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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

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

Defendants.

Case No. 21STCV06257

PLAINTIFF THE PEOPLE OF THE STATE OF CALIFORNIA'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR A STAY

Assigned for All Purposes to:
Hon. Daniel S. Murphy, Dept. 32

Date:	May 19, 2023
Time:	8:30 a.m.
Department:	32
Reservation ID:	305522480553
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Trial Date:	May 30, 2023

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INTRODUCTION

Defendants return to this Court with yet another eleventh-hour motion—this time, for judgment on the pleadings or a stay. This motion likewise fails. It is procedurally improper because, contrary to California law, it repeats many of the same arguments that Defendants raised in their overruled demurrer, and there has been no material change in case law that justifies any different outcome now. It is substantively deficient because, as this Court has ruled, the People have more than adequately alleged that the Defendants have been selling unserialized, no-background-check gun-building kits in violation of multiple federal and state gun laws. PLCAA provides Defendants no shelter from this unlawful conduct. Accordingly, the Court should deny this motion and the case should proceed to trial.

STATEMENT OF FACTS

The Complaint alleges that Defendants manufacture, advertise, and sell do-it-yourself firearm-assembly kits that contain components and instructions for the quick and easy assembly of firearms, including both Glock-style semiautomatic handguns and AR-15 semiautomatic rifles. (Compl. ¶ 5.) Firearms assembled from these kits are known as "ghost guns" because they lack serial numbers, which makes them virtually untraceable by law enforcement when recovered at crime scenes. (*Id.* ¶¶ 5, 24). Defendants sell these kits without background checks, even though they know that such kits are particularly attractive to criminals and other individuals (including minors) legally barred from purchasing or possessing firearms. (*Id.* ¶¶ 6, 28, 31.)

Until December 2020, Polymer80 sold "Buy Build Shoot" kits (BBS kits), which contained all the components needed to assemble a functioning semiautomatic handgun. (Compl. ¶¶ 11, 33.) Polymer80 also sells frame kits and receiver kits, which include nearly finished frames or receivers that can quickly and easily be completed and incorporated into a functioning handgun or AR-15. (*Id.* ¶ 35.) These kits come with a jig, drill bits, and other parts and can be combined with other, unregulated parts (also sold by Polymer80) into a functioning weapon. (*Id.* ¶¶ 35-36.) Although these kits constitute "firearms" under federal law (as discussed below), Polymer80's website misleadingly advertised them as "legal" to buy online without a background check. (*Id.* ¶ 13.)

When the People filed this lawsuit in early 2021, Polymer80 was the largest ghost gun maker in the country and had already sold tens of thousands of their products nationwide, most often into California, including hundreds of BBS kits. (Compl. ¶¶ 10, 12.) Each sale into California was illegal: Polymer80 violated provisions of the federal Gun Control Act (GCA) and Child Safety Lock Act (CSLA) requiring firearms to be sold in person, with background checks and serial numbers, and requiring handguns to be sold with gun storage or safety devices. (*Id.* ¶¶ 41-42, 44, 49.) And Defendants aided and abetted violations of the California Unsafe Handgun Act (CUHA) and California's Assembly of Firearms Law (CAFL), which forbid, respectively, the manufacture of handguns without certain safety features and firearms made of polymer plastic that lack 3.7 ounces of steel embedded in the plastic on which a serial number can be affixed. (*Id.* ¶¶ 52-57, 59-60.) The People seek an injunction under the Unfair Competition Law (UCL) to stop these unlawful and deceptive business practices, as well as statutory penalties. (*Id.* ¶¶ 86-89 & pp. 28-29.)

PROCEDURAL HISTORY

On April 20, 2021, Defendants demurred to the People's Complaint, arguing that the People had failed to explain how Polymer80's frame and receiver kits constituted "firearms" or "handguns" under the GCA, failed to plead unlawful, fraudulent, or unfair conduct under the UCL, and failed to state a claim for public nuisance. On May 20, 2021, Defendants moved to stay the case during the pendency of ATF rulemaking on the federal definition of "firearm." This Court denied Defendants' stay motion on May 26, 2021, and on June 7, 2021, it overruled Defendants' demurrer. On September 23, 2021, Defendants filed a motion for abstention, which the Court denied on November 10, 2021. On March 16, 2023, Defendants filed an untimely motion for summary judgment/adjudication, which the Court struck on March 22, 2023. On April 27, 2023, Defendants file this motion ("Mot." or "Motion"). Trial is set to begin on May 30, 2023.

