to build a functional weapon. (UMF No. 16). Polymer80 stopped marketing and selling this product around December 2020. (UMF No. 17).

Illustrative of Polymer80's commitment to cease marketing and selling Buy Build Shoot kits, Polymer80 has entered into a Cooperation Agreement with the United States Attorney's Office for the Central District of California. (UMF No. 18). Polymer80 agreed that, between the USAO and Polymer80, Buy Build Shoot kits and "similar combinations of parts from which a complete firearm can be assembled . . . are to be classified and considered as 'firearms' and 'handguns' as those terms are defined under federal law and regulations" that were in effect at the time of the agreement's execution. (*Id.*). In response, the USAO agreed to "not prosecute Polymer80 . . . related to Polymer80's manufacture and sale of 'Buy, Build, Shoot' firearms kits" on the condition of Polymer80's "full compliance" with the agreement (*Id.*) Importantly, that agreement was "not intended to be used in any other matter, including any civil . . . action, nor its terms intended to constitute admissions" by Polymer80. (*Id.*) Polymer90 is committed to complying. (UMF No. 19).[3]

No product relevant to this lawsuit could be machined and assembled into a functional weapon without additional equipment and machining workmanship. (UMF No. 21). Polymer80 has also publicly announced that it "will comply with" the changing landscape of firearms regulation.[4] The

[3] Polymer80 has also developed and sold other components, such as slide assemblies and magazines, and some machining tools on its website. (UMF No. 20).

[4] Stephanie S. Hickey, *Polymer80 Product Changes in Accordance with ATF Final Rule*, Polymer80 (Aug. 29, 2022), https://www.polymer80.com/blog/polymer80-product-changes-in-accordance-with-atf-final-rule (last visited Mar. 14, 2023).

company ceased selling all components and kits into California in 2022 in response to new California legislation, 2022 Cal. Legis. Serv. 76 (A.B. 1621); (UMF No. 22).

II. PLAINTIFF'S EVIDENTIARY SHORTCOMINGS

Plaintiff alleges that Defendants' manufacturing, marketing, and distributing of unfinished frames and receivers, unfinished frame and receiver kits, and "Buy Build Shoot" kits caused an "increase in ghost gun-related violence and illegal activity in Los Angeles," "a threat to the safety and well-being of the people of Los Angeles," and "an increase in investigative costs and expenditure of law enforcement resources." (UMF No. 23). But these allegations are unsupported by the evidence:

- Each of Plaintiff's alleged harms stems from independent actors' criminal misuse of Polymer80 products. (*Id.*)
- There is no evidence that any Defendant knowingly and actively participated in any actual violation of a federal or state law firearms statute. (UMF No. 24).
- There is no evidence that any Defendant sold a product with knowledge of the purchaser's underlying criminal intent to commit an act of gun violence. (UMF No. 25).
- There is no evidence that Los Angeles law enforcement investigations or officers have been adversely affected by Defendants' conduct in any cognizably actionable way, including supposed increased in investigative costs and expenditures of law enforcement resources. (UMF No. 26).
- There is no evidence that Polymer80's business practices proximately caused criminal possession of a firearm or caused any firearm-related crimes to occur. (UMF No. 34).
- Although Plaintiff states in conclusory fashion that "law enforcement officers . . . are frustrated" and their jobs "are made more dangerous, by the proliferation of untraceable firearms built from Polymer80 kits," Plaintiff does not provide evidence of any individual in California who criminally used a Polymer80 product but would not have committed the crime in the absence of Polymer80's conduct, and therefore cannot provide evidence of:
    - any specific law enforcement officer who is frustrated or whose job is made more dangerous by Polymer80's business practices;
    - what specifically frustrates these hypothetical officers or makes their jobs more dangerous by Polymer80's business practices;
    - a specific instance of when these hypothetical officers were frustrated or when their jobs were made more dangerous by Polymer80's business practices; or
    - why Polymer80's business practices frustrate these hypothetical officers or why their jobs are made more dangerous by Polymer80's business practices. (UMF No. 39).
- There is no evidence that Polymer80's business practices harmed any California firearms dealer or consumer as a consumer. (UMF No. 40).

These evidentiary shortcomings demonstrate that Defendants are entitled to summary judgment under California Code of Civil Procedure § 437c or, in the alternative, summary adjudication under California Code of Civil Procedure § 437c(f).

STANDARD OF REVIEW

Summary judgment is appropriate when the moving party shows "that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fajardo v. Dailey* (2022) 85 Cal. App. 5th 221, 225. A triable issue of material fact exists "if, and only 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. Atl. Richfield Co.* (2001) 25 Cal. 4th 826, 850. The defendant meets its summary judgment burden by demonstrating "that one of more elements of the cause of action in question cannot be established, or that there is a defense thereto." *Id.* (quoting Cal. Code Civ. Proc. § 437c).

ARGUMENT

I. THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT PREEMPTS THIS LAWSUIT

Federal law preempts state laws and causes of action "that conflict with the federal law." *Murphy v. Nat'l Collegiate Athletic Ass'n* (2018) 138 S. Ct. 1461, 1480 (statute); *Mut. Pharm. Co., Inc. v. Bartlett* (2013) 570 U.S. 472, 488–69 (tort claim). PLCAA "generally preempts claims against manufacturers and sellers of firearms and ammunition resulting from the criminal use of those products." *Ileto v. Glock* (9th Cir. 2009) 565 F.3d 1126, 1131.

Congress enacted PLCAA in 2005 in response to predatory lawsuits by "the Federal Government, *States*, *municipalities*, and *private interest groups*" that sought to hold firearms-industry companies liable "for the harm caused by the misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3), (7) (emphases added). Two of PLCAA's express purposes were "[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products . . . for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended," and to protect those companies' right under "the First Amendment . . . to speak freely," *id.* § 7901(b)(1), (5).

By its terms, PLCAA preempts any "qualified civil liability action" unless one of six narrow enumerated exceptions applies. *Id.* §§ 7902, 7903(5)(A). PLCAA preemption is an appropriate issue for summary judgment. *See Ryan v. Hughes-Ortiz* (Mass. App. Ct. 2012) 959 N.E.2d 1000, 1006–10. It preempts this lawsuit and compels "immediate[] dismiss[al]." 15 U.S.C. § 7902(b).

A. This lawsuit is a "qualified civil liability action" under PLCAA

PLCAA compels state and federal courts to "immediately dismiss[]" any "qualified civil liability action." *Id.* A "qualified civil liability action" includes "a civil action . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include [actions satisfying certain enumerated exceptions]." *Id.* § 7903(5)(A).

This lawsuit satisfies every element. It is a "civil action" that seeks injunctive relief, abatement, penalties, and other relief. *Id.* It is "brought by any person" because that term includes government entities. *Id.* § 7903(3). Polymer80's products are "qualified product[s]" because that term includes any "firearm" or "component part of a firearm" shipped in interstate commerce. *Id.* § 7903(4). Defendants are "manufacturer[s]" or "seller[s]" of qualified products and hold licenses to engage in business as such. *Id.* § 7903(2), (6). (UMF No. 2). And each of Plaintiff's asserted injuries flows directly from independent actor's "criminal or unlawful misuse" of Polymer80's products, *id.* § 7903(5)(A), or as Plaintiff puts it: from third parties' engagement in "ghost gun-related violence and illegal activity." (UMF No. 23). Lastly, none of PLCAA's exceptions applies, making summary judgment proper.

