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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CIVIL COMPLEX CENTER

Hon. William D. Claster, Coordination Trial Judge

Coordination Proceeding Special Title (Rule 3.550) GHOST GUNNER FIREARMS CASES Included actions: Cardenas v. Ghost Gunner, Inc. dba GhoseGunner.net, et al. McFadyen, et al. v. Ghost Gunner, Inc. dba GhostGunner.net, et al.	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 5167 **NOTICE OF DEMURRER AND DEMURRER OF DEFENDANTS TO PLAINTIFFS' COMPLAINTS; MEMORANDUM OF POINTS AND AUTHORITIES** Hearing Date: May 6, 2022 Hearing Time: 9 a.m. Department: CX104 Reservation No.: 73662202

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 6, 2022, at 9:00 a.m. or as soon thereafter as the matter may be heard in Department "CX104" of the above-entitled Court, located at 751 W. Santa Ana Blvd., Santa Ana, California, 92701 the below Defendants will generally and specially demur to Plaintiffs' Complaints on the grounds that the Complaints fail to set forth facts sufficient to constitute a cause of action and fail to include the requisite certainty required to allow Defendants to defend against Plaintiffs' claims.

Defendants' demurrer is made pursuant to California Code of Civil Procedure, Sections 430.10 and 430.30 *et seq*. Defendants respectfully request that this Court sustain their general demurrer without leave to amend as Plaintiffs cannot cure the defects in their Complaints. Alternatively, Defendants request that this Court sustain their special demurrer. Pursuant to CCP § 430.41, the parties completed a meet and confer conference prior to the filing of Defendants' demurrer.

This demurrer is based upon this notice, the accompanying demurrer, the accompanying memorandum of points and authorities, the accompanying request for judicial notice, the pleadings and records on file with the Court, and upon such further oral and documentary evidence as may be presented at the time of the hearing.

Respectfully submitted.

Dated: January 24, 2022

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DEMURRER TO COMPLAINT

Pursuant to California Code of Civil Procedure § 430.30(e), the below Defendants Juggernaut Tactical, Inc., MFY Technical Solutions, LLC, Blackhawk Manufacturing Group, Inc., Thunder Guns, LLC, Ghost Firearms, LLC, Tactical Gear Heads, LLC, Defense Distributers, Cody R. Wilson, Polymer80, Inc., and James Tromblee, Jr., d/b/a USPatriotArmory.com, by and through their respective attorneys, respectfully demur to Plaintiffs' Complaints on the following grounds:

1. These two coordinated wrongful death and personal injury actions arise out of a series of shootings that occurred in Rancho Tehama Reserve, an unincorporated community in Tehama County, on November 13-14, 2017. During his deadly rampage, 44-year-old Kevin Janson Neal intentionally and criminally shot and killed five people and injured eighteen others at eight separate crime scenes. Neal died by suicide shortly before local law enforcement officers could apprehend him.

2. Plaintiffs have commenced this action claiming that Defendants should be responsible for the criminal misuse of Defendants' products. Plaintiffs, however, concede that they have not identified the manufacturer or distributor of the products misused by Neal. As such, Plaintiffs' Complaints fail to allege causation, an essential element of each of their causes of action. That failure warrants dismissal of the Complaints in their entirety.

3. Plaintiffs attempt to avoid dismissal by claiming that a market share liability theory should be applied against Defendants. But Plaintiffs do not allege facts sufficient to establish a prima facie case of market share liability as a matter of law. Initially, Plaintiffs do not allege that Defendants' products are defective or inherently harmful. Because market share liability is a unique and narrow doctrine that only applies in product liability cases arising from harm caused by an inherently defective product, Plaintiffs' market share liability theory is necessarily meritless.

4. Plaintiffs' market share liability theory is also unsound because it is based on the incorrect assumption that Defendants' products are fungible. Plaintiffs do not, however, allege facts sufficient to establish the fungibility of Defendants' products and, in any event, Defendants' products are demonstrably not fungible. Plaintiffs further fail to allege that they are unable to identify the product that caused their injuries due to circumstances out of their control, which are

prima facie requirements for stating a tenable claim under market share liability. Because Plaintiffs' market share liability theory fails as a matter of law, each of Plaintiffs' causes of action is subject to demurrer and should be dismissed for this reason alone.