ARGUMENT

I. DEFENDANTS' MOTION IS PROCEDURALLY IMPROPER

Under California law, a defendant can move for judgment on the pleadings "on the same grounds as" a previously overruled demurrer only if "there has been a material change in applicable

case law or statute since the ruling on the demurrer." (Code Civ. Proc., § 438.)

Defendants' Motion fails because it asserts the same grounds as its previously overruled demurrer.[1] For example, both motions argue that the People fail to allege that Defendants' products are "firearms" or "handguns" under the GCA. (Mot. 7-9; Demurrer 4-5.) Both motions argue that the People fail to state a valid public nuisance claim. (Mot. 13-14; Demurrer 10.) And both motions argue – as even Defendants concede (Mot. 3) – that the People fail to plausibly allege aiding-and-abetting liability. (Mot. 10-11; Demurrer 5-7.) This Court rejected all these arguments on demurrer (*see* Demurrer Order at 4-5), and should do the same now.

There has been no "material change in applicable case law or statute" since the Court denied Defendants' demurrer. The two recent Second Amendment decisions cited by Defendants (*Renna v. Bonta* (S.D.Cal. Apr. 3, 2023, No. 20-cv-2190) 2023 WL 2846937; *Boland v. Bonta* (C.D.Cal. Mar. 20, 2023, No. CV 22-01421) 2023 WL 2588565), discussed further below, granted preliminary injunctions but have been stayed in relevant part pending review by the Ninth Circuit, and both found unconstitutional only two of several CUHA requirements that the People allege that Polymer80 violated.[2] Accordingly, these rulings, even if later affirmed, affect only a portion of one of several ways that Polymer80 is alleged to have violated the law, and would not prevent the People from prevailing on either cause of action.

As for the GCA, if there has been any change, it is that the case law has gotten significantly worse for Defendants. Defendants cite the decision of a judge in Texas who held that partially

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[1] Order Re Demurrer to Complaint, *The People of the State of California v. Polymer80*, et al., Case No.: 21STCV06257 (June 7, 2021) ("Demurrer Order").

[2] The two decisions found the (i) chamber load indicator (CLI), (ii) magazine disconnect mechanism (MDM), and (iii) microstamping requirements of CUHA to be unconstitutional. The Ninth Circuit stayed the first decision as to the CLI and MDM requirements, and the second decision was stayed by the district court. *See Boland v. Bonta* (9th Cir. Mar. 31, 2023, No. 23-55276); *Renna v. Bonta*, *supra*, 2023 WL 2846937, at *16. Here, the Complaint alleges that Polymer80 aided and abetted violations of the CLI and MDM requirements but *does not allege* violations of the microstamping requirement. (Compl. ¶¶ 53-54.) In addition, CUHA requires that handguns have (iv) a mechanical "safety device" and satisfy (v) fire-testing and (vi) drop-safety testing requirements. (*Id.* ¶ 53.) The People also allege that (vii) Polymer80's kits are not on the roster of handguns determined not to be unsafe. (*Id.* ¶¶ 55-56.) Requirements (iv) through (vii) are not implicated by either *Renna* or *Boland*. (See infra at 11-13).

complete frames and receivers and gun-building kits do not fit within the GCA's definition of a firearm, but fail to tell the Court about two other decisions that held the opposite and found, consistent with this Court's conclusion overruling a demurrer in *Apolinar v. Polymer80*, that gun-building kits meet the definition of "firearm" if they can be "readily converted" into a functioning weapon or the frame or receiver of a functioning weapon. Just last week, yet another judge rejected precisely the same argument Defendants make here, holding that "weapons parts kits may constitute a 'firearm' under the GCA." *See People v. Blackhawk Manufacturing Group Inc.* (Super. Ct. S.F. City and County, May 2, 2023, No. CGC-21-594577) (copy attached as Exhibit A to Schoen Declaration).

II. PLCAA DOES NOT PREEMPT THIS LAWSUIT

Defendants invoke the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. § 7901 *et seq*., to argue that the People's case must be dismissed on the pleadings. Defendants' arguments are wrong, for multiple reasons.