B. No PLCAA exception saves this lawsuit (or any claim) from preemption

Six narrow exceptions limit PLCAA's preemptive reach. *See* 15 U.S.C. § 7903(5)(A)(i)–(vi). The only exception possibly implicated by this lawsuit is the so-called "predicate exception," which allows causes of action that rely on knowing violations of a federal or state statute applicable to the sale or marketing of firearms to escape PLCAA preemption. *See Ileto*, 565 F.3d at 1132 (discussing 15 U.S.C. § 7903(5)(A)(iii)). That exception does not apply because consumer-protection and nuisance statutes are not predicates, Defendants did not knowingly violate any predicate, and Defendants did not proximately cause any of Plaintiff's alleged harms.

1. PLCAA preempts individual causes of action

PLCAA preemption requires a claim-by-claim analysis, and this Court should dismiss any claim (or, more precisely, any basis for any claim) that does not satisfy an exception. PLCAA's operative provision and exceptions use the word "action," 15 U.S.C. § 7903(5)(A), but that term "is

sometimes used . . . as a shorthand for a single 'cause of action.'" *Ramos v. Wal-Mart Stores, Inc.* (E.D. Penn. 2016) 202 F. Supp. 3d 457, 466. "Action" should be read here to refer to individual claims.

The United States Supreme Court has interpreted "action" to refer to claims in other federal statutory law. *Jones v. Bock* (2007) 549 U.S. 199, 220–22 (interpreting "[n]o action shall be brought" in 42 U.S.C. § 1997e(a) to require claim-by-claim analysis and to "proceed[] with the good and leave[] the bad"). This reading is also consistent with PLCAA caselaw. *See Delana v. CED Sales, Inc.* (Mo. 2016) 486 S.W.3d 316 (conducting claim-by-claim analysis). In addition, this Court should favor "the textually permissible interpretation that furthers rather than obstructs" Congress's purposes. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 63 (2012); *see Altra Grp., Inc. v. Good* (2008) 555 U.S. 70, 76 ("[T]he purpose of Congress is the ultimate touchstone in any preemption case." (quotation marks omitted)). Congress's expressly stated purpose was "[t]o prohibit *causes of action*" that blame the firearm industry for criminal misuse of their products. 15 U.S.C. § 7901(b)(5) (emphasis added). As such, interpreting "action" to mean individual *claims* is the best reading. In fact, any other reading would be absurd. This Court thus should dismiss any claim that does not satisfy a PLCAA exception.

2. The predicate exception does not apply

PLCAA does not bar claims "in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii). "[A] plaintiff not only must present a cognizable claim, he or she also must allege a knowing violation of a 'predicate statute.'" *Ileto*, 565 F.3d at 1132.

Plaintiff's anticipated effort to avail itself of the predicate exception fails. First, consumer-protection and nuisance statutes cannot satisfy the exception to the extent liability is untethered to the violation of a statute that specifically regulates firearms. Second, Plaintiff cannot make a summary judgment showing that Defendants knowingly violated any firearms-specific statute. Third, Plaintiff cannot make a summary judgment showing on PLCAA's proximate causation requirement.

a. Consumer-protection and nuisance statutes are not predicates

Plaintiff sues under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, and its statutory public nuisance framework, *see* Cal. Civ. Code § 3480. (Compl. ¶¶ 84, 97).

Those are not "statute[s] applicable to the sale or marketing" of firearms products, 15 U.S.C. § 7903(5)(A)(iii), and therefore cannot serve as predicates for purposes of the predicate exception.

In interpreting a federal law, "the beginning point must be the language of the statute." *Estate of Cowart v. Nicklos Drilling Co.* (1992) 505 U.S. 469, 475. Words of a statute should be read "in their context and with a view to their place in the overall statutory scheme." *Home Depot U.S.A., Inc. v. Jackson* (2019) 139 S. Ct. 1743, 1748. The word "applicable" has two possible meanings. First, it could mean any statute "capable of being applied" to firearms. *Ileto*, 565 F.3d at 1133; *Applicable*, BLACK'S LAW DICTIONARY (11th ed. 2019). Second, it could more-narrowly mean "applicable specifically," satisfied only by statutes that "pertain[] *exclusively* to the sale or marketing of firearms." *Ileto*, 565 F.3d at 1134; *Applicable*, BLACK'S LAW DICTIONARY (11th ed. 2019). Despite surface-level ambiguity, statutory context and interpretive tools confirm that, in PLCAA, the phrase "applicable to the sale or marketing of the product" means statutes that specifically regulate firearms.

First, Congress provided examples of statutes that could satisfy PLCAA's predicate exception, and each specifically regulates firearms. 15 U.S.C. § 7903(5)(A)(iii)(I)–(II). The meaning of "applicable" is thus "narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated," *i.e.*, statutes that specifically regulate firearms. *United States v. Williams* (2008) 553 U.S. 285, 294.

Second, when "a general statement of policy is qualified by an exception, [courts] usually read the exception narrowly in order to preserve the primary operation of the provision." *Comm'r v. Clark* (1989) 489 U.S. 726, 739. PLCAA's preemptive grant is unmistakably a broad and general statement of policy, *see* 15 U.S.C. §§ 7901–03, such that the predicate exception must be construed narrowly.

Third, a broad interpretation "would frustrate Congress' manifest purpose." *United States v. Hayes* (2009) 555 U.S. 415, 427. Congress enacted PLCAA (1) to bar suits, exactly like this one, which seek to blame a firearms-industry company "for the harm solely caused by the criminal or unlawful misuse of firearm product," 15 U.S.C. § 7901(b)(1), and (2) to preserve the right of such companies "to speak freely," *id.* § 7901(b)(5). Reading the exception to cover any statute "capable of being applied to" firearms would eviscerate PLCAA's protections and scorn Congress' purposes.

Fourth, a broad reading would also violate the canon against superfluity. Courts usually "reject[] an interpretation of a statute that would render" other statutory text duplicative or meaningless. *Nat'l Ass'n of Mfrs. v. Dep't of Def.* (2018) 138 S. Ct. 617, 632. A broad reading would render the predicate examples meaningless: "Indeed, if *any* statute that 'could be applied' to the sales and manufacturing of firearms qualified as a predicate statute, there would be no need to list examples at all." *Ileto*, 565 F.3d at 1134. It would also render superfluous the negligence *per se* exception, which already covers tort liability based on statutory violations. 15 U.S.C. § 7903(5)(A)(ii).[5]

These interpretive tools conclusively demonstrate that the only permissible interpretation of the predicate exception is that it applies only to violations of statutes that specifically regulate firearms. This Court should reject any argument to read the exception as including any statute "capable of being applied to" firearms, or any other reading, as utterly impermissible. *See City of New York v. Beretta U.S.A. Corp.* (2d Cir. 2008) 524 F.3d 384, 403 ("Such a result would allow the predicate exception to swallow the statute, which was intended to shield the firearms industry from vicarious liability for harm caused by firearms that were lawfully distributed into primary markets.").[6]

For these reasons, Plaintiff cannot rely on an alleged violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, or its public nuisance framework, *see* Cal. Civ. Code § 3480, to the extent Plaintiff's theories are untethered to an underlying violation of a firearms statute. *See Ileto*, 565 F.3d at 1134–38 (holding Cal. Civ. Code § 3480 not a predicate). This means that Plaintiff's Unfair Competition Law claim (Count I) must be dismissed except to the extent

[5] By enacting the negligence *per se* exception, Congress demonstrated that it knew exactly how to include general remedies based on statutory violations; its refusal to include Plaintiff's relied-upon statutes should therefore be determinative. READING LAW, *supra*, at 93 ("Nor should the judge elaborate unprovided-for exceptions to a text, as Justice Blackmon noted while a circuit judge: '[I]f the Congress [had] intended to provide additional exceptions, it would have done so in clear language.'" (quoting *Petteys v. Butler* (8th Cir. 1966) 367 F.2d 528, 538 (Blackmun, J., dissenting))).