5. Plaintiffs' negligence cause of action (Count I) is subject to demurrer for the additional reason that Plaintiffs fail to sufficiently allege that Defendants breached a duty owed to them. Plaintiffs improperly attempt to impose duties applicable to firearm sales on Defendants. Because Defendants could not, as a matter of law, breach a duty not imposed upon them, Plaintiffs' negligence cause of action must fail. This cause of action also fails because the claim is uncertain, vague, and ambiguous.

6. Plaintiffs' negligence per se cause of action (Count II) is subject to demurrer because there is no separate cause of action for negligence per se under California law. Moreover, Plaintiffs fail to allege a cognizable claim that Defendants violated any law that could even potentially give rise to a negligence per se cause of action. This cause of action also fails because the claim is uncertain, vague, and ambiguous.

7. Plaintiffs' negligent entrustment cause of action (Count III) is subject to demurrer for failure to state facts sufficient to constitute a cause of action. In particular, Plaintiffs fail to allege facts demonstrating that any of the Defendants even sold anything to Neal, let alone that any Defendant knew Neal was the purchaser, or that he was a danger to himself or others. These are essential elements of a claim for negligent entrustment, and Plaintiffs have not alleged them. This cause of action also fails because the claim is uncertain, vague, and ambiguous.

8. Plaintiffs' public nuisance cause of action (Count IV) is subject to demurrer because they fail to link their claimed injuries to Defendants' products. Causation is an essential element to a claim for public nuisance and Plaintiffs have not alleged it. In fact, they concede that they do not know which Defendants' products purportedly caused their injuries. This cause of action also fails because the claim is uncertain, vague, and ambiguous.

9. Plaintiffs' causes of action under California Business & Professions Code Section 17200 (Counts V and VI) are subject to demurrer because Plaintiffs do not have standing to assert claims under Section 17200 since they do not claim to be consumers whose injuries resulted from

direct business relationships with Defendants, as they must under that provision. Plaintiffs' Section17200 causes of action are also subject to demurrer for failure to allege causation. These causes of action also fail because the claims are uncertain, vague, and ambiguous.

Dated: January 24, 2022

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INTRODUCTION

These coordinated actions arise from a series of criminal shootings that occurred in Rancho Tehama Reserve, an unincorporated community in Tehama County, on November 13-14, 2017. During a deadly rampage, Kevin Janson Neal ("Neal") shot and killed five people and injured eighteen others at eight separate crime scenes. To perpetrate his criminal assault, Neal allegedly misused semi-automatic rifles assembled from a "receiver blank" and a variety of readily available component parts. "Receiver blanks" or "80% lower receivers" are items that have not yet reached the stage of manufacture to meet the definition of a "firearm frame" or "receiver" according to the Gun Control Act, 18 U.S.C. 921(a)(3). And they must be significantly machined to become operable receivers that can then be incorporated into a functioning firearm. (*Cardenas* Compl. ¶ 46; *McFadyen* Compl ¶ 62).[1] Because they do not meet the definition of "firearm" under California or federal law, Defendants' products currently are, and at the time of the incident were, legal to manufacture and sell without any special license. (See Request for Judicial Notice in Support of Defendants' Demurrer ("RJN"), Exhibit B; *see also City of Syracuse, NY v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 1:20-CV-06885-GHW, 2021 WL 23326, at *1 (S.D.N.Y. Jan. 2, 2021) ["In 2015, the ATF promulgated an interpretive rule distinguishing a firearm from an unregulated frame or receiver based on a solidity test, and in 2015 and 2017, issued three determination letters to that effect to a gun-building kit supplier, Polymer80, which features the letters on its websites as proof of the legality of selling gun-building kits."].) ATF has published on its website photographs depicting an example of a "receiver blank" versus a "firearm". (*See* RJN, Exhibit C [Depicting an example of a "receiver blank" versus a "firearm"].)

Defendants are various manufacturers, distributors, and/or retailers of "receiver blanks" and other firearm parts. While Plaintiffs concede they have not identified the actual manufacturer

[1] References to "*McFadyen* Compl." relate to the case initiated by plaintiffs Troy McFadyen, *et al*., in the Superior Court of California for the County of San Bernardino, Docket Number CIVDS 1935422. References to "*Cardenas* Compl." relate to the case brought by plaintiff Francisco Gudino Cardenas in the Superior Court of California for the County of Orange, Docket Number 30-2019-01111797-CU-PO-CJC. Hereinafter, they are collectively referred to as "Complaints."

