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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

Coordination Proceeding Special Title (Rule 3.550) GHOST GUNNER FIREARMS CASES Included actions: Cardenas v. Ghost Gunner, Inc., d/b/a GhostGunner.net, et al., Orange County Superior Court Case No. 30-2019-01111797-CU-PO-CJC McFadyen v. Ghost Gunner, Inc. d/b/a Ghost Gunner.net, et al., San Bernardino Superior Court Case No. CIVDS1935422	Case No. 5167 *Assigned to the Honorable William D. Claster as Coordination Trial Judge, Dept. No. CX104* **PETITIONERS' REPLY TO PLAINTIFFS' OPPOSITION TO PETITION FOR INCLUSION OF ADD-ON CASE** **Proposed Add-On Case:** Sacramento County Superior Court Case No. 34-2021-00302934-CU-PO-GDS
KELLEY and DENNIS O'SULLIVAN, in their Individual Capacity and KELLY O'SULLIVAN as Administrator of the Estate of TARA O'SULLIVAN, Deceased, Plaintiffs, vs. GHOST GUNNER INC., d/b/a GHOSTGUNNER.NET, et al., Defendants.	

INTRODUCTION

Plaintiffs in both this coordinated proceeding ("*Ghost Gunner*") and *O'Sullivan, et al. v. Ghost Gunner, Inc., et al.*, Case No. 34-2021-00302934-CU-PO-GDS ("*O'Sullivan*") seek to hold Defendants liable under a market share liability theory based on their purported business practices. While the incidents that gave rise to the *Ghost Gunner* and *O'Sullivan* cases are different, Plaintiffs' respective legal theories and allegations regarding Defendants' products and business practices are identical. The single most predominant issue in each of these cases is whether market share liability can be properly applied to Defendants' products under California law. While Plaintiffs acknowledge that this is a common issue, they attempt to diminish its importance. Plaintiffs disingenuously argue that "[c]ommon legal theories and causes of action exist in thousands of civil cases" but that alone does not "suggest that common issues of law predominate." (Ghost Gunner Pltfs' Opp. at 4:16-19; see also O'Sullivan Pltfs' Opp. at 7:4-6.) But these cases are plainly not just a couple of random negligence actions as Plaintiffs portray them. They both involve identical legal theories asserted against mostly the same group of defendants for the same alleged conduct concerning the same types of products and practices.

As set forth in Petitioners' opening brief, all factors weigh in favor of coordinating *O'Sullivan* as an add-on case, including (1) the legal theories at issue predominate and defendants' demurrers will be nearly identical; (2) consolidating discovery greatly increases convenience and efficiency for both the parties and the judiciary; (3) coordination avoids wasting judicial resources; (4) coordination avoids the clear risk of duplicative or inconsistent rulings on identical issues; (5) the cases remain at an early stage, such that now would be the ideal time to coordinate; and (6) would facilitate settlement. In opposition, Plaintiffs do not cite a single case to support their arguments and fail to even address, let alone distinguish, any of the cases relied upon by Petitioners. Plaintiffs' respective oppositions focus on factual distinctions with the underlying incidents while ignoring the predominating legal issues common to each case, while case law instructs the exact opposite approach. They also raise concerns about convenience that case law again instructs are easily mitigated by the flexibility afforded to the coordination judge by the rules adopted by the Judicial Council under Code Civ. Proc., § 404.7. In fact, the majority of Plaintiffs' arguments are

directly contradicted by the principal case relied upon by Petitioners, *McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804 (coordinating 300 separate cases pending in over 20 California counties which all involved different underlying facts, but concerned similar products and legal theories.) Plaintiffs' failure to even attempt to distinguish *McGhan* is telling, as that case sets a clear precedent for the propriety of coordinating *O'Sullivan* as an add-on case.

Plaintiffs also make much that only six out of the seventeen defendants named in both cases bring a petition to coordinate *O'Sullivan*. But the more remarkable fact is that not a single defendant in either matter opposes coordination; a fact that decidedly favors coordination. Plaintiffs cite no authority to suggest otherwise, or any authority at all.