[6] Some courts have decided this issue differently. A fractured Connecticut Supreme Court held that Connecticut's consumer-protection statute qualified as a predicate "at least to the extent that it prohibits the unethical advertising of dangerous products for illegal purposes." *Soto v. Bushmaster Firearms Int'l, LLC* (Conn. 2019) 202 A.3d 262, 325; *see Prescott v. Slide Fire Sols., LP* (D. Nev. 2019) 410 F. Supp. 3d 1123, 1138–39 (following *Soto* in holding that Nevada Deceptive Trade Practice Act was a predicate); *City of New York*, 524 F.3d at 403 (declining "to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complaints of, in which case such a statute might qualify as a predicate statute"). These compromising readings are not based on any permissible interpretation and should be rejected.

tied to a violation of a federal or state firearm statute (*i.e.*, Plaintiff's "fraudulent" and "deceptive" practices theories cannot survive). Similarly, Plaintiff's public nuisance claim (Count II) must be dismissed except to the extent liability is tied to a firearms-statute violation.

b. Plaintiff cannot show a knowing violation of a firearms statute

The predicate exception also does not apply because Plaintiff cannot show that Defendants violated the Gun Control Act, the Child Safety Lock Act, the California Unsafe Handgun Act, or the California Assembly of Firearms Law. As such, complete summary judgment is appropriate.

***i.* The Gun Control Act**

Plaintiff contends that Defendants have violated the Gun Control Act ("GCA") through sales of unfinished frames and receivers, unfinished frame and receiver kits, and Buy Build Shoot kits. This theory fails because Polymer80's products are not "firearm[s]" under the plain meaning of the GCA.

The GCA sets a federal floor for regulation of "firearms." 18 U.S.C. § 921 *et seq.* Among other things, the GCA requires importers, manufacturers, and dealers of "firearms" to have a federal firearms license, *id.* § 923(a)(1), conduct a background check before transferring a "firearm," *id.* § 922(t), and maintain certain records, *id.* § 923(g)(1)(A). It requires importers and manufacturers to serialize "firearm[s]." *Id.* § 923(i). And it prohibits shipment of "firearm[s]" directly to purchasers, *id.* § 922(a)(2), sale or delivery to a resident of another state, *id.* § 922(b)(3), and sale to a purchaser who does not appear in person unless he executes an affidavit and notifies law enforcement, *id.* § 922(c).

The provisions apply to "firearm[s]," defined 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." *Id.* § 921(a)(3). Polymer80's products satisfy none of these definitions.[7]

1. 18 U.S.C. § 921(a)(3)(A)

Subsection (A) defines a "firearm" as "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)(A). Polymer80's relevant products principally are unfinished individual components or

[7] It is beyond dispute that Polymer80's products do not satisfy Subsection (C) or Subsection (D) of 18 U.S.C. § 921(a)(3). As such, Polymer80 addresses only Subsection (A) and Subsection (B), *infra*.

aggregations of unfinished components (and some products included some tools and other components). None can "expel a projectile," *id.*, absent (1) additional tools (and, for all but BBS kits, additional components) and (2) substantial machining workmanship. (UMF Nos. 6–22). For example, with the necessary equipment, tools, components, and know-how, a customer could potentially machine an unfinished frame into a finished, functional frame in around "30 minutes to an hour" of workmanship; an unfinished receiver would take longer; and complete manufacture of a functional weapon would take longer still. (UMF No. 13). These products cannot satisfy Subsection (A) for two reasons. First, the term "weapon" must be read to exclude individual components and mere combinations of parts. Second, none of these products is "*readily* convertible to expel a projectile."

As an initial matter, individual components plainly fall outside the scope of Subsection (A), which covers "weapon[s]" that might be "converted to expel a projectile"; *i.e.*, it does not cover things that might be converted into a weapon. Congress's choice to regulate frames and receivers in Subsection (B) compels the conclusion that components are not capable of satisfying Subsection (A).[8]

Combinations of parts are not "weapon[s]," either. First, Congress used "combination of parts" elsewhere in the GCA but omitted that language from Section 921(a)(3)(A). *See* 18 U.S.C. § 921(a)(4)(C) (definition of "destructive device"); *id.* § 921(a)(24) (incorporating 26 U.S.C. § 5845(b) (defining "machinegun")). This demonstrates that Congress "intentionally and purposely" excluded "combination of parts" from the meaning of "firearm" in 18 U.S.C. § 921(a)(3). *See Collins v. Yellen* (2021) 141 S. Ct. 1761, 1782. Second, "weapon" must mean something different than "combination of parts" because courts "give effect, if possible, to every word Congress used." *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 632. Third, and decisively, the word "weapon" does not inherently encompass a combination of parts because Congress used *both terms* in the same sentence of a provision incorporated into the GCA. 18 U.S.C. § 921(a)(24) (incorporating 26 U.S.C. § 5845(b)). *See also VanDerStok v. Garland* (N.D. Tex. Sept. 2, 2022) No. 4:22-cv-00691-O, 2022 WL 4009048, at *6 n.25 (discussing 26 U.S.C. § 5845(b)). Thus, Congress understood that a "weapon" did not include a

[8] Even the ATF has agreed: "As a statutory matter, Congress has legislatively defined a 'firearm' to be a weapon that may be readily converted to expel a projectile by the action of an explosive, or the frame or receiver of such weapon, but has explicitly excluded 'firearms parts' from that definition." Federal Defendants' Notice of Motion and Motion to Dismiss at 1, *State of California v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* (Nov. 30, 2020) No. 3:20-cv-6761, 2020 WL 9849685.

combination of parts and, as such, Polymer80's unfinished frames, unfinished-frame kits, and Buy Build Shoot kits cannot satisfy Subsection (A).

Because individual components and combinations of parts cannot be considered a "weapon," it does not matter whether a Polymer80 product "will or is designed to or may readily be converted to expel a projectile." 18 U.S.C. § 921(a)(3)(A). The existence of a "weapon" is an antecedent condition.

Polymer80's products also cannot satisfy Subsection (A) because Plaintiff cannot show that any product at issue "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)(A). Those products neither "will" or are "designed to" expel a projectile because each requires additional equipment and workmanship, and any reading of those terms to encompass conversion would render the "readily be converted" language superfluous. *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 632. Moreover, Plaintiff cannot show that these products are "*readily* convertible to expel a projectile." Although the record contains some evidence about the time, effort, and equipment required to machine some Polymer80 products into functional frames or into complete weapons, the records *lacks* sufficient evidence to support a finding that each of Polymer80's relevant products can "readily be converted to expel a projectile." To the contrary, all available evidence demonstrates that these products cannot be "readily converted to expel a projectile."

For these reasons, Polymer80's products are not "firearm[s]" under 18 U.S.C. § 921(a)(3)(A).

2. 18 U.S.C. § 921(a)(3)(B)

Subsection (B) defines a "firearm" as "the frame or receiver of any such weapon." This only covers *finished* frames and receivers. Congress included "conver[sion]" in Subsection (A) but omitted that language from Subsection (B), which means that Congress "intentionally and purposely" excluded unfinished frames and receivers from Subsection (B). *Collins*, 141 S. Ct. at 1782. "That which *may become* a receiver is not itself a receiver," *VanDerStok*, 2022 WL 4009048, at *4, and that which may become a frame is not itself a frame, *see id.* Because each of Polymer80's products contains only an *unfinished* frame or receiver, those products cannot satisfy 18 U.S.C. § 921(a)(3)(B).