of the parts that Neal misused, they claim that their admitted failure to plead causation is not fatal to their Complaints. They are incorrect. Plaintiffs attempt to apply a market share liability theory against Defendants in an effort to scapegoat an entire industry for the criminal misuse of lawfully sold and properly functioning products. Market share liability is an alternative theory of liability applicable in a very narrow subset of product liability cases where a group of manufacturers produce from an identical formula a defective product that poses a singular, inherent risk of harm. The doctrine further requires that the allegedly defective product be fungible, that the specific manufacturer thereof cannot be identified, and that a plaintiff injured by the product names as defendants a "substantial share" of all the manufacturers in the respective industry. Yet, Plaintiffs' Complaints are fundamentally flawed because they do not even allege that Defendants' products are defective. To the contrary, those pleadings make clear that whatever products Neal criminally misused to cause Plaintiffs' injuries functioned without defect. Tellingly, California courts have never applied market share liability in a case where, as here, the product at issue functioned properly, is not claimed to be defective, and caused damages solely by a third party's misuse. Extending the doctrine to this set of facts would drastically and improperly expand its scope in contravention of controlling case law and of the principles underlying its original purpose.

Moreover, Plaintiffs' effort to interject market share liability into this case is based upon mere assumptions that Defendants' products are fungible goods whose origin cannot be identified. But Plaintiffs assume wrongly, and their allegations are insufficient to state a claim based on fungibility. They do not claim that Defendants' products lack any distinguishing characteristics as required for market share liability and, in fact, the goods at issue are demonstrably *not* fungible.

In addition to their inability to sustain a market share liability theory, Plaintiffs' causes of action warrant dismissal for the following additional reasons: (1) Plaintiffs' negligence cause of action imposes on Defendants the strict duties that statutory law applies to firearm sales without any legal basis for doing so, and thus Plaintiffs fail to sufficiently allege that Defendants breached a duty owed to them; (2) Plaintiffs' negligence per se cause of action fails because Plaintiffs do not identify any law that they allege Defendants have violated in distributing their products, and improperly attempt to manufacture a viable claim by alleging that Defendants "aided and abetted"

Neal's violation of a statute, while at the same time conceding they do not know which, if any, of the Defendants actually sold him any products; (3) Plaintiffs' negligent entrustment cause of action is meritless because such a claim must be based on a seller's direct interaction with and knowledge of the purchaser, but Plaintiffs do not allege that any Defendant actually sold any products to Neal or that any Defendant had knowledge of Neal's character or propensities, let alone even knew who he was at the time of his purchase; (4) Plaintiffs' public nuisance claim is groundless because they have not alleged sufficient facts establishing a causative link between the conduct of any of Defendants and their claimed injuries; and (5) Plaintiffs' two Section 17200 claims fail because Plaintiffs lack standing to assert them since they do not allege that they were consumers whose claimed injuries resulted from direct business relationships with Defendants. Indeed, Plaintiffs concede that they cannot even say which, if any, Defendant caused their injuries.

For the foregoing reasons and those explained in detail below, Plaintiffs' Complaints should be dismissed in their entirety, as a matter of law.

BACKGROUND

On November 13-14, 2017, Neal is alleged to have "engaged in a rampage shooting spree" that "killed or injured [p]laintiffs or their loved ones." (*McFadyen* Compl. ¶¶ 13, 94; *Cardenas* Compl. ¶¶ 13, 78). On November 14, 2019, the *McFadyen* plaintiffs filed an action in the Superior Court of California for San Bernardino County, and the *Cardenas* plaintiff filed another in the Superior Court of California for Orange County, against the same thirteen (13) named defendants (and 50 DOES). Both complaints assert the same six causes of action: (i) negligence, (ii) negligence *per se,* (iii) negligent entrustment, (iv) public nuisance, (v) violation of Business and Professions Code Section 17200 (unfair and unlawful sales practices), and (vi) contravention of Business and Professions Code Section 17200 (unfair marketing tactics). The *McFadyen* and *Cardenas* actions were coordinated under Docket Number JCCP 5167.