Finally, Plaintiffs issue a misguided warning against the supposed risk of Defendants seeking to coordinate all cases involving "ghost guns" brought in California. This demonstrates an inherent misunderstanding about the basis for which Petitioners seek coordination of *O'Sullivan* as an add-on case. As far as Petitioners are aware, the *Ghost Gunner* and *O'Sullivan* cases are the only cases pending in California asserting market share liability against an industry of manufacturers and sellers of so-called "ghost gun parts and kits." Petitioners seek coordination due to these cases sharing unique predominating legal theories. In sum, while Petitioners have set forth specific, case-law-rooted reasons for why the factors weigh in favor of coordinating *O'Sullivan*, Plaintiffs have simply failed to make either a legal or practical case for why coordination should not be granted. Accordingly, this Court should grant the petition to coordinate O'Sullivan as an add-on case.

ARGUMENT

1. Significant common questions of law and fact predominate.

It is indisputable that Plaintiffs[1] in all three cases are attempting to apply a market share liability theory against defendants due to their admitted failure to identify which, if any, of the defendants' products were used to cause their injuries. (*McFadyen* Complaint, 24:10-14, *Cardenas*

[1] Unless otherwise indicated, reference to Plaintiffs shall mean the plaintiffs in all three cases, including the plaintiffs in the coordinated Ghost Gunner Firearm Cases, and the plaintiffs in the *O'Sullivan* action.

Complaint, 21:13-19, and *O'Sullivan* Complaint, 22:8-12.) Plaintiffs' respective oppositions attempt to minimize this important common and predominating issue of law. The truth remains, however, that Plaintiffs' theory of liability and the products at issue in each case are *identical*. And, as such, the viability of Plaintiffs' market share liability theory in the context of so-called "ghost gun parts/kits" predominates. Simply put, as a matter of law, market share liability is either applicable to Defendants' products or it is not.

Plaintiffs incorrectly argue that the *Ghost Gunner* and *O'Sullivan* cases arising from different incidents will "almost certainly mean that there will not be common legal issues." (Ghost Gunner Pltfs' Opp. at 4: 12-13, see also O'Sullivan Pltfs' Opp. at 7:24-8:1.) Not so. Plaintiffs appear to misunderstand the nature of their own claims. The viability of market share liability rises and falls with whether it can be properly applied to the products at issue. (*See Sindell v. Abbott Laboratories* (1980) 26 Cal. 3d 588, 612; *Wheeler v. Raybestos-Manhattan* (1992) 8 Cal.App.4th 1152, 1155-1156.) In this respect, the facts underlying each case are irrelevant. Tellingly, Plaintiffs provide no explanation for specifically why the different incidents raise distinct legal questions. They do not cite any authority nor do they even attempt to distinguish the cases cited by Petitioners. As set forth in Petitioner's opening brief, it is well established that where, as here, common legal questions predominate, coordination is proper, even if the precise incidents that gave rise to each matter are different. (*See* Petition at 9:12-25; *McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804.) Moreover, Plaintiffs disregard that there are also common questions of fact in each case. While the specific incidents that gave rise to the *Ghost Gunner* and *O'Sullivan* cases are different, Plaintiffs' allegations regarding Defendants' alleged business practices and products are the same. Indeed, entire sections of the complaints in each matter are verbatim copies of each other; a fact Plaintiffs conveniently ignore. (*See* Petition at 8:13-26.) In their respective oppositions, Plaintiffs claim that merely because the underlying incidents are different, common issues cannot predominate. But Plaintiffs' argument is belied by the law. (*See McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804.) The trial court's reasons for denying coordination in *McGhan* that the appellate court expressly rejected were effectively identical to the arguments Plaintiffs make here. (*Id*. at 808.) This Court should likewise reject them.

Plaintiffs further contend that the answer to whether market share liability is applicable in each case will be different "since different defendant sets are named in the *Ghost Gunner cases* than in the *O'Sullivan* case." (Ghost Gunner Pltfs' Opp. 5:1-3.) But Plaintiffs again fail to explain how this impacts the analysis, let alone cite any authority in support of their argument. In fact, whether Plaintiffs have joined as defendants the manufacturers of a substantial share of the market is an essential element of market share liability. (*See Sindell v. Abbott Laboratories* (1980) 26 Cal. 3d 588, 612; *Wheeler v. Raybestos-Manhattan* (1992) 8 Cal.App.4th 1152, 1155-1156.) Thus, differences in named defendants in each action is also a common legal issue that predominates since it directly impacts the applicability of market share liability.

Plaintiffs also suggest that coordination is improper because the legal issues may eventually change due to the *O'Sullivan* plaintiffs indicating that they may not ultimately rely on a market share liability theory because they "expect to dismiss defendants (if any) who can demonstrate that their ghost gun kits were not used in the *O'Sullivan* shooting." (Ghost Gunner Pltfs' Opp. at 5:3-11, see also O'Sullivan Pltfs' Opp. at 8:4-6.). Plaintiffs act like this is a novel or magnanimous concept. It is not. In fact, Plaintiffs in *all* actions have an obligation to do so. Market share liability is a burden shifting doctrine, and a defendant avoids liability "by proving that it did not produce the specific product that harmed the plaintiff." (*Mullen v. Armstrong World Industries, Inc.* (1988) 200 Cal. App. 3d 250, n. 6, internal quotations omitted.) Any plaintiffs who willfully refuse to voluntarily dismiss a defendant that proves it did not manufacture the product that caused their injury would potentially subject themselves to sanctions. In any event, Plaintiffs' speculation about what they may do should they learn additional facts is irrelevant. Plaintiffs cannot claim that coordination is inappropriate now because their legal theories *might* end up changing in the future. Plaintiffs are restricted to defending their complaints as currently written.

Moreover, Ghost Gunner Plaintiffs appear, at least in part, to be pursuing market share liability premised on pure speculation, arguing that their claims are partially based on firearms that may or may not have existed, and that they may never know if they existed because a fire might have destroyed them. (Ghost Gunner Pltfs' Opp. at 2:24-25; 5:9-11.) First of all, *Ghost Gunner* Plaintiffs do not make this allegation in their complaints, and it is therefore not properly before the

Court. Most importantly, however, Plaintiffs could never maintain an action based on such tenuous and hypothetical allegations. It is fundamental that a product liability action, even one based on market share liability, requires identification of the product at issue. (*Setliff v. E. I. Du Pont de Nemours & Co.* (1995) 32 Cal. App. 4th 1525, 1536 ["plaintiff's failure to identify the specific product causing his injury resulted in a failure to state a cause of action for either negligence or products liability"].) As such, Plaintiffs' attempt to draw a distinction between the *Ghost Gunner* and *O'Sullivan* cases based on hypothetical products allegedly at issue in the *Ghost Gunner* cases is seriously misguided.

Finally, Plaintiffs claim that coordinating *O'Sullivan* as an add-on case would invite Defendants to request that various other lawsuits involving "ghost gun manufacturers" also be coordinated, apparently arguing that doing so would cause further delay. (Ghost Gunner Pltfs' Opp. at 6:5:16.) But the cases Plaintiffs cite as examples of other "ghost gun cases" have been in litigation for several month, and no defendant in this matter has indicated any intention to seek coordination of them. This is because, unlike the instant Plaintiffs, the plaintiffs in those cases are not attempting to assert market share liability against an entire industry. As discussed at length, Petitioners are not seeking coordination of *O'Sullivan* as an add-on case merely because it also involves "ghost guns" as Plaintiffs suggest. Rather, coordination is being pursued here because the *Ghost Gunner* and *O'Sullivan* cases both allege that market share liability should be applied against defendants based on their purported business practices concerning a particular type of product. In any event, whether additional cases might qualify for coordination is not among the factors that courts consider in determining whether to coordinate actions. (*See* Code Civ. Proc., §404.1.) Indeed, in *McGhan,* the court coordinated 300 separate cases pending in over 20 California counties against various defendants. (*McGhan Medical Corp., supra,* 11 Cal.App.4th at 808.) Plaintiffs wholly ignore *McGhan,* let alone explain how the *3* cases here are distinguishable from the *300* coordinated there.

In sum, common questions of law and fact predominate the *Ghost Gunner* and *O'Sullivan* cases, weighing strongly in favor of coordinating *O'Sullivan* as an add-on case.

2. <u>Coordination increases convenience of parties, witnesses, and counsel.</u>

Because significant common questions of law and fact predominate in each of these matters,

coordination will naturally increase the convenience of witnesses, counsel, and parties. For example, as explained in Petitioners' opening brief, Defendants will file demurrers to all of the complaints. (*See* Petition at 10:2.) Due to the identical legal theories asserted in both the *Ghost Gunner* and *O'Sullivan* cases, Defendants' demurrers would likewise be essentially identical across all the cases. Defendants and their counsel would be greatly inconvenienced having to argue the same demurrer separately in two different courts that could, as explained below, result in conflicting outcomes, leading to potential appeals in one case and trial in the other. Plaintiffs call Petitioners' concerns about duplicative demurrers a "red herring," yet provide no basis for why Petitioners' concerns are invalid. (Ghost Gunner Pltfs' Opp. at 7:21-22.)

Plaintiffs also raise vague concerns about potential inconveniences based on location of witnesses, parties, and counsel in *O'Sullivan*. (Ghost Gunner Pltfs' Opp. at 7:14-17, see also O'Sullivan Pltfs' Opp. at 9:3-16.) But courts have explained that "with today's technology, there is no reason why counsel, parties and witnesses should have to travel frequently" because they can email, electronically file, and appear remotely, if needed. (*Ford Motor Warranty Cases* (2017) 11 Cal.App.5th 626, 643.) Plaintiffs' arguments regarding the location of parties, counsel and witnesses are significantly undermined by available technology and the ease of remote proceedings in today's society. In fact, given the recent COVID-19 pandemic, remote proceedings have become the norm in many cases.

Likewise, Plaintiffs' concern about written discovery varying between the matters is unfounded. (Ghost Gunner Pltfs' Opp. at 6:25-7:3.) Any concern regarding varying discovery is mitigated by the flexibility provided by the rules adopted by the Judicial Council under Code Civ. Proc., § 404.7. (*See McGhan Medical Corp., supra,* 11 Cal.App.4th at 806 [holding that the flexibility afforded to the coordination judge undermine concerns of inconvenience].) Moreover, "[c]ounsel and the court may take advantage of technology to devise means to coordinate discovery and other pretrial practice so as to avoid 'great inconvenience.' " (*Id*., [citing *Tech Tips From the Bench: An Interview with Hon. Emilie Elias* (Summer 2015) ABTL Report Los Angeles.].) On the other hand, Plaintiffs ignore Petitioners' legitimate concerns about the advantages of avoiding duplicative depositions and document productions. It is indisputable that depositions of defendants'

representatives and those of its experts would be essentially the same in all of these matters, as would any potential document production made by Defendants. Consolidating discovery thus clearly weighs strongly in favor of coordinating *O'Sullivan* as an add-on case.

3. Each action remains at a very early stage.

Plaintiffs concede that both actions remain at early stages but argue that this factor tilts against coordination because the *Ghost Gunner Firearms Cases* are ready to begin discovery, while discovery in *O'Sullivan* is not ready to proceed because the suspect in the shooting is being criminally prosecuted and law enforcement has indicated it will not give them access to the evidence. (Ghost Gunner Pltfs' Opp. at 8:3-17, see also O'Sullivan Pltfs' Opp. at 9:18-20.) But, as set forth above, the coordination judge has great flexibility to mitigate this concern. (*See* Code Civ. Proc., § 404.7; *See McGhan Medical Corp., supra*, 11 Cal.App.4th at 806.) The Court may simply stagger discovery in the respective matters to address any timing issues.

Importantly, however, the first phase of these litigations is Defendants' demurrers. As Petitioners have explained, Defendants intend to demur to each of the complaints in the *Ghost Gunner Firearms Cases* and *O'Sullivan* on identical grounds; namely, that their market share liability theory is inapplicable here and that none of the Defendants breached any duty to Plaintiffs by engaging in their businesses that are lawful under California and federal law. To the extent these cases proceed beyond the demurrer stage, the *O'Sullivan* plaintiffs can request a stay of their lawsuit pending the criminal case. Indeed, in the event the *O'Sullivan* plaintiffs survive demurrer, equity demands that they request a stay in light of their admission that critical information about the identity of the firearms misused to murder Officer O'Sullivan will remain unknown until after the criminal trial. (Ghost Gunner Pltfs' Opp. at 8:3-17.)

4. Coordination would promote efficient utilization of judicial resources.

Plaintiffs' arguments for why coordination would decrease judicial efficiency are all based on the erroneous premise that these matters are not essentially identical at the pretrial phase. (Ghost Gunner Pltfs' Opp. at 8:18-9:11.) Because these matters concern identical legal issues, it is indisputable that proceeding in separate courthouses to address the same issues is a burden on both the second court hearing the motions and the parties having to relitigate them.

5. The disadvantages of duplicative or inconsistent rulings are significant.

As an initial matter, Plaintiffs incorrectly suggest that Petitioners must establish a "likelihood" of duplicative or inconsistent rulings. (Ghost Gunner Pltfs' Opp. at 9:12-13.) This factor does not concern the likelihood of such rulings. Rather, it merely asks for consideration of "the disadvantages of duplicative and inconsistent rulings" that *may* occur. (Code Civ. Proc., §404.1; *see also Ford Motor Warranty Cases* (2017) 11 Cal.App.5th 626, 645 [rejecting trial court's determination that there was "not a significant risk that there would be duplicative and inconsistent rulings regarding the [defendant's] liability . . . given the issues specific to each vehicle and to each filed case" because it "ignores 'the disadvantages of duplicative and inconsistent rulings' (§ 404.1) on discovery and other pretrial matters that precede determinations of [defendant's] liability."].) Petitioners have demonstrated that duplicative or inconsistent rulings on significant filings could be significantly and unduly burdensome by forcing defendants to potentially have obligations in one matter that they do not in the other or be on appeal in one matter while in trial on the other.

Plaintiffs argue that because the facts of the underlying incidents are different, different rulings in the respective cases may result for good reason, and thus "it is irrelevant whether one case might have some issues on appeal while another goes to trial." (Ghost Gunner Pltfs' Opp. at 9:16-22.) This argument, again, depends on Plaintiffs' erroneous premise that these cases do not rely on identical legal theories alleged against mostly the same defendants. As explained above, all defendants have expressed an intent to demur to all three complaints on essentially the same grounds. Plaintiffs' argument is thus contrary to precedent that "if possible, trial rulings should be accomplished in a manner permitting uniform and centralized resolution on appeal. This sort of treatment can be achieved by coordination of motion practice." (*McGhan Medical Corp., supra,* 11 Cal.App.4th at 813.)

6. Coordination of these actions would facilitate settlement.

Petitioners assert that they, and likely all defendants involved in both of these matters, are less likely to settle if coordination is denied and the matters proceed on separate tracks because their potential liability will remain unknown should they settle one case and not the other. (*See* Petition at 11:27-12:1.) Plaintiffs do not dispute that assertion. Instead, they argue that

coordination would hinder settlement by "unnecessarily adding complexity" because each action has some different parties and might proceed on a different timeline. (Ghost Gunner Pltfs' Opp. at 10:10-11.) Plaintiffs' vague argument about coordination "adding complexity" does not change or outweigh Defendants' uncertainty about their potential liability in making a settlement with one set of plaintiffs but not the other.

* * * *

As established in the Petition and above, *all* of the §404.1 factors support coordination of *O'Sullivan* as an add-on case with the *Ghost Gunner Firearms Cases* for pretrial purposes.

CONCLUSION

For the above reasons, Petitioners respectfully request that the *O'Sullivan* matter be coordinated as an add-on case with the *Ghost Gunner Firearms Cases* for all pretrial purposes; specifically, for responsive pleadings, discovery, and dispositive motions.

Dated: October 21, 2021

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PROOF OF SERVICE

STATE OF CALIFORNIA
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I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

On October 21, 2021, I served the foregoing document(s) described as:

PETITIONERS' REPLY TO PLAINTIFFS' OPPOSITION TO PETITION FOR INCLUSION OF ADD-ON CASE

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

Executed on October 21, 2021, at Long Beach, California.

Laura Palmerin

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