A. This case is not a "qualified civil liability action" under PLCAA.

PLCAA does not even apply to this case because it does not arise from a third party's criminal or unlawful misuse of firearms. *See* 15 U.S.C. § 7903(5)(A) ("qualified civil liability action" must "result[ ] from the criminal or unlawful misuse of a qualified product by the [plaintiff] or a third party".) Although the criminal and unlawful misuse of Polymer80 firearms is widespread, that is not a necessary element of the People's claims, nor is it necessary for the People's standing. Rather, this case is premised on Defendants' *own* violations of state and federal gun laws: the GCA, the CSLA, CUHA, and CAFL. It is Defendants' *own* unlawful conduct—the sale of unserialized firearms without background checks or secure storage or safety devices, including to prohibited persons, and the aiding and abetting of the manufacture of illegal handguns—that the People seek to enjoin and penalize. PLCAA was designed to protect law-abiding members of the gun industry from vicarious liability when third parties misuse their products. *See City of New York v. Beretta U.S.A. Corp.* (2d Cir. 2008) 524 F.3d 384, 403. It has no application to a lawsuit brought by the People to restrain and penalize a defendant's own law-breaking. Indeed, just last week, another

Superior Court judge found that PLCAA did not apply to sellers of gun-building kits in another UCL case also brought by the People for precisely this reason. *Blackhawk*, *supra*, at 5.

B. This lawsuit qualifies for PLCAA's predicate exception.

As Defendants note, even if this were a "qualified civil liability action," PLCAA does not bar "an action 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). This is known as PLCAA's "predicate exception," and here the People have alleged numerous state and federal statutes that Defendants knowingly violated.[3]

1. The People have adequately alleged violations of the GCA because Polymer80's kits plainly meet the definition of "firearm."

Defendants again assert that their products "fall outside the scope of the GCA as a matter of law" because they are not "firearms." (Mot. 7.) This Court rejected similar arguments in overruling Defendants' demurrer (*see* Demurrer Order at 2-4 (June 7, 2021)) and also rejected the same PLCAA and the GCA arguments when Polymer80 made them in its failed demurrer in *Apolinar* (which alleges that Polymer80's gun-building kits are "firearms" for the same reasons the People assert here).[4] Since those two rulings, a Washington, D.C. court granted summary judgment against

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[3] Preliminarily, Defendants assert that this Court must examine the People's causes of action separately to determine whether each meets PLCAA's predicate exception. (Mot. 5-6.) Not so. PLCAA defines "qualified civil liability action" to be "a civil action or proceeding or administrative proceeding" that meets certain requirements. 15 U.S.C. § 7903(5)(A). Moreover, PLCAA's predicate exception applies to "an action in which" certain conditions are met, such as "any *case* in which" certain laws were violated. *Id.* § 7903(5)(A)(iii), italics added. It is thus of no moment whether the word "action," standing alone, might in some contexts be shorthand for "cause of action." (*Cf.* Mot. 5.) PLCAA's text plainly refers to *civil actions*—cases—as courts have repeatedly recognized. In short, "as long as one PLCAA exception applies to one claim the entire action continues." *Chiapperini v. Gander Mountain Co.* (N.Y.Sup.Ct. 2014) 13 N.Y.S.3d 777, 787 [48 Misc. 865, 876]; *accord Williams v. Beemiller, Inc.* (N.Y.App.Div. 2012) 952 N.Y.S.2d 333, 339-40 (finding no need to analyze negligent entrustment or negligence per se exceptions where predicate exception applied); *Englund v. World Pawn Exch.* (Or.Cir. Multnomah Cty. June 30, 2017, No. 16CV00598) 2017 WL 7518923, at *7 ("because the predicate exception applies, the Court need not determine whether the negligence *per se* exception is specifically applicable").

[4] *Apolinar et al. v. Polymer80, Inc.* (Super. Ct. L.A. County, Feb. 2, 2022, No. 21STCV29196) Minute Order at 3-4 (rejecting an argument that plaintiffs had not adequately pleaded that

Polymer80, finding that the gun-building kits at issue in this case are "firearms" under the District's law (which is nearly identical in relevant part to the GCA), and two other courts found that "weapons parts kits" fit the GCA's "firearm" definition.[5]

Consistent with these decisions, the People here adequately allege that Polymer80's products qualify as firearms under the GCA: the BBS kits "consist[ ] of all components of a firearm, including handgun frames, which are 'designed to' be and 'may readily be converted' into an operable weapon," while frame and receiver kits "contain[ ] an unfinished frame or receiver along with jigs and drill bits that enable a customer to complete" the frame or receiver. (Compl. ¶ 40.) These BBS and pistol frame and receiver kits meet the GCA definition of "firearm" because – as the Complaint alleges – the kits are "weapon[s]" that are "designed to or may be readily converted" to fire (18 U.S.C. § 921(a)(3)(A)) and because the kits include an unfinished "frame or receiver" of a "weapon" that "is designed to or may be readily converted" to fire. 18 U.S.C. § 921(a)(3)(A), (B).

There is no reason for this Court to depart from its own prior overruling of Polymer80's demurrers in this case and in the *Apolinar* case on the GCA issue or the decisions of these three other courts recognizing that the definition of "firearm" is broad enough to capture gun-building kits that include unfinished frames and receivers where they may be readily converted into an operable firearm or the frame or receiver of an operable weapon. That the frames included in Defendants' kits are "unfinished" in that they require minimal machining does not change the analysis under the GCA, as these and numerous prior decisions confirm.[6]

Polymer80's PF940C kits are firearms under the GCA, finding that disputes about the "ready convertibility" of the kits are "unsuitable" for resolution at the pleading stage).

[5] *D.C. v. Polymer80, Inc.* (D.C. Super. Ct. Aug. 10, 2022, No. 2020-CA-002878-B) Order at 6; *Morehouse Enterprises, LLC v. ATF* (D.N.D. Aug. 23, 2022, No. 3:22-CV-116) 2022 WL 3597299, at *5, app. pending sub nom. *West Virginia v. ATF*, (8th Cir. argued Mar. 14, 2023) No. 22-2854; *Blackhawk Manufacturing Group*, *supra*, at p. 5.

[6] *See, e.g., United States v. Stewart* (9th Cir. 2006) 451 F.3d 1071, 1072-73 & n.2 (affirming district court probable cause finding that "parts kits" for "Maadi-Griffin .50 caliber rifles" sold over internet, which included receivers that "had not yet been completely machined," could "readily be converted" and thus were firearms); *United States v. Wick* (D.Mont. July 1, 2016, No. CR 15-30-M-DLC) 2016 WL 10637098, at *1 (explaining that "a plain reading of § 921(a)(3) indicates that if the receiver of a weapon can be readily converted to expel a projectile, then that receiver can be considered a 'firearm' under the statute," and upholding verdict where "the

Defendants argue that their ghost gun kits cannot be "firearms" under the GCA because they are not "weapons" but rather "combinations of parts." That too is wrong. An all-parts-included gun-building kit like Polymer80's BBS kit is a "weapon" by any reasonable interpretation of section 921(a)(3)(A), which includes not-yet-functioning "weapons," so long as they are "designed" or can be "readily converted" to fire. Defendants' interpretation cannot be squared with consistent judicial holdings that a *disassembled* gun is "firearm" covered by the GCA.[7] Defendants also rely on recent decisions issued by a judge in Texas granting Polymer80 and other ghost gun sellers preliminary injunctions against enforcement of ATF's new ghost gun regulations.[8] But these rulings are outliers, their reasoning is flawed, and there is no reason for this Court to follow their erroneous analysis.[9]

Finally, Defendants invoke the rule of lenity as reason to adopt their interpretation of the GCA, but that rule applies only where "after considering text, structure, history and purpose, there

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receiver pieces in Wick's parts kits were readily convertible to Uzi receivers" where they could be welded together in "30 to 45 minutes"), aff'd. on other grounds, (9th Cir. 2017) 697 F.App'x 507; *United States v. Randolph* (S.D.N.Y. Mar. 20, 2003, No. 02-CR-850-01 (RWS)) 2003 WL 1461610, at *2 (gun consisting of "disassembled parts with no ammunition, no magazine, and a broken firing pin, making it incapable of being fired without replacement or repair" was a firearm).

[7] *See, e.g.*, *Wick*, *supra*, 697 F.App'x at p. 508 (complete Uzi parts kits met definition of firearm because it "contained all of the necessary components to assemble a fully functioning firearm with relative ease"); *United States v. Theodoropoulos* (3d Cir. 1989) 866 F.2d 587, 595 n.3, overruled in part on other grounds by *United States v. Price* (3d Cir. 1996) 76 F.3d 526, 528 (disassembled machine pistol that could easily be made operable was a firearm); *United States v. Morales* (S.D.N.Y. 2003) 280 F.Supp.2d 262, 272-73 (partially disassembled pistol that could be assembled in short period of time was a firearm).