The now-coordinated Complaints both aver that Defendants bear responsibility for Neal's conduct, because they purportedly manufactured, distributed, and/or sold "kits and firearms parts that are easily assembled by the purchaser into fully functioning weapons, including AR-15 style assault weapons . . . to California residents leading up to November 2017." (*McFadyen* Compl. ¶¶

2, 11; *Cardenas* Compl. ¶¶ 2, 11). And, Plaintiffs maintain that Neal "used these parts/kits to assemble at least two AR-15 style 'ghost gun' rifles barred under California's prohibition on assault weapons." (*See McFadyen* Compl. ¶¶ 13, 96; *Cardenas* Compl. ¶¶ 13, 80).[2] However, these Complaints do not specifically identify which of Defendants' products Neal supposedly used. Instead, Plaintiffs expressly concede that "[i]t is unknown how and where Neal acquired the 'ghost gun' parts/kits used to assemble the weapons used in the attack," and that "it may be impossible to determine the exact manufacturer(s)/seller(s) of the 'ghost gun' parts/kits Neal used to assemble the AR-15 style 'ghost gun' rifles used in the attack." (*McFadyen* Compl. ¶ 98; *Cardenas* Compl. ¶ 82). Moreover, the Complaints do *not* assert that Plaintiffs undertook any investigation or efforts to identify the source of the "two AR-15 style semiautomatic rifles" that Neal "was in possession of and used . . . [d]uring his rampage." (*McFadyen* Compl. ¶ 96; *Cardenas* Compl. ¶ 80).

Unable (or unwilling) to determine the source(s) of Neal's rifles, Plaintiffs have sweepingly and lawlessly sued what appears to be random members of the "parts/kits" industry upon a legal hypothesis wholly tethered to probability and market share liability and largely asserted upon mere information and belief. Indeed, Plaintiffs allege only (upon information and belief) that "*there is a substantial probability that one or more of the Defendants* sold Neal" and "shipped . . . to Neal's California residence . . . one or more 'ghost gun' parts/kits used to assemble the AR-15 style rifles used in the attack." (*McFadyen* Compl. ¶¶ 106-07 (emphasis added); *Cardenas* Compl. ¶¶ 90-91 (emphasis added)). That "information and belief" as to this "substantial probability" is founded, in turn, upon a further averment, itself tendered "upon information and belief," that Defendants "in aggregate, were responsible for manufacturing and/or selling a substantial percentage of all 'ghost gun' parts/kits enabling assembly of AR-15 style 'ghost gun' rifles which entered into California leading up to and during November 2017." (*McFadyen* Compl. ¶ 105; *Cardenas* Compl. ¶ 89). Thus, Plaintiffs endeavor to hold all Defendants liable in the "aggregate" on a market-share

[2] Plaintiffs also allege that Defendants "designed, advertised, [and] marketed" these so-called "'ghost gun' kits/parts" to "criminals, killers, and others whose possession of firearms pose an unacceptably high threat of injury to others" by "intentionally emphasiz[ing] that 1) their products can be used to assemble untraceable weapons and 2) enable the purchaser to evade background checks and interaction with [a Federal Firearms Licensee]." (*McFadyen* Compl. ¶¶ 4, 7, 11; *Cardenas* Compl. ¶¶ 4, 7, 11).

construct owing to the purported fungibility of Defendants' products, alleging as follows:

> "Ghost gun" parts/kits that can be used to assemble unserialized AR-15 style rifles are fungible products. Such parts/kits share the same core characteristics and present an equivalent risk of danger to members of the public like PLAINTIFFS. These products provide dangerous parties like NEAL with an identical capability to possess untraceable assault weapons without going through an FFL [federally licensed firearms dealer] and in violation of California's assault weapons ban.

(*McFadyen* Compl. ¶ 108; *Cardenas* Compl. ¶ 92). Plaintiffs do not, however, allege that Defendants' products lack any distinguishing characteristics that would render them incapable of being differentiated. And, perhaps most critically, Plaintiffs do not allege that Defendants' products are defective, a fundamental premise on which market share liability theory was founded.

Plaintiffs tacitly acknowledge that their market-share and fungibility-based legal theory is infirm, insofar as they know that specific Defendants *must* have proximately caused the cited harm for the injury to be legally cognizable. Therefore, Plaintiffs assert, as they are constrained to do, that "[w]hichever Defendant or Defendants are responsible, either directly or as an accomplice, for selling Neal one or more 'ghost gun' parts/kits in violation of one or more statutes including, at minimum, California's assault weapons ban, breached the standard of care imposed by statute." (*McFadyen* Compl. ¶ 137; *Cardenas* Compl. ¶ 118. *Accord*, *McFadyen* Compl. ¶ 155 ("Whichever Defendant or Defendants sold or shipped one or more 'ghost gun' parts/kits . . . to Neal . . . were . . . negligently entrusting these one or more items."); *Cardenas* Compl. ¶ 133).[3]

For the reasons below, Plaintiffs' Complaints are subject to demurrer, and should be dismissed in their entirety because they fail to state any valid cause of action under California law.

LEGAL ARGUMENT

I. The Demurrer Standard.

In ruling on a demurrer, trial courts should consider, based on all facts alleged, whether "the plaintiff is entitled to any relief at the hands of the court against the defendants." (*Schnall v.*

[3] *See also, e.g.*, *McFadyen* Compl. ¶¶ 117-27 [alleging "the actions and conduct of Defendants, which granted Neal access to . . . dangerous weapons" caused Plaintiffs' harm]; *Cardenas* Compl. ¶¶ 101-08; *McFadyen* Compl. ¶ 179; *Cardenas* Compl. ¶ 154; *McFadyen* Compl. ¶ 185; *Cardenas* Compl. ¶ 160; *McFadyen* Compl. ¶ 5; *Cardenas* Compl. ¶ 170.

Hertz Corp. (2000) 78 Cal.App.4th 1144, 1152.) A demurrer should be sustained without leave to amend if the plaintiff does not show "a reasonable possibility to cure any defect by amendment" or "that the pleading liberally construed can state a cause of action." (*Ibid*.) While the allegations of the complaint must be treated as having been admitted, this applies only to well-pleaded allegations. (*Consumer Cause, Inc. v. Weider Nutrition International, Inc*. (2001) 92 Cal.App.4th 363, 366 ["In reviewing a demurrer dismissal, all well-pleaded factual allegations must be assumed as true."].) Courts need not accept as true a plaintiff's contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Rakestraw v. Cal. Physicians' Serv.* (2000) 81 Cal.App.4th 39, 43.) A complaint will not survive demurrer if it does not allege facts sufficient to support a cause of action. (*Ibid*.)

II. Plaintiffs' Market Share Liability Theory is not Viable in this Case.

Plaintiffs allege that this matter qualifies as one of the rare instances where the burden of proof shifts to Defendants to show they did not cause Plaintiffs' harm under a market share liability theory. Plaintiffs are wrong. To succeed under that theory, Plaintiffs must prove that: (1) a defective product, which defect has a singular, inherent risk of harm, caused an injury to Plaintiffs; (2) that the origin of the product that allegedly caused Plaintiffs' injury cannot be identified through no fault of the Plaintiffs; (3) that Defendants' products alleged to have caused Plaintiffs' injury are "fungible" goods; and (4) that Plaintiffs have joined as Defendants the manufacturers of a "substantial share" of the market of the defective, injury-causing product. (See *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 612; *Wheeler v. Raybestos-Manhattan* (1992) 8 Cal.App.4th 1152, 1155-1156; *Mullen v. Armstrong World Industries, Inc.* (1988) 200 Cal.App.3d 250 [declining to apply market share liability to asbestos products because asbestos was not a fungible good]; *Sheffield v. Eli Lilly & Co.* (1983) 144 Cal.App.3d 583, 597-99 [declining to apply market share liability to the "manufacturers of a product [polio vaccine] not intrinsically defective for the purpose for which it was used"]; *Morris v. Parke, Davis & Co.* (C.D.Cal. 1987) 667 F.Supp. 1332, 1348 [holding plaintiffs can recover under market share liability theory "if and only if they establish they have joined as defendants the manufacturers of a substantial share of the market."].)[4]

[4] "If, after proceeding against the industry in this manner, plaintiff successfully establishes

Plaintiffs' Complaints, however, fail to "state facts sufficient to establish a prima facie case of market share liability . . .." (*Wheeler v. Raybestos-Manhattan* (1992) 8 Cal.App. 4th 1152.)

Specifically, Plaintiffs do not adequately allege that Defendants' products are defective, fungible, or inherently harmful. Nor do Plaintiffs allege that the origin of the product that caused their harm cannot be determined. Without market share liability, Plaintiffs must prove which specific Defendant actually caused their injuries. In a personal injury action, "the general rule is that the burden of proof is on the plaintiff to establish that the injuries she suffered were caused by the conduct of the defendant." (*Sanderson v. Int'l Flavors and Fragrances, Inc.* (C.D.Cal. 1996) 950 F.Supp. 981, 984.) Plaintiffs, however, concede that "it is unknown how and where NEAL acquired the 'ghost gun' parts/kits used to assemble the weapons used in the attack." (*Cardenas* Compl. ¶ 82; *McFadyen* Compl. ¶ 98). As set forth below, each of Plaintiffs' causes of action depends upon a viable market share liability theory owing to their admitted inability to establish causation. Because Plaintiffs fail to allege a prima facie case of market share liability, their Complaints should be dismissed in their entirety.

A. Market share liability has a very limited application not available in this case.

The market share liability doctrine was first announced in *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588. There, the plaintiff sought to impose liability on pharmaceutical manufacturers, alleging that, while pregnant, her mother (along with thousands of other pregnant women between 1941 and 1971) was given a synthetic compound of the female hormone estrogen known as diethylstilbestrol or DES, as a miscarriage preventative. (*Id*. at pp. 593-95.) It was later determined that DES could cause cancerous growths in women whose mothers had used DES while pregnant with them. (*Ibid*.) The plaintiff alleged that DES was produced from a common and mutually agreed upon formula as a fungible drug interchangeable with other brands of the

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liability, damages are simply apportioned among defendants on the basis of each defendant's **share** of the product **market**. The resultant **market share liability** imposed thus approximates each manufacturer's responsibility for the injuries caused by its own products. A defendant can avoid **liability** only by proving that it did not produce the specific product that harmed the plaintiff." (*Mullen*, 200 Cal.App.3d at n. 6, [internal quotations omitted].)

same product, and that the defendant manufacturers "collaborated in marketing, promoting and testing the drug, relied upon each other's tests, and adhered to an industrywide safety standard." (*Id*. at p. 595.) After ruling out several alternative proposed theories of liability, the *Sindell* court adopted market share liability, finding that it was a logical extension of *Summers v. Tice* (1948) 33 Cal.2d 80, given that "all defendants produced a drug from an identical formula and the manufacturer of the DES which caused plaintiff's injuries cannot be identified through no fault of plaintiff." (*Sindell*, 26 Cal.3d at pp. 610-11.)

Plaintiffs' allegations in this case are inconsistent with the fundamental principles upon which the *Sindell* court defined market share liability. Plaintiffs do not claim that Defendants' products are inherently defective or that they have the potential to cause harm when used lawfully and in their intended manner. Rather, they contend that Defendants' products were affirmatively (criminally) misused by a third party, which is a substantial departure from the typical theory of market share liability. Plaintiffs also do not allege that Defendants collaborate in marketing, promoting, or testing their products, or that an industrywide standard exists with respect to Defendants' products. Rather, Plaintiffs generally take issue with Defendants' marketing practices, but their Complaints implicitly demonstrate that each Defendant has its own separate marketing methods. (*Cardenas* Compl. ¶¶ 57; *McFadyen* Compl. ¶ 73). Nor do Plaintiffs allege that they cannot identify the manufacturer of the product used to cause them injury; instead, they merely say they do not know the manufacturer, without claiming to have made any reasonable attempt to identify them. Simply put, the doctrine announced and narrowly circumscribed in *Sindell* does not apply to Plaintiffs' allegations in this case.

Since *Sindell*, California courts have applied market share liability extremely sparingly. Indeed, as the California Supreme Court has observed, "[o]nly in one circumstance have we relieved toxic tort plaintiffs of the burden of showing exposure to the defendant's product: where hundreds of producers had made the same drug from an identical formula, practically precluding patients from identifying the makers of the drugs they took." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 976, [citing *Sindell*, *supra*, 26 Cal.3d at pp. 610–613].) In fact, to Defendants' knowledge, no California court has ever even entertained market share liability in any

context other than harms alleged to have been caused by defective products containing an identical chemical makeup. Only one court has allowed a market share liability case that did not involve DES (the product at issue in *Sindell*) to proceed past the pleading stage. (*Wheeler v. Raybestos-Manhattan* (1992) 8 Cal.App.4th 1152 [overturning trial court's finding of nonsuit for allegations that brake pads containing identical makeup of asbestos whose manufacturer could not be determined due to wear of the pads].) That court emphasized the "narrowness of [its] holding," explaining that "Plaintiffs have not proven the elements of a market share case; we hold only that they should be allowed to attempt it." (*Id*. at p. 1158.) What's more, other courts have since seriously questioned whether *Wheeler* remains good law following *Rutherford*. (*See Ferris v. Gatke Corp.* (2003) 107 Cal.App.4th 1211, 1218-1221; *see also Farris v. 3M Co.* (N.D.Cal. Dec. 5, 2018, No. 18-cv-04186-JST) 2018 U.S.Dist.LEXIS 206490, at *11-12.)

There is good reason for courts' reluctance to apply and extend market share liability, as it is a doctrine that shifts the burden of proof to defendants in contravention of longstanding American legal principles. (*Comcast Corp. v. Nat'l Ass'n of African American-Owned Media* (2020) ___U.S.___ [140 S.Ct. 1009, 1014, 206 L.Ed.2d 356, 361-362], citing *Univ. of Tex. Southwestern Med. Ctr. v. Nassar* (2013) 570 U.S. 338, 346.) Courts "employ such group liability concepts with great caution and only after being satisfied that the circumstances invoked in support of their application are truly compelling." (*Ferris*, *supra*, 107 Cal. App. 4th at p. 1223.) No compelling reason to shift the burden of proof to Defendants exists here. In fact, doing so would be inconsistent with the original purpose of market share liability as explicated in *Sindell*. Nevertheless, Plaintiffs ask this Court to drastically expand the reach of market share liability in an unprecedented manner. Plainly, this Court should decline that invitation and adhere to the narrow and prudent principles on which market share liability was established.

B. Plaintiffs' failure to allege that Defendants' products are defective is fatal to their market share liability claims.

To be sure, this is not a product liability case. Plaintiffs do not allege any product liability causes of action or maintain that their injuries were caused by some defect in Defendants' products. Thus, Plaintiffs' Complaints are not candidates for market share liability, which can only be

applied in a product liability action involving a defective product. (See *Sindell*, *supra*, 26 Cal.3d at p. 612; *Sheffield*, *supra*, 144 Cal.App. at pp. 597-99; *Chavers v. Gatke Corp.* (2003) 107 Cal.App.4th 606, 609 [noting that market share liability is among the "novel theories under which manufacturers of a *defective* product could assertedly be held liable in damages to plaintiffs injured by use of or exposure to it" without the plaintiff having to prove causation, often due to the plaintiff's inability to identify the manufacturer, emphasis added.].) To the contrary, the danger that Plaintiffs complain about seems to be the products' intended purpose, i.e., their use in a *functioning* firearm. Based on Plaintiffs' own allegations, their reported injuries resulted not from any defect in a product, but from a properly functioning product that a third-party criminally misused. Indeed, "defendants' products are concededly not defective – if anything, the problem is that they work too well." (*Hamilton v. Beretta U.S.A., Corp.* (2001) 96 N.Y.2d 222, 235.) Thus, "the unavoidable conclusion is that Plaintiffs are attacking an entire industry, not seeking recovery for damages caused by a single fungible product carrying with it a singular risk factor." (*Mullen*, *supra*, 200 Cal.App.3d at pp. 256-57.) Such an improper extension of market share liability was rejected in *Mullen* and should likewise be rejected here.

The New York Court of Appeals decision in *Hamilton* is instructive. In that case, the plaintiffs, relatives of victims killed with handguns, sued various handgun manufacturers alleging negligent marketing, design defect, and fraud. (*Hamilton*, *supra*, 96 N.Y.2d at pp. 229-30.) As here, the *Hamilton* plaintiffs sought to impose market share liability against manufacturers on the ground that the origin of the handguns that caused their injuries could not be identified. (*Ibid*.) Addressing the Second Circuit's certified question, the New York Court of Appeals held that market share liability did not and could not apply, in part, because:

> The distribution and sale of every gun is not equally negligent, nor does it involve a defective product. Defendants engaged in widely-varied conduct creating varied risks. Thus, a manufacturer's share of the national handgun market does not necessarily correspond to the amount of risk created by its alleged tortious conduct. No case has applied the market share theory of liability to such varied conduct and wisely so.

(*Id*. at p. 241.) The *Hamilton* court further stated that "we recognize the difficulty in proving precisely which manufacturer caused any particular plaintiff's injuries since crime guns are often not recovered. **Inability to locate evidence, however, does not alone justify the extraordinary step of applying market share liability.**" (*Ibid*. [emphasis added].)

California courts share the *Hamilton* court's reluctance to expand market share liability to cover a product that is not inherently defective, even if that product can cause harm and identifying its manufacturer is difficult. For example, in *Sheffield*, a plaintiff sued various manufacturers of a vaccine developed for the treatment of polio after receiving a defective dose of the vaccine that caused her to develop a neurological and muscular disorder. (*Sheffield*, *supra*, 144 Cal.App.3d at pp. 590-91.) Because the plaintiff did not know the identity of the manufacturer of the vaccine that she took, she attempted to proceed on a market share theory of liability against all manufacturers of the vaccine. The court, however, refused to approve the use of market share theory, in part, because "unlike *Sindell*, the injuries did not result from the use of a drug generally defective when used for the purpose it was marketed, but because some manufacturer made and distributed a *defective* product. The product that allegedly injured the plaintiffs was itself not a unit of a total generic pharmaceutical product but a deviant *defective* vaccine." (*Id*. at p. 594 [emphasis added]; see also *Pooshs v. Philip Morris USA, Inc.* (N.D.Cal. 2012) 904 F.Supp.2d 1009, 1025 [federal court rejected application of market share liability to cigarettes, reasoning that "[t]aken to its logical conclusion, the argument that cigarettes are defectively designed because they deliver nicotine through the inhalation of smoke, if adopted, would mean that the only remedy for this alleged design defect would be a ban on the manufacture and sale of any cigarettes containing nicotine."].) Defendants' products may be criminally misused by third parties like Neal to cause harm, but because that harm does not result from an inherent defect, market share liability is inapplicable to them. Indeed, Plaintiffs ask this Court to expand market share liability by holding that the criminal misuse of a lawful, well-functioning product can trigger market share liability. There is simply no support for that leap.

At bottom, market share liability is restricted to injuries resulting from *defective* products that present an inherently singular risk of harm. Plaintiffs have not alleged that any of Defendants'

products are defective, let alone that a defect in their products poses a singular, inherent risk of harm. To the contrary, the potential harm Plaintiffs allege arises solely from criminal misuse of the products at issue. Otherwise put, there is no case law that supports asserting market share liability against the criminal misuse of a properly functioning and lawfully sold product. Market share liability cannot apply to this case as a matter of law.

C. Plaintiffs fail to sufficiently allege that Defendants' products are fungible under *Sindell* or that the origin of the parts used by Neal is incapable of being identified.

Plaintiffs' market share liability theory is also meritless because their Complaints do not allege sufficient facts that Defendants' products are fungible. To be sure, Plaintiffs make the conclusory allegation that "Ghost gun parts/kits that can be used to assemble unserialized AR-15 style rifles are fungible products." (*Cardenas* Compl. ¶ 92; *McFadyen* Compl. ¶ 108). Nevertheless, that bare allegation is not entitled to a presumption of truth. (See *Hilltop Properties, Inc. v. State* (1965) 233 Cal.App.2d 349, 354 ["Although plaintiff, in its first cause of action, alleges that defendant 'took for public purposes' the subject parcels, this allegation is a statement of a legal conclusion and not of ultimate fact. Accordingly, it is not deemed admitted by the demurrer nor must such allegation be regarded as true"]; see also *Blank*, *supra*, 39 Cal. 3d at p. 318 [conclusory allegations are not accepted as true].) Aside from their conclusory statement, Plaintiffs' only allegation to purportedly support their claim that Defendants' products are fungible is that those products "share the same core characteristics." (*Cardenas* Compl. ¶ 92; *McFadyen* Compl. ¶ 108). That, however, is not enough to establish "fungibility" as that term is contemplated under market share liability theory.

The test for "fungibility" is not whether goods share core characteristics, but whether there is an "absence of discernable distinguishing features or characteristics of the instrumentalities produced by the industry defendants." (*Mullen*, *supra*, 200 Cal.App.3d at p. 255; see also *Pooshs, supra,* 904 F. Supp. 2d at p. 1032.) In fact, the *Sindell* "court took pains to establish that it was dealing with 'fungible goods'—specifically, a drug produced "from an identical formula." (*Mullen*, *supra*, 200 Cal.App.3d at p. 255, [citing *Sindell*, 26 Cal. 3d at 610-11].) In other words,

Plaintiffs must show that Defendants' products are indistinguishable from each other. Plaintiffs have not alleged such, and, even if they had, it would be a demonstrably false allegation.

Receiver blanks are not monolithic. Like firearms generally, receiver blanks have discernable and distinguishing features. (See *Hamilton v. Beretta U.S.A. Corp.* (2001) 96 N.Y.2d 222, 240-41 ["guns are not identical, fungible products"].) They are manufactured using different methods and materials and come in various forms. California law expressly acknowledges that reality. (See Cal. Pen. Code, § 16531, subd. (a)(1) ["As used in this part, 'firearm precursor part' means a component of a firearm that is necessary to build or assemble a firearm and is described in either of the following categories: (1) An unfinished receiver, including both a single part receiver and a multiple part receiver, such as a receiver in an AR-10- or AR-15-style firearm. An unfinished receiver includes a receiver tube, a molded or shaped ***polymer*** frame or receiver, a ***metallic*** casting, a ***metallic*** forging, and a receiver flat, such as a Kalashnikov-style weapons system, Kalashnikov-style receiver channel, or a Browning-style receiver side plate;" emphasis added].) