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STATE OF MICHIGAN
IN THE 22nd JUDICIAL CIRCUIT FOR THE COUNTY OF WASHTENAW

GUY BOYD,
Plaintiff,

Case No. 24-000304-NP
v.
Hon. Julia B. Owdziej

NOT AN LLC d/b/a JSD SUPPLY and
KYLE THUEME,
Defendant.

CIVIL-CRIMINAL LITIGATION CLINIC By: David Santacroce (P61367) Attorney for Plaintiff 863 Legal Research Building 801 Monroe Street Ann Arbor, MI 48109-1215 (734) 763-4319	PENTIUK, COUVREUR & KOBILJAK, P.C. By: Randall A. Pentiuk (P32556) And: Kerry L. Morgan (P32645) Attorneys for Defendant Not an LLC d/b/ JSD Supply, Only 2915 Biddle Avenue, Suite 200 Wyandotte, MI 48192 (734) 281-7100 rpentiuk@pck-law.com kmorgan@pck-law.com

JSD'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

First, Boyd cites *Moning v Alfono*, 400 Mich 425 (1977) in support of his argument that JSD owed him a "common law duty to exercise reasonable care, especially in connection with marketing and selling dangerous instrumentalities to children". (Response, pg. 5). Boyd's reliance upon *Moning* is disingenuous. *Moning* is inapplicable because that case involved a toy slingshot which was marketed directly to children.

> The issue in the instant case is not whether slingshots should be manufactured, but **the narrower question** of whether marketing slingshots **directly to children** creates an unreasonable risk of harm. *Id.* at 451 (emphasis added). [1]

[1] *Moning* is also distinguishable because the slingshots at issue there were manufactured by a toy company, did not require any assembly and could launch projectiles "out of the box" without any further action by the 10-year old children who purchased them. In this case, the Kits were not manufactured by a toy company, were not "marketed directly to children", could not fire projectiles as sold, required machining and assembly and further required that Theume affirmatively seek out and **purchase compatible firearm magazines and ammunition from other sources**.

Indeed, **the entire holding in *Moning* involves the narrow question where products are marketed directly to children, which is not the case here**. Courts have repeatedly held *Moning* is limited to products "directly marketed to children" and cannot be used to impose a duty outside that specific context. *Id.* at 445 ("special rules for children are not unusual"); *Buczkowski v McKay*, 441 Mich 96 (1992)(emphasizing that *Moning* found a duty of care…**because the product at issue was targeted specifically toward children**, "a class historically protected under the law of torts")[2]. *Buczkowski* further held:

> We granted leave in this case to determine whether to impose a duty on a retailer to protect a bystander injured by the use of shotgun ammunition it sold to defendant…while…intoxicated, and whether the sale of the ammunition was a proximate cause of the plaintiff's injury. Because the product sold was neither defective nor inherently dangerous, and because the Legislature has not defined a class of purchasers who we may deem legally incompetent to buy ammunition, we find that the retailer did not have a legal duty to protect plaintiff, a member of the general public, from the criminal act of the defendant.

JSD did not market "directly to children" according to JSD's own website which Boyd extensively cites in his Complaint. Boyd has not produced any such evidence. Moreover, like the ammunition in *Buczkowski*, the Kits were "neither defective nor inherently dangerous"[3]. *Moning* cannot be used to establish a duty here.[4] Boyd ignores these critical and controlling legal

[2] *See also Rookus v Randy Merren Auto Sales*, unpublished decision of the Michigan Court of Appeals, Docket No. 336766, decided February 13, 2018 ("plaintiffs cite caselaw in which our state's Supreme Court imposed duties of care despite the lack of relationship between the parties. But **the Court has only imposed such a duty where a protected class of persons, such as children, is involved**… plaintiffs are not entitled to the imposition of a duty in the absence of any relationship between plaintiffs and defendant")(emphasis added). *McCarthy v Sturm & Ruger, Co* 916 F. Supp. 366("to extend this theory to the general public would be a dramatic change in tort doctrine." *Moning* only applies where products are directly marketed to children, not the general public, finding no duty existed against manufacturer of ammunition); *King v RG Industries* 182 Mich App 343; 451 NW2d 874 (1990) (dismissing negligence claim against manufacturer of "Saturday night special" .38 revolver and distinguishing *Moning* because manufacturer did not market weapons directly to criminals and no special relationship existed)

[3] *See US v Hernandez*, No. 22-122-GBW, 2024 U.S. Dist. LEXIS 38093, at *13-14 (D Del 2024)("for a weapon to be "dangerous," it must be more dangerous than weapons in common use for self-defense in the present era").

[4] Boyd's reliance upon *Moning* is especially ironic because he asks this Court to do exactly what the Michigan Supreme Court held should not be done, *i.e.* conflate specific and general standards of care which are two very different things depending upon whether a given product is marketed to the general public or "directly to children". *See Moning* at 439 (a court should not "combine the separate questions of duty, general and specific standard of care and proximate cause…Combining in one statement these different questions obscures the functions of the court").

distinctions, is committed to recast this lawsuit in emotional terms, and persuade this Court to enter the legislative arena.

Boyd also distinguishes "active misconduct" from "passive inaction" by arguing "JSD actively created the danger". Boyd has not cited any authority for this position. It is beyond the pale for Boyd to argue JSD "actively" created a danger by merely supplying inoperable parts where **Thueme, not JSD**, assembled the Kits, actively sought out and purchased a magazine and ammunition from third parties, consumed drugs and alcohol, and recklessly aimed a loaded firearm at Boyd's face. By Boyd's logic, Dick's Sporting Goods' sale of a baseball bat to a minor would make it liable if that minor struck his friend in a drunken stupor. This is not the law.

Next, Boyd alleges JSD owed him a duty under negligence *per se*, which "presumes a breach of duty where a defendant acts **in violation of law**". (Response pg. 5). It is surprising Boyd insists on advancing this argument because JSD did not sell Thueme a "firearm" as that term is defined by the US Supreme Court, the GCA, the BATF, Michigan statutes, and federal and state courts. Boyd repeats the same flawed argument over and over, *i.e.* "JSD violated MCL §§ 28.422 and 750.234f(1) which prohibit (a) selling **a firearm**…" (emphasis added). This is addressed in JSD's Motion: **JSD did not sell Thueme a "firearm"**. Boyd attempts to avoid this by arguing his "allegations" are sufficient to oppose summary disposition. But Congress, the BATF and federal courts have already held these Kits are not "firearms". *See* Title and Definition Changes, 43 Fed. Reg. 13531, 13537 (March 31, 1978); *California v ATF*, *Id*; *United States v Rowold*, *Id.*

This is not a question for the jury, rather, it has already been decided and is governed by binding precedent. The Court must keep it clearly in mind, the product **as sold** is the basis of the Complaint, not the product after it was altered, modified and created by Thueme. What indeed is that product? It is a set of parts that cannot be made into a workable firearm unless the purchaser

obtains a magazine and ammunition, obtains tools such as a hammer, punches, files, a Dremel or mill and expends time and skill to modify the product. None of these were sold by JSD. Nor did JSD modify anything. This is akin to saying Home Depot's sales of sticks and rubber bands to a 17-year old is really the sale of a slingshot to a minor and Home Depot is liable in tort when the minor creates a slingshot and injures his friend after finding the perfect stone in his parents outdoor planter.

Boyd's proximate cause and negligent entrustment theories fail because they are based upon the same flaw as his common law negligence claim. All of the cases cited at pgs. 12-16 of Boyd's Response involve individuals who provided fully functional firearms to children/mentally ill people and/or products marketed directly to children (which are illegal). Boyd also argues he only needs to allege "JSD knew or should have known" Thueme generally possessed "unreasonable risk propensities". (*Id.* pg. 14). But this is speculation because Boyd cannot prove JSD knew of Thueme's particular, "unreasonable risk propensities" which he **must** do for negligent entrustment[5]. *Fredericks, Id.* at 719 (no affirmative duty to inquire as to user's status).

Finally, Boyd's MCPA claim fails because the right to sell the Kits is protected by the 2nd Amendment. *Rigby v Jennings*, 630 F Supp 3d 602 (D Del 2022) ("the right to keep and bear arms implies a corresponding right to manufacture arms. Indeed, the right to keep and bear arms would be meaningless if no individual or entity could manufacture a firearm"). Boyd's argument that JSD's sale of the Kits was not specifically authorized is absurd, especially where that right arises under the 2nd Amendment and has been "specifically authorized" by both the ATF and federal

[5] *Detroit v Gen Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998)("[P]arties opposing a motion for summary disposition must present more than conjecture and speculation").

courts (which held such sales are permitted and lawful). *Vanderstok, Id.* cert granted 23-852, April 22, 2024.[6]

Nor did JSD make any false statements to Thueme. Boyd misleads this Court by selectively quoting portions of JSD's website that purportedly benefit him while ignoring other relevant language. JSD stated: "Non-firearm 80% lower receivers may be illegal to own, finish, or use in your location"[7]. Moreover, most states do not require any license/registration to purchase a pistol. *See eg* ARS 13-3108 (Arizona Revised Statutes)[8]. JSD's statements that a pistol assembled from its kits may not require paperwork were true in most jurisdictions and JSD specifically advised Thueme he should check laws in his own jurisdiction. This was not misleading or deceptive under the MCPA.

Respectfully submitted,
PENTIUK, COUVREUR & KOBILJAK, P.C.

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[6] The United States Supreme Court has stayed the nationwide injunction issued by the Fifth Circuit striking the ATF "ghost gun" rule and accepted *certiorari* to take the matter up this term. Plaintiff's counsel asks this Court to jump into this national legal fray in this tort action.

[7] https://web.archive.org/web/20210421192800/https://jsdsupply.com/terms-and-conditions/ By purchasing from JSD, Thueme also acknowledged that he "read and understand your local laws when it pertains to unfinished non-firearm 80% lower receivers and parts. You understand that JSD Supply nor any of its officers has implied a legal determination to your unique situation." *Id.* By using www.jsdsupply.com, you understand that JSD Supply and its associates will not be liable for any legal issues that may arise from the use of or inability to use any of the products on this site. Please check with your state's Attorney General's Office if you are unsure of your situation.

[8] In fact, numerous states have laws prohibiting registration of firearms, as does the federal government. *See* Section 103(i) of the Brady Handgun Violence Prevention Act. A homemade gun does not have to be registered unless state or local law requires registration. (18 USC § 922(d) (2023).