[8] *See Polymer80, Inc. v. Garland* (N.D.Tex. Mar. 19, 2023, No. 4:23-cv-00029-O); *VanDerStok v. Garland* (N.D.Tex. Sept. 2, 2022, No. 4:22-cv-00691-O) 2022 WL 4009048, at *11.

[9] In these decisions, Judge Reed O'Connor provides no logical explanation for how or why section 921(a)(3)(A)'s reference to weapons does not reach all-parts-included gun-building kits, even if they require some small amount of drilling and machining. He fails to acknowledge that subsection (B)'s reference to the frame or receiver of "any such weapon" described in subsection (A) incorporates and applies that subsection's "designed" and "readily be converted" language to subsection (B). *See, e.g.*, *Ocean Advocates v. U.S. Army Corps of Eng'rs* (9th Cir. 2005) 402 F.3d 846, 872. And while Judge O'Connor agrees that a "disassembled" weapon is a firearm (*Polymer80 v. Garland*, slip op. at 13), he provides no explanation why a not-yet-assembled weapon-in-a-box should be treated any differently. Finally, although it is true that other parts of the GCA use the phrasing "combination of parts" (*id.* at 17-18), that is not the only formulation of words that Congress can use to capture a weapon that requires some work before it becomes operational.

remains a grievous ambiguity or uncertainty in the statute." *Maracich v. Spears* (2013) 570 U.S. 48, 76, quoting *Barber v. Thomas* (2010) 560 U.S. 474, 488. Here, this is manifestly not a case where, after considering those factors, the Court finds itself at such a loss that it "must simply guess as to what Congress intended." *Id.*[10]

2. The People have adequately alleged violations of the CSLA.

The People have alleged that Defendants violated the CSLA in selling BBS kits without secure gun storage or safety devices. (Compl. ¶¶ 45-49.) A BBS kit, which contains "all the components necessary for the purchaser to quickly assemble a complete and operable firearm" (*id*. ¶ 21), is a "handgun," because it amounts to a "combination of parts from which a firearm [with a short stock that is designed to be fired by one hand] can be assembled." 18 U.S.C. § 921(a)(30), recodified from 18 U.S.C. § 921(a)(29) in 2022. Defendants argue that if any amount of "drilling or machining" to a single component is required in an all-parts-included gun-building kit like the BBS kit, then that kit cannot be "assembled" and therefore cannot be a "handgun" under the CSLA. But Defendants cite no case law to support their argument, and this Court "need not adopt an interpretation of statutory language … that leads to absurd or futile results at variance with policy or legislation as a whole." *Wenger v. Lumisys, Inc.* (N.D.Cal. 1998) 2 F.Supp.2d 1231, 1242. Not surprisingly, the word "assemble" has not been interpreted to carry this narrow meaning elsewhere in the GCA. *See United States v. Kirkland* (9th Cir. 2018) 909 F.3d 1049, 1053-54 (applying definition of a "destructive device," which includes a "combination of parts … from which a destructive device may be *readily assembled*," 18 U.S.C. § 921(a)(4)(C), to include even "situations

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[10] Even if the Court were to accept Defendants' argument that its gun-building kits are not "firearms," that would just provide another reason why PLCAA does not apply. "Seller" is defined in PLCAA, in relevant part, as a "dealer" who is "engaged in the business of selling *firearms*." 15 U.S.C. § 7903(5)(A), (6); *see* 18 U.S.C. § 921(a)(11) ("The term 'dealer' means (A) any person engaged in the business of selling *firearms* at wholesale or retail"), emphasis added.) If the conduct giving rise to the People's claims does not relate directly to Polymer80's "business of selling firearms," and if all they are doing is selling (or manufacturing) unregulated firearm "parts" (for which no federal license is required), then PLCAA does not apply. *See Ileto v. Glock* (9th Cir. 2009) 565 F.3d 1126, 1145-46 (rejecting defendant's argument that it was entitled to PLCAA protection because it qualified as a "seller" under PLCAA where that aspect of defendant's business was not related to the case). And the People's CUHA and CAFL claims do not depend on Defendants' kits satisfying the definition of a "firearm" under federal law.

in which the assembly process entails the acquisition and addition of a new part," and recognizing that "[r]eading the statute to require possession of *every* necessary component, even a single item that could be readily obtained, would defeat the flexibility Congress sought to build into the statutory scheme and 'would foster easy evasion to thwart the Congressional intent'").

3. The People have adequately alleged violations of CUHA.

Defendants argue that the People's allegations that Polymer80 aided and abetted violations of CUHA fail because two district courts—in *Renna* and *Boland*—recently found provisions of CUHA unconstitutional. But as explained above, regardless of whether the Ninth Circuit upholds or reverses *Renna* and *Boland*, the People's CUHA-based allegations, which form only one of multiple theories of wrongdoing alleged here, survive because other aspects of CUHA are untouched by those district court decisions. *Renna* and *Boland* limited their holdings to three provisions of CUHA—the CLI, MDM, and microstamping provisions—and declined to find that CUHA's original roster, firing, or drop-safety requirements were unconstitutional.[11] Here, the People allege that Defendants' products violate the CLI and MDM requirements (Compl. ¶ 54), but do not allege violations of the microstamping requirement. The People also allege that Polymer80 ghost guns "are not listed on the Roster of Certified Handguns maintained by the State of California" (*id.* ¶ 56; see also *id*. ¶ 78), and that Defendants failed to certify that their products were not unsafe handguns (*id*. ¶ 78), which includes, among other things, that they "meet firing requirements" and "satisfy drop safety requirements." Pen. Code, § 31910, subd. (a)(2), (3). Accordingly, the People can prevail on their allegations that Polymer80 violated CUHA regardless of what happens in the CUHA cases on appeal. Moreover, the CLI and MDM rulings have been stayed pending appeal, which indicates that the Ninth Circuit has concerns about whether the cases were decided correctly.[12]

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[11] *Renna*, 2023 WL 2846937, at *1 ("Plaintiffs have not met their burden to show that the UHA's roster listing requirement, fees, and other safety and testing requirements, all of which became effective in 1999, themselves or in combination with other requirements" violate the Second Amendment); *Boland*, 2023 WL 2588565, at *11 (confirming plaintiffs sought – and Court issued – injunction limited to "only the CLI, MDM and microstamping requirements").

[12] *See generally Boland v. Bonta* (9th Cir. Apr. 28, 2023, No. 23-55276) Opening Brief of the California Attorney General (copy attached as Exhibit B to Schoen Declaration).

Substantively, the People have sufficiently alleged that Defendants aided and abetted violations of CUHA by selling ghost gun kits to California residents. (*See* Compl. ¶ 57.) The People allege that Defendants knew and intended that their kits would be assembled into unsafe handguns, in violation of CUHA, and yet sold them into California anyway. (*See id.* ¶¶ 12, 54-57.) Defendants assert that nothing in the Complaint suggests that they "had knowledge of a purchaser's criminal intent, shared that intent, [or] encouraged or facilitated commission of that offense." (Mot. 10.) But the unlawful act at issue here is the *manufacture* of unsafe handguns—*i.e.*, the assembly of Polymer80 BBS kits and frame kits into handguns in violation of CUHA's many requirements. (*See* Compl. ¶ 57; Pen. Code, § 32000, subd. (a)(1).) All the People need allege is that Defendants knew or understood and intended that the handgun kits they sold into California would in fact be assembled there, and that such assembled weapons were not CUHA-compliant. The People need *not* allege (or prove) that Defendants knew or intended that any particular firearm that it sold would later be used to commit another crime like a shooting. (*Cf.* Mot. 11.) The Complaint also specifically alleges that Defendants published step-by-step assembly instructions online and assisted their customers in assembling functioning firearms from the kits, further showing their knowledge, intent, and substantial assistance vis-à-vis California consumers. (*See* Compl. ¶ 37.) That constitutes aiding and abetting the manufacture of unsafe handguns. It is certainly enough at the pleading stage, as this Court held in *Apolinar* when it rejected the same argument on a demurrer. Super. Ct. L.A. County, No. 21STCV29196, at *4.

4. The People have adequately alleged violations of CAFL.

The People have sufficiently alleged that Defendants aided and abetted violations of CAFL for much the same reason. As with CUHA, the assembly of Polymer80 handguns violates CAFL because Defendants' frames, which are made of polymer plastic, do not contain the legally required 3.7 ounces of stainless steel embedded within them. (*See* Compl. ¶¶ 59-60; Pen. Code, § 29180, subd. (b)(2)(B).) Thus, as with CUHA, by selling into California ghost gun kits whose very assembly violates CAFL, Defendants have aided and abetted the violation of CAFL. (*See* Compl. ¶¶ 59-61.) Again, Defendants' knowledge and intent that their kits would be assembled into polymer-frame

firearms that lack the mandated 3.7 ounces of steel is underscored by the allegations that Defendants provided instructions and assistance to their customers. (*See id.* ¶ 37.)

5. The People have adequately alleged facts to satisfy the predicate exception's proximate-cause requirement.

The last step in establishing PLCAA's predicate exception is alleging that "the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii). Defendants argue that the Complaint fails to sufficiently allege that Defendants' violations of law proximately caused "independent criminal actors' misuses of Polymer80 products." (Mot. 11.) Their argument misses the point. The alleged harms "for which relief is sought" are Defendants' own violations of law. (*See, e.g.,* Compl. ¶¶ 86-89.) Defendants cannot and do not argue that their conduct did not proximately cause the legal violations at the heart of this lawsuit—*i.e.,* the unlawful sale *by Defendants* of unserialized firearms without background checks and the aiding and abetting of the unlawful manufacture, by Defendants' customers, of unsafe handguns that do not comply with CUHA or CAFL. No further crime or shooting need be committed for the People to seek relief for these violations.[13] For the same reasons, this connection is not "too remote." (Mot. 12.) Defendants posit five steps. (*Id.* at 12-13.) But the harms that the People allege as the basis for relief occur at steps one and two: unlawful sales of unserialized no-background-check guns in violation of the GCA and CSLA and, as Defendants knew and intended, assembly of those firearms in violation of state law.[14]

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[13] Even if Defendants were right that the People must show proximate causation of the "downstream criminal acts," there is nothing "speculative" about the connection between Defendants' unlawful conduct and the "increase in ghost gun-related violence and illegal activity" in Los Angeles. (Mot. 12.) The People have alleged an increase in the number of ghost guns recovered at crime scenes in Los Angeles and an increase in the proportion of ghost guns among all firearms recovered from crime scenes in Los Angeles. (Compl. ¶¶ 2, 7, 10.) The People have also alleged that Defendants sell "the vast majority of the kits and parts used to assemble these illegal and untraceable firearms." (*Id.* ¶ 4.) Because *all* of Defendants' sales of ghost gun kits into California were unlawful (*see, e.g.*, *id.* ¶¶ 42, 56, 60), the connection between Defendants' unlawful activity and the downstream harms alleged in the Complaint – including "the proliferation of untraceable handguns in the hands of prohibited purchasers" (*id.* ¶ 91), the "significant threat to the public right of health and safety in public spaces" (*id.* ¶ 99), and the increased use of their ghost guns in crime – is clear.

[14] By contrast, in the case Defendants cite, the defendants were "manufacturers [who] produce *lawful* handguns and make *lawful* sales to *federally licensed gun distributors*, who in turn *lawfully*

Defendants' argument that "superseding criminal misuse of Polymer80 products forecloses proximate cause" also fails. (Mot. 13.) First, the harm "for which relief is sought" requires no "criminal misuse" beyond Defendants' illegal sales and aiding and abetting of the illegal manufacture of firearms. Second, even if it did, Defendants acknowledge that a superseding cause is one that is not foreseeable. *Id.*; *accord Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1274. As alleged here, it was entirely foreseeable that the sale, without background checks, of untraceable firearm-building kits would result in guns in the hands of prohibited persons and crimes committed with those firearms. (*See, e.g.*, Compl. ¶¶ 28-31.)[15] Third, Defendants' suggestion that "criminal misuse of [firearms] by independent actors" can never satisfy PLCAA's proximate-cause requirement would eviscerate the predicate exception. PLCAA's exceptions were intended to permit lawsuits arising out of "the criminal or unlawful misuse of a [firearm] by … a third party," provided that certain conditions were met. 15 U.S.C. § 7903(5)(A). If third-party misuse necessarily vitiated proximate cause, the predicate exception would be impossible to satisfy. That is not the statute that Congress wrote.

III. THE PEOPLE HAVE PROPERLY ALLEGED A PUBLIC NUISANCE

A "nuisance" is "[a]nything which is injurious to health" (Civ. Code, § 3479), and a "public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons." Civ. Code, § 3480. "A public nuisance cause of action is established by proof that a defendant knowingly created or assisted in the creation of a substantial and unreasonable interference with a public right." *People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 79. For a nuisance to be substantial, it must create "significant harm," which is "definitely offensive, seriously annoying or intolerable." *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1105, quoting Rest.2d Torts, § 821F, coms. c & d. And to be unreasonable, its "social utility" must be outweighed by "the gravity of the harm it inflicts." *Id.*

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sell those handguns to *federally licensed dealers*." *Camden County Board of Chosen Freeholders v. Beretta, U.S.A. Corp.* (3d Cir. 2001) 273 F.3d 536, 541 (emphasis added..

[15] This Court rejected similar proximate-cause arguments from Defendant Polymer80 in the related case, *Apolinar v. Polymer80, Inc.* (Super. Ct. L.A. County, No. 21STCV29196, at *5.)

The People have properly alleged a public nuisance. The Complaint alleges that Defendants "created a public nuisance by marketing, selling, and distributing ghost gun kits to California residents without serial numbers, without background checks, and without appropriate safety features." (Compl. ¶ 99.) This conduct has "created a significant threat to the public right of health and safety in public spaces" and "dangerous conditions that threaten Los Angeles residents." (*Id.*) Moreover, the People alleged that Defendants' conduct is unreasonable and that "the seriousness of the harm to the public" is outweighed by the "little or no social utility in the proliferation of untraceable firearms sold without background checks." (*Id.* ¶ 100.)

Defendants argue that "the purported 'public right of health and safety'" is not "cognizable" under public nuisance law. Mot. 13. But California courts disagree. *See People v. ConAgra Grocery Products Co.*, 17 Cal.App.5th at 112. There, the Court of Appeal rejected the notion that lead paint "merely pose[s] a risk of private harm in private residences," holding that there is a "collective social interest in the safety of children in residential housing." *Id.* A similar public right to the health and safety of community members is at issue in this case. Notably, *ConAgra Grocery* rejected the defendants' attempts to rely on Illinois public-nuisance law (*id.*), which Defendants here also seek to do. *See* Mot. at 13-14, citing *City of Chicago v. Beretta, U.S.A. Corp.* (2004) 213 Ill. 2d 351, 363 [821 N.E.2d 1099, 1116].

In any event, the *City of Chicago* case is inapposite because, as with most of Defendants' citations, it involved "the *lawful* sale of a nondefective product." 821 N.E.2d at 1109 (emphasis added). Defendants try to preempt this objection by asserting that the "legality of [their] conduct is irrelevant to … whether [a] public right exists." (Mot. 14, fn. 6.) But in *City of Chicago*, the specific "public right" that the Illinois court rejected was a "public right to be free from the threat that others may use a *lawful product* to break the law." 821 N.E.2d at 1116 (emphasis added). The People are not invoking any such right in this case. Similar objections can be made to the cases Defendants cite from Pennsylvania and Oklahoma. *See City of Philadelphia v. Beretta U.S.A., Corp.* (E.D.Pa. 2000) 126 F.Supp.2d 882, 906 (considering whether "Pennsylvania law recognize[s] a public nuisance tort for distribution practices of a legal, non-defective product"); *State ex rel. Hunter v. Johnson &*

Johnson (Okla. 2021) 499 P.3d 719, 725 & fn. 14 ("our Court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products" but "has considered whether a defendant was liable for public nuisance involving the marketing or selling of goods … when the marketing or selling of that product was illegal").

Defendants cite language from the Restatement Second of Torts, quoted by the California Supreme Court, that a public right is "not like the individual right that everyone has not to be assaulted." Mot. 13-14. But as the Restatement makes clear, this traditional, common-law definition of "public right" is not strictly required where, as in California, a public nuisance includes "interference with 'any considerable number of persons.'" Rest.2d Torts, § 821B, com. g; see Civ. Code, § 3480. Ultimately, Defendants' argument hinges on the assertion that "Polymer80 *lawfully* manufactured and sold products into California." Mot. 14 (emphasis added). The Complaint, of course, alleges just the opposite, and that is enough to survive Defendants' pending motion.

IV. THE COURT SHOULD NOT STAY THE CASE

This case has been pending for over two years, and is set for trial in just a few weeks. As explained above, the Ninth Circuit has stayed the preliminary injunctions in *Renna* and *Boland*, and even if affirmed would not have a material impact on the trial of this case. The Court should reject Defendants' attempt to derail or delay the trial.

DATED: May 8, 2023

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 865 South Figueroa Street, 10th Floor, Los Angeles, CA 90017-2543.

On May 8, 2023, I served true copies of the following document(s) described as

PLAINTIFF THE PEOPLE OF THE STATE OF CALIFORNIA'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR A STAY

on the interested parties in this action as follows:

See 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 Katherinekim@quinnemanuel.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 was unsuccessful.

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

Executed on May 8, 2023 at Los Angeles, California.

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