3. Polymer80's legality and prospective compliance.

ATF recently abandoned its longstanding interpretation of "frame or receiver," 43 Fed. Reg. 13,531, 13,537 (Mar. 31, 1978), by promulgating an unlawful regulation that interprets "frame or

receiver" to "include a partially complete, disassembled, or nonfunctional frame or receiver, including a framer or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver." 87 Fed. Reg. 24,652, 24,739 (Apr. 26, 2022). ATF also now unlawfully interprets "firearm" to "include a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive." *Id.* at 24,735. These prospective interpretive changes became effective August 24, 2022. *Id.* at 24,652. The changes demonstrate why Polymer80 entered the Cooperation Agreement with the USAO and underscore Polymer80's commitment to compliance. (*See* UMF Nos. 18–19).

ATF's new interpretations disprove Polymer80's supposed backwards-looking liability in two ways. First, "[w]hen Congress amends legislation, courts must presume it intends the change to have real and substantial effect." *Van Buren v. United States* (2021) 141 S. Ct. 1648, 1660. Similarly here, ATF's changed interpretations supports the conclusion that the new regulation had an actual effect of changing the scope of the GCA, which demonstrates the legality of Polymer80's antecedent conduct. Second, California's attorney general has *admitted* by letter and press release that the ATF's new regulation closed an existing "loophole[]":

- "Certain firearm dealers have capitalized on these **regulatory loopholes** . . . ."
- "The newly proposed definitions leave no doubt that ghost guns, and other firearms **now treated as beyond federal regulation**, are indeed subject to the Gun Control Act and federal regulation."
- "The ATF's Proposed Rule will bring federal law **up to speed** with California law, and make it clear that unfinished frames and receivers are firearms, and will be regulated as such."

(UMF No. 30). Attorney General Bonta's statements are binding on Plaintiff (suing on behalf of the People of the State of California) as party admissions and authorized admissions that Polymer80's antecedent conduct did not violate the GCA. *See* Cal. Evid. Code §§ 1220, 1222; *see YDM Mgmt. Co., v. Sharp Cmty. Med. Grp.* (2017) 16 Cal. App. 5th 613, 630–31 (binding assignee to admission of assignor because assignee "stands in [the assignor's] shoes").

As for forward-looking liability, Polymer80 has announced that it "will comply with" ATF's new interpretations despite its sharp disagreement with the legality of those actions. (UMF No. 31). It

also has agreed with California federal prosecutors to treat "Buy Build Shoot" kits as "firearms" prospectively. (UMF No. 18). Polymer80 ceased selling all firearms components into California in 2022, and the record is devoid of any evidence that Polymer80 *will* sell any relevant products into California. (UMF No. 22). As such, Plaintiff cannot show any prospective GCA violation.

Plaintiff cannot show a violation of the GCA. As such, Plaintiff cannot rely on the GCA as a PLCAA predicate and this Court should dismiss any claims that rely an alleged GCA violation.

ii. **The Child Safety Lock Act**

Plaintiff's second theory is that Defendants directly violated the Child Safety Lock Act ("CSLA") by selling Buy Build Shoot kits without "any supplemental or external locking device or gun storage container." (Compl. ¶ 49). This theory fails because those kits are not "handguns."

For purposes of the CSLA, "handgun" means "(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and (B) any combination of parts from which a firearm described in subparagraph (A) can be assembled." 18 U.S.C. § 921(a)(30).

Polymer80's products are not "handgun[s]" under either definition. First, Buy Build Shoot kits are not "firearms" for the same reasons described above. (*See supra* at 10–14). Second, those kits are not "any combination of parts form which a firearm described in subparagraph (A) can be *assembled*." 18 U.S.C. § 921(a)(30)(B) (emphasis added). The term "assemble," in context, means "to fit together the parts of." *Assemble*, Webster's Ninth New Collegiate Dictionary (1990). The undisputed facts show that Polymer80 products are not "assembled." In fact, they cannot be "assembled." Instead, they are built through machining workmanship. (UMF Nos. 6–22). For example, the PF940C pistol frame lacks *drilling* for pin holes, *cutting* for slide installation, and *machining* for installation of the block barrel and recoil spring. (UMF No. 10). No reasonable juror could conclude that Polymer80's Buy Build Shoot kits are "handgun[s]" under the CSLA For that reason, Defendants cannot have violated the CLSA. This Court therefore should reject Plaintiff's attempt to rely on the CLSA for predicate-exception purposes and should dismiss any claims based on an alleged CLSA violation.

iii. **The California Unsafe Handgun Act**

Plaintiff's third theory is that Defendants aided and abetted violations of California's Unsafe Handgun Act ("CUHA") "by marketing, selling, and transferring all of the components, parts,

materials, tools and instructional videos needed to build an unsafe handgun in the state." (Compl. ¶ 57). Plaintiff cannot introduce evidence sufficient to show a knowing violation.

The CUHA criminalizes the manufacture, import, sale, or lending of any "unsafe handgun." Cal. Penal Code § 32000(a). It sets forth a vast framework for defining an "unsafe handgun," through requirements for drop safety, fire testing, safety devices, a chamber-load indicator, magazine disconnect mechanism, micro-stamping, and certification, and a handgun roster. *Id.* § 31900 *et seq.* As an initial matter, Plaintiff's focus on accomplice liability, rather than any direct violation, demonstrates that Polymer80's products fall outside the scope of the "unsafe handgun" definition *i.e.*, no Polymer80 product is a "pistol, revolver, or other firearm," and CUHA's requirements therefore do not apply to Polymer80 products. Cal. Penal Code § 31910.[9]

Under California law, aiding-and-abetting liability requires proof that the defendant "act[ed] with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." *People v. Mendoza* (1998) 18 Cal. 4th 1114, 1123. But aiding-and-abetting liability is appropriately analyzed under federal law because PLCAA requires a "knowing" violation. Federal law similarly requires proof that the defendant had "foreknowledge" of the principal's criminal intent and "knowingly aided . . . that person to commit" the primary offense. *United States v. Goldtooth* (9th Cir. 2014) 754 F.3d 763, 768–69; *see Rosemond v. United States* (2014) 572 U.S. 65, 76 ("[A]iding and abetting requires . . . a state of mind extending to the entire crime."); *id.* at 67 ("[T]he government makes its case by proving that the defendant [1] actively participated in the underlying [crime] [2] with advance knowledge [of the

[9] In 2022, more than a year after the Complaint was filed, the California Legislature redefined "firearm" to "include[] the frame or receiver of the weapon, including both a completed frame or receiver, or a firearm precursor part," as that term is used in more than 26 sections of California law. *See* Cal. Penal Code § 16520(b). For its part, "firearm precursor part" includes unfinished frames and receivers that are unassembled and unmachined. *See id.* § 16531(a). But these enactments didn't change the meaning of "unsafe handgun" in the CUHA, *see id.* § 31910, and if anything solidify the conclusion that unfinished frames and receivers were not and are not within the scope of the CUHA, even after completion, *see Van Buren*, 141 S. Ct. at 1660 ("When Congress amends legislation, courts must presume it intends the change to have real and substantial effect."). Moreover, Plaintiff did not allege a violation of any California law as amended by this recent legislation. *See* 2022 Cal. Legis. Serv. 76 (A.B. 1621); *see WFG Nat'l Title Ins. Co. v. Wells Fargo, N.A.* (2020) 51 Cal. App. 5th 881, 888 ("The pleadings determine the issues to be addressed by a summary judgment motion."). Thus, any argument that Polymer80 aids and abets violations of California law based on sales of "firearm precursor part[s]" misses the point and is without merit.

principal's criminal intent]."). It is not enough that Defendants were negligent or should have known a purchaser's intent. *United States v. Ricard* (5th Cir. 2019) 922 F.3d 639, 655; *United States v. Carrillo* (7th Cir. 2006) 435 F.3d 767, 781–82.

Plaintiff cannot make a summary judgment showing of accomplice liability because Plaintiff cannot show that any Defendant "actively participated" in any actual customer's violation of the CUHA or another downstream criminal act, *Rosemond*, 572 U.S. at 67; (UMF No. 24), or had actual knowledge of any purchaser's underlying criminal intent, *see Rosemond*, 572 U.S. at 77 n.8 (questioning whether "incidental[] facilitat[ion]" is sufficient); (UMF No. 25). Although the record supports a finding in the abstract that Defendants expected that "some" purchasers would complete machining and assembly of Polymer80 products into complete weapons, or that purchasers have "contacted" Polymer80 "for assistance," the record does not support a finding that Defendants made a sale to any actual purchaser, or assisted any actual purchaser, with knowledge that the purchaser intended to violate the CUHA. (UMF No. 27). In addition, many of Polymer80's products could be mated with other readily available products manufactured by Polymer80 or other companies that meet CUHA's requirements, (UMF No. 32), and Plaintiff has offered no proof that Polymer80 made any sale with knowledge that the purchaser would build product that failed to comply with CUHA.

This Court should reject Plaintiff's effort to rely on aiding-and-abetting violations of the CUHA for purposes of PLCAA and for supporting its consumer-protection and nuisance claims.

iv. California's Assembly of Firearms Law

Plaintiff's fourth theory is that Defendants' "actions [of] selling and aiding and abetting the manufacture and assembly of firearms" violate California's Assembly of Firearms Law ("CAFL"). (Compl. ¶ 61). This law requires any "person manufacturing or assembling a firearm" to incorporate 3.7 ounces of steel within the plastic of a polymer firearm and affix a serial number to that steel. Cal. Penal Code § 29180(b). Plaintiff cannot introduce evidence sufficient to show a violation.

First, Plaintiff cannot show any direct violation. The CAFL does not criminalize "selling," so Plaintiff's allegations and any evidence about Polymer80 sales are irrelevant. *Id.* § 29180(a). In addition, Polymer80's products are not "firearm[s]" and, for that reason, the CAFL does not apply. *Id.*

Second, Plaintiff cannot make a summary judgment showing of accomplice liability because Plaintiff cannot show that any Defendant "actively participated" in any actual customer's violation of the CAFL or another downstream criminal act, *Rosemond*, 572 U.S. at 67; (UMF No. 24), or had actual knowledge of any purchaser's underlying criminal intent, *see Rosemond*, 572 U.S. at 77 n.8 (questioning whether "incidental[] facilitat[ion]" is sufficient); (UMF No. 25). For one, this Court should hold that a complete weapon constructed with Polymer80 components complies with the CAFL; although a complete Polymer80 product does not contain "3.7 ounces of material type 17-4 PH stainless steel . . . embedded *within the plastic*," Cal. Penal Code § 29180(b)(2)(B) (emphasis added), the product does incorporate 3.7 ounces of steel, (UMF No. 28). Further, Polymer80 should be entitled to "reasonably proceed upon the assumption that others will obey the criminal law," including the CAFL's requirements. W. PAGE KEETON, *ET AL.*, PROSSER & KEETON ON TORTS § 33, at 201 (5th ed. 1984) ("Under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law."). For another, the record does not support a finding that Defendants made a sale to any actual purchaser, or assisted any actual purchaser, with knowledge that the purchaser intended to violate the CAFL or another California firearms statute. (UMF No. 27).

This Court should reject Plaintiff's effort to rely on aiding-and-abetting violations of the CAFL for purposes of PLCAA and for supporting its consumer-protection and nuisance claims

c. Plaintiff cannot prove PLCAA proximate causation

No predicate-statute "violation was a proximate cause of the harm for which relief is sought," *i.e.*, downstream effects of gun violence by independent actors. 15 U.S.C. § 7903(5)(A)(iii).

Federal proximate-causation standards govern this issue. Courts "ordinarily presume that 'Congress intends to incorporate the well-settled meaning of the common-law term it uses.'" *Jam v. Int'l Fin. Corp.* (2019) 139 S. Ct. 759, 769–70 (quoting *Neder v. United States* (1999) 527 U.S. 1, 23). Proximate causation squarely fits that mold, as courts apply federal proximate-causation standards when Congress expressly or impliedly incorporates a proximate-causation requirement into a federal statute. *See, e.g.*, *Bank of Am., Corp. v. City of Miami* (2017) 581 U.S. 189, 202 (FHA); *Lexmark Int'l, Inc. v. Static Control Components, Inc.* (2014) 572 U.S. 118, 132 (Lanham Act); *Holmes v. Secs.*

Investor Prot. Corp. (1992) 503 U.S. 258, 268 (RICO). Plaintiff cannot show proximate cause for two reasons: (1) any connection between Defendants' conduct and Plaintiff's alleged injuries is too attenuated to support liability; and (2) independent actors' superseding criminal misuse of Polymer80's products forecloses proximate cause.

First, proximate cause requires a "sufficiently close connection," *Bank of Am. Corp.*, 581 U.S. at 201, or "some direct relation," *Hemi Grp., LLC v. City of New York* (2009) 559 U.S. 1, 9, between the plaintiff's injury and the defendant's conduct. By contrast, "[a] link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." *Hemi Grp., LLC*, 559 U.S. at 9; *see also Lexmark*, 572 U.S. at 133 ("[T]he proximate-cause requirement generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct."). In addition, "[t]he general tendency of the law, in regards to damages at least, is not to go beyond the first step" of attenuation. *Hami Grp., LLC*, 559 U.S. at 10.

Plaintiff seeks to recover for "ghost gun-related violence and illegal activity in Los Angeles." (Compl. ¶¶ 43, 58, 61, 80). That assertion assumes that: (1) Polymer80 sells products to individuals in California; (2) those individual either manufacture a functional weapon or transfer the product to another individual who does so; (3) the individual foreseeably criminally uses the product; (4) the criminal would not have committed the criminal act in the absence of Polymer80's conduct; (5) those criminal acts manifested in increased public costs and other harms to Plaintiff which would not have occurred in the absence of Polymer80's conduct. But that chain of causation fails. For one, Plaintiff cannot show that each of those assumptions are supported by fact: Plaintiff cites five individuals' misuses of Polymer80 products, but cannot explain how those misuses are sufficient to support its consumer-protection claims, (UMF No. 29), Plaintiff has produced no evidence that law enforcement investigations or officers have been adversely affected by Defendants' conduct in any articulable way, (UMF No. 26), and Plaintiff otherwise cannot show that criminal actors used Polymer80 products in crimes that would not have occurred but-for Defendants' conduct. (UMF No. 39). For another, even if Plaintiff could prove each of the necessary facts, that chain of causation is far too attenuated and remote to support proximate cause. *City of Phila. v. Beretta U.S.A. Corp.* (3d Cir. 2002) 277 F.3d 415, 423 (Pennsylvania law) (finding nuisance theory against gun manufacturers to be too "long and torturous" to support proximate causation). At the very least, this theory impermissibly goes "beyond

the first step." *Hemi Grp., LLC*, 559 U.S. at 10. In any event, Plaintiff cannot show that any recoverable harm was proximately caused by any specific violation. 15 U.S.C. § 7901(5)(A)(iii).

Second, federal proximate-cause standards also recognize that superseding causes break the chain of causation. *See Staub v. Proctor Hosp.* (2011) 562 U.S. 411, 420. A cause is "superseding" if "it is a 'cause of independent origin that was not foreseeable.'" *Id.* And "acts that are either criminal or intentionally tortious . . . are more likely to be adjudged superseding causes." *Kemper v. Deutsche Bank AG* (7th Cir. 2018) 911 F.3d 383, 393. Plaintiff's alleged harms stem only from independent third parties who criminally misused Polymer80 products. This Court should hold that those actors' independent and criminal misuse of Polymer80's otherwise legal products is an intervening and superseding cause that breaks any connection between Defendants' conduct and Plaintiff's harms.

d. No other PLCAA exception even arguably applies

PLCAA limits its preemptive reach through five other exceptions. 15 U.S.C. § 7903(5)(A). None of those exceptions applies to any of Plaintiff's claims.

* * *

PLCAA bars this lawsuit and each claim. This case is a "qualified civil liability action" and no exception saves this lawsuit or any claim from preemption. Accordingly, this Court should immediately dismiss this lawsuit, Cal. Civ. Proc. Code § 437c, or alternatively should summarily adjudicate any claim for which an exception does not apply, *id.* § 437c(f).

II. PLAINTIFF CANNOT ESTABLISH THAT DEFENDANTS CAUSED PLAINTIFF'S ALLEGED HARMS

A. Plaintiff cannot show that Defendants caused the alleged nuisance

Plaintiff bears the burden of proof to establish each element of its public nuisance claim. "The elements of a cause of action for public nuisance include . . . causation." *Melton v. Boustred* (2010) 183 Cal. App. 4th 521, 542. "Whether liability is based upon nuisance or negligence, the scope of that liability has been similarly measured: It extends to damage which is proximately or legally caused by the defendant's conduct, not to damage suffered as a proximate result of the independent intervening acts of others." *Martinez v. Pacific Bell* (1990) 225 Cal. App. 3d 1557, 1565. Merely engaging in what a plaintiff deems to be a risky practice, without a connecting causative link to threatened harm, is not a public nuisance. *In re Firearms Cases* (2005) 126 Cal. App. 4th 959, 988.

Plaintiff must therefore establish causation in fact, which requires facts demonstrating that the defendant's conduct was a "substantial factor in bringing about the result." *People v. ConAgra Grocery Prod. Co.* (2017) 17 Cal. App. 5th 51, 102 (internal citation omitted). Plaintiff must also establish proximate causation, which requires facts demonstrating that Polymer80's allegedly wrongful conduct was foreseeable and not "too remote from the current hazard to be its 'legal cause.'" *Id*. at 103. Causation is required even if the defendant's conduct is unlawful. *Gonzalez v. Derrington* (1961) 56 Cal. 2d 130, 133–34 ("[T]here was no evidence that the violation of the municipal ordinance was a proximate cause of the resulting injuries and death. Rather, the uncontradicted evidence shows that the injuries and deaths were due to an independent, intervening cause, to wit, the action of [defendants] starting the fire.").

Foreseeability is not dispositive in the proximate-cause analysis. *See, e.g., Martinez*, 225 Cal. App. 3d at 1565. Mere foreseeability does not ensure a sufficiently close connection, especially when the harm results from intervening criminal acts of third parties because the "mere fact that misconduct on the part of another might be foreseen" does not "place the responsibility upon the defendant." PROSSER & KEETER ON THE LAW OF TORTS § 44, at 305 (relied upon in *e.g., Sears v. Morrison* (1999) 76 Cal. App. 4th 577, 585); *see also Novak v. Cont'l Tire N. Am*. (2018) 22 Cal. App. 5th 189, 197 ("Proximate cause analysis is also concerned with intervening forces operating independent of [a] defendant's conduct."). California law does not, for instance, allow "General Motors [to] be sued by someone who was hit by a Corvette that had been stolen by a juvenile [because] . . . General Motors knew that cars that can greatly exceed the legal speed limit are dangerous, and through advertising and by offering discounts, it increased the attractiveness of the car and the number of Corvettes on the road and thus increased the likelihood that a juvenile would steal a Corvette and operate it in a injurious manner." *In re Firearm Cases*, 126 Cal. App. 4th at 991 (quotation omitted).

Plaintiff alleges the nuisance of "the perpetration of crime less easily combatable through traditional law enforcement means," (Compl. ¶ 101), and that Polymer80 "created [this] public nuisance by marketing, selling and distributing ghost gun kits to California residents without serial numbers, without background checks, and without appropriate safety features," (*id.* ¶ 99). But Plaintiff

has failed to produce evidence that Polymer80's business practices in fact or proximately caused this alleged nuisance. The undisputed facts demonstrate that Polymer80 did not.

In re Firearm Cases confirms that Plaintiff's nuisance cause of action fails for lack of evidence of causation. 126 Cal. App. 4th 959.[10] The People's nuisance allegations there are similar to Plaintiff's allegations here. The People in *In re Firearm Cases* alleged that certain firearm manufacturers' business practices—which allegedly "circumvent[ed] federal, state and local laws" and "fail[ed] to incorporate safety features"—created a public nuisance of "supplying handguns to the criminal market that . . . causes death and injury to the public." *Id*. at 986.

The court held that the People's nuisance cause of action failed as a matter of law for lack of evidence of causation. Although the People provided "a mountain of argument," including "studies, monographs and reports," that manufacturing and selling firearms is a risky practice, *id*. at 970, the Court held that "[i]n this case, there is no causal connection between any conduct of the defendants and any incident of illegal acquisition of firearms or criminal acts or accidental injury by a firearm," *id*. at 989 (citing *City of Modesto Redevelopment Agency v. Superior Ct.*, 119 Cal. App. 4th 28, 40 (2004) ("Our research reveals no California state cases holding such defendants liable for causing a nuisance.")). The Court held so even though the defendants presumably foresaw the risk that their products may be misused by criminals. *Id*. at 991 (holding that the "complaint attempt[ed] to reach too far back in the chain of distribution when it targets the manufacturer of a legal, non-defective product that lawfully distributes its product"); *see also Martinez*, 225 Cal. App. 3d 1566 (dismissing public nuisance claim against a telephone company for maintaining a public telephone booth that was primarily used to facilitate crime). *In re Firearm Cases* makes clear that a plaintiff must at the

[10] The *In re Firearm Cases* court is just one of many to hold that a nuisance cause of action against a firearm manufacturer for the criminal acts of independent actors fails for lack of causation. *See, e.g.*, *Ganim v. Smith & Wesson Corp*. (Conn. 2001) 780 A.2d 98, 132 (holding harms "too remote . . . to confer standing" even though allegations fell within definition of public nuisance); *Young v. Bryco Arms* (Ill. 2004) 821 N.E.2d 1078, 1091 (holding that "the defendants' conduct is not a legal cause of the alleged nuisance because the claimed harm is the aggregate result of numerous unforeseeable intervening criminal acts by third parties"); *District of Columbia v. Beretta, U.S.A., Corp*. (D.C. 2005) 872 A.2d 633, 650 (declining to "relax the common-law limitations of duty, foreseeability, and direct causation so as to recognize the broad claim of public nuisance"), *cert. denied*, (2005) 546 U.S. 928; *City of Chicago v. Beretta U.S.A. Corp*. (Ill. 2004) 821 N.E.2d 1099, 1138 (holding pleadings insufficient to establish proximate cause); *People ex rel. Spitzer v. Sturm, Ruger & Co*. (App. Div. 2003) 761 N.Y.S.2d 192, 201–02 (holding harm "far too remote" and that defendants' lawful activity was not a proximate cause of the harm), *appeal denied*, 801 N.E.2d 421 (2003).

summary judgment stage "produce evidence to show" the defendant's business conduct caused the alleged harm. 126 Cal. App. 4th at 990. The People produced insufficient evidence, so their nuisance cause of action failed as a matter of law. *Id*.

Plaintiff here presents even less evidence of causation than in *In re Firearm Cases*. Polymer80 lawfully manufactures and distributes its products. (UMF No. 33). Even still, Plaintiff has produced no evidence that that Polymer80's business practices caused criminal possession of a firearm or caused any firearm-related crimes to occur. (UMF No. 34). Plaintiff has produced no evidence that Polymer80 knew its products were pervasively being used in the commission of any firearm-related crime, was complicit in these crimes, or caused any crime to occur through any act or omission. (UMF No. 35). Nor has Plaintiff produced evidence that Defendants knowingly controlled, helped, or furthered the commission of any criminal misuse of a firearm. (UMF No. 36).

While Plaintiff produced evidence that various police departments have seized firearms with Polymer80 components, Plaintiff cites only five individuals' criminal misuses of Polymer80 products. (UMF No. 37). Beyond this, Plaintiff has produced no evidence that any firearm containing Polymer80 components was seized in connection with a specific criminal act of gun violence in California. Plaintiff has not produced any evidence that these crimes would not have happened had Polymer80's products not been in California. (UMF No. 38).

Plaintiff's evidence suggests at most that Polymer80, at some point, manufactured firearm components that were later seized by law enforcement. This evidence is insufficient to create a triable issue of fact as to whether Polymer80—and not the criminals themselves—legally and proximately caused any crimes to occur. *See In re Firearm* Cases, 126 Cal. App. 4th at 990.

Plaintiff has produced no evidence that Polymer80's business practices undermined law enforcement's ability to prevent and prosecute the possession and criminal use of weapons. Plaintiff has instead stated in conclusory fashion that "law enforcement officers . . . are frustrated" and their jobs "are made more dangerous, by the proliferation of untraceable firearms built from Polymer80 kits." (UMF No. 39). Plaintiff provides no evidence of:

- Any specific law enforcement officer who is frustrated or whose job is made more dangerous by Polymer80's business practices;

- What specifically frustrates these hypothetical officers or makes their job more dangerous by Polymer80's business practices;
- A specific instance of when these hypothetical officers were frustrated or when their job was made more dangerous by Polymer80's business practices; or
- Why Polymer80's business practices frustrate these hypothetical officers or why their job is made more dangerous by Polymer80's business practices.

(*Id.*) As in *In re Firearm Cases*, Plaintiff's baseless allegations are insufficient to create a triable issue of fact as to whether Polymer80 caused a public nuisance.

B. Plaintiff cannot show that Polymer80's business practices caused the alleged harms under the California Unfair Competition Law

Plaintiff's allegation that Polymer80's business practices violated the UCL also fails as a matter of law because Plaintiff cannot show that Polymer80's business practices caused any harm. To prevail on their UCL cause of action, Plaintiff must establish a causal connection between Polymer80's allegedly unfair business practices and the alleged harms. *See, e.g., In re Firearm Cases*, 126 Cal. App. 4th at 977 ("The UCL provisions are not so elastic as to stretch the imposition of liability to conduct that is not connected to the harm by causative evidence." (relying on *Cel–Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co*. (1999) 20 Cal. 4th 163, 185)). Plaintiff alleges that Polymer80's business practices harmed both California firearm dealers and California consumers. (Compl. ¶¶ 78-80). But Plaintiff has produced no evidence that Polymer80's business conduct caused harm to either group.

Plaintiff produced no evidence that Polymer80's business conduct harmed any California firearm dealer. Plaintiff fails to identify any dealer, or consumer as consumer, that has been harmed by Polymer80's business practices. (UMF No. 40). Plaintiff speculates that some unidentified firearm dealer (or dealers) has been harmed in two ways. First, that Polymer80's alleged noncompliance with federal and state regulations has given Polymer80 an unfair advantage because other firearm dealers comply and incur "economic costs." (*Id.*) Second, that Polymer80's business practices might divert two customer bases from these unidentified firearm dealers: those prohibited purchasers who cannot lawfully obtain a firearm and those "who do not want to submit to background checks." (*Id.*).

As an initial matter, Polymer80 is and has since 2016 been a federally licensed firearms dealer, and it complies with all applicable federal and state laws and regulations. (UMF No. 41). Because

Polymer80 sells only firearm components—it does not and has never sold *firearms*—into California, the costs of complying with California's firearm regulations are inapplicable. In any event, Polymer80 ceased sales of even firearm components into California around June 2022. (UMF No. 42).

Moreover, Plaintiff failed to produce any evidence showing that Polymer80's business conduct in fact diverted the alleged customer bases from any California firearm dealer. (UMF No. 43). Plaintiff's speculations that Polymer80's business practices diverted business from California firearm dealers fail even in theory. Prohibited persons may not purchase a firearm from a firearm dealer. They are outside any firearm dealers' customer base. They are by law—not by Polymer80—diverted from purchasing a firearm from a firearm dealer. Individuals who may purchase a firearm in California but refuse to submit to a background check are also outside of firearm retailers' customer base. These individuals' consumer preferences—not Polymer80—divert them from purchasing a firearm from a dealer. Simply put, these two customer bases are disingenuously identified by Plaintiff and simply do not exist. Plaintiff has produced no evidence of any firearm consumer who, but for Polymer80's business conduct, would have submitted to a background check. Plaintiff cannot survive summary judgment by relying on hypothetical diverted customers, *see Mireskandari v. Edwards Wildman Palmer LLP* (2022) 77 Cal. App. 5th 247, 264 ("hypothetical alternative" was "too speculative to be presented to a jury"), especially when those customers cannot exist as a matter of law.

Plaintiff likewise produced no evidence that Polymer80's business harmed California consumers as consumers. When asked to identify how alleged UCL violations harmed consumers, Plaintiff responded with only a bullet-point list of all the ways Polymer80's business practices are allegedly unlawful. (UMF No. 44). Plaintiff produced no evidence of how Polymer80's allegedly unfair actions, outside the vacuum of perhaps being unlawful, have caused any harm to consumers. The failure to tie the alleged unlawful activity to any arguable harm to consumers is fatal.

Plaintiff's evidence of third parties' criminal misuse of Polymer80 products do not evidence causation that Polymer80's business practices have harmed consumers. These examples only highlight that Plaintiff's actual complaint is with third-party criminals, not Polymer80. Plaintiff has produced no evidence that Polymer80 knew, intended, or foresaw that a third-party individual would criminally misuse a Polymer80 product. (UMF No. 45). The only alleged "link" between Polymer80's business

practices and crime is that, at some point, Polymer80 allegedly manufactured firearm components that were later criminally misused, manufactured, or assembled into a weapon that was criminally misused, by some third-party criminal. This evidence is plainly insufficient as a matter of law to create a triable issue of fact as to whether Polymer80 caused criminals to commit crimes.

This Court should grant Defendants' motion for summary judgment based on Plaintiff's failure to establish causation on any of its claims, Cal. Civ. Proc. Code § 437c, or alternatively should summarily adjudicate any claim Plaintiff failed to establish causation, *id.* § 437c(f).

III. PLAINTIFF'S NUISANCE CLAIM FAILS ON THE MERITS BECAUSE MANUFACTURING AND SELLING FIREARMS COMPONENTS OR FIREARMS IS NOT A PUBLIC NUISANCE

Plaintiff's public nuisance claim also fails as a matter of law because California's public nuisance doctrine does not extend to Polymer80's manufacturing and selling of lawful products such as the firearm components or firearms at issue in this case.

A nuisance is "[a]nything which is injurious to health ... or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Cal. Civ. Code § 3479. A public nuisance "affects at the same time an entire community or neighborhood, or any considerable number of persons." *Id.* § 3480. The public nuisance doctrine generally "is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century." *People ex rel. Gallo v. Acuna* (1997) 14 Cal. 4th 1090, 1103.

The public nuisance doctrine in California is confined to public rights: a defendant's use of or effect upon real property *or* a defendant's violation of a statute or ordinance. *See, e.g., Acuna*, 14 Cal. 4th at 1100, 1120-21 (street gang's obstruction of public streets and illegal activities in four-square-block neighborhood); *People ex. rel. Dept. of Transp. v. Maldonado* (2001) 86 Cal. App. 4th 1225, 1231 (billboard advertisement that violated Outdoor Advertising Act); *County of San Diego v. Carlstrom* (1961) 196 Cal. App. 2d 485 (dilapidated, uninhabitable residential structures that created fire hazard); *City and County of San Francisco v. Safeway Stores, Inc*. (1957) 150 Cal. App. 2d 327 (supermarket's use of traffic easement in residential area in violation of zoning ordinance).

A public right is more than an aggregate of private rights by a large number of injured people. It "is one common to all members of the general public." *Acuna*, 14 Cal. 4th at 1104 (citing RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (Am. L. Inst. 1979)). "It is collective in nature and *not like the individual right that everyone has not to be assaulted* or defamed or defrauded or negligently injured." *Id*. (emphasis added); *see also Monks v. City of Rancho Palos Verdes* (2008) 167 Cal. App. 4th 263, 300 (same). The California Supreme Court has relied upon Donald Gifford's article *Public Nuisance as a Mass Products Liability Tort*, which makes clear:

> The manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance. Products generally are purchased and used by individual consumers, and any harm they cause—even if the use of the product is widespread and the manufacturer's or distributor's conduct is unreasonable—is not an actionable violation of a public right . . . . The sheer number of violations does not transform the harm from individual injury to communal injury.

Donald Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 817 (2003); *see Cnty. of Santa Clara v. Sup. Ct.* (2010) 50 Cal. 4th 35, 52 n.9 (citing Gifford's article for a different proposition). California courts have accordingly refused to extend public nuisance law to the sale or distribution of lawful products. In *City of San Diego v. U.S. Gypsum* (1994) 30 Cal. App. 4th 575, 584, for instance, the plaintiff sued several manufacturers and distributors of building materials containing asbestos, alleging that the deterioration of asbestos-containing building materials was a nuisance under Civil Code § 3479. The court affirmed dismissal as a matter of law: "City cites no California decision, however, that allows recovery for a defective product under a nuisance cause of action." *Id*. at 586. The Court noted that public nuisance actions generally relate to the use or condition of property, not to the design, sale or condition of products. *Id*. "Indeed, under City's theory, nuisance 'would become a monster that would devour in one gulp the entire law of tort . . . .'" *Id*. (quoting *Tioga Public School Dist. v. U.S. Gypsum* (8th Cir. 1993) 984 F.2d 915, 921).

Manufacturing and selling firearm components or lawful firearms is no exception. In firearm-related cases, like the instant case, the harm is not to a public right but is personal injury caused by third parties. That harm "is merely an assertion, on behalf of the entire community, of the individual right not to be assaulted," *Chicago v. Beretta*, 821 N.E. 2d at 1116 (emphasis added), which is

expressly not a public right in California, *Acuna*, 14 Cal. 4th at 1104 (public rights are "not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured").

In *Chicago v. Beretta*, the City of Chicago and Cook County brought public nuisance claims against manufacturers, distributors, and dealers of handguns. 821 N.E. 2d at 1108. The city and county alleged that the manufacturing defendants knowingly oversupplied the market with their products and marketed their products to appeal to those who intended to use them for criminal purposes. *Id*. The Illinois Supreme Court affirmed dismissal of the nuisance cause of action, holding that a public right to be free from the threat that others may commit crimes "would permit nuisance liability to be imposed on an endless list of manufacturers, distributors, and retailers of manufactured products." *Id*. The Court warned of the far-reaching effects of a decision otherwise:

> If there is public right to be free from the threat that others may use a lawful product to break the law, that right would include the right to drive upon the highways, free from the risk of injury posed by drunk drivers. This public right to safe passage on the highways would provide the basis for public nuisance claims against brewers and distillers, distributing companies, and proprietors of bars, taverns, liquor stores, and restaurants with liquor licenses, all of whom could be said to contribute to an interference with the public right.

Id.; *accord Philadelphia v. Beretta U.S.A. Corp.* (E.D. Penn. 2000) 126 F. Supp. 2d 882, 909 ("Idyllic and desirable though it may be, there is no similar right to be free from guns and violence."); *cf. In re Firearm Cases*, 126 Cal. App. 4th at 989 n.23 (noting many courts prohibit nuisance claims against firearm manufacturers and dismissing nuisance claim on causation). Appealing to a higher level of generality—a right to safety and welfare—swallows the rule, creating "a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it." *Beretta*, 821 N.E.2d at 1116. A right so broad is contrary to hundreds of years of settled California law.

The overwhelming weight of authority holds that selling and manufacturing lawful products, including firearms, cannot give rise to a public nuisance cause of action. Various plaintiffs have tried to file public nuisance claims "against the makers of products that have caused harm, such as tobacco, firearms, and lead paint," those claims have been squarely "rejected by most courts . . . because the common law of public nuisance is an inapt vehicle." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. g (Am. L. Inst. 2020). As a recent example, the Supreme Court of Oklahoma

canvassed the common law from dozens of states and held that the "public nuisance" doctrine does not apply to "the manufacturing, marketing, and selling of lawful products." *State ex rel. Hunter v. Johnson & Johnson* (Okla. 2021) 499 P.3d 719, 725–26 (rejecting nuisance claim against prescription opioid manufacturer). That conclusion is firmly grounded in the common law and is squarely consistent with California law, which limits public nuisance actions to violations of "public rights," which must be "more than an aggregate of private rights by a large number of injured people." *Id*. at 726. As a result, plaintiffs (including governmental entities) cannot bring a public nuisance claim based on "individual injuries sustained from use of a lawful product." *Id*. at 727.

This case provides no reason to depart from this standard. Polymer80 lawfully manufactured and sold products into California. (UMF No. 46). Polymer80 did not use or effect real property, nor did it violate a statute or ordinance. (UMF No. 47). Just as in *Beretta*, Plaintiff fails to establish a violation of a public right. *Beretta*, 821 N.E.2d at 1116 (holding "there is no authority for the unprecedented expansion of the concept of public rights to encompass the right asserted by plaintiffs"). This Court should not expand public nuisance to claims against a product manufacturer. Under California law, Plaintiff's public nuisance claim fails as a matter of law.

CONCLUSION

Defendants respectfully request that this Court grant Defendants' Motion for Summary Judgment or, in the Alternative, for Summary Adjudication.

DATED: March 16, 2023

GREENSPOON MARDER LLP

By: _____
MICHAEL MARRON
Attorney for Defendants Polymer80, Inc., David Borges, and Loran Kelley

PROOF OF SERVICE

The People of The State of California vs. Polymer80, Inc., David Borges, Loran Kelley
Case No. 21STCV06257

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

I am employed in the County of Jefferson, State of Alabama. I am over the age of eighteen years and not a party to this action. My business address is 1819 5th Avenue N, Birmingham, AL 35203. On March 16, 2023, I served true and correct copies of the following document(s) described as **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address clamar@bradley.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission unsuccessful.

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

Executed on March 16, 2023, at Birmingham, Alabama.

/s/ W. Chadwick Lamar, Jr.
W. Chadwick Lamar, Jr.

SERVICE LIST

The People of The State of California vs. Polymer80, Inc., David Borges, Loran Kelley
Case No. 21STCV06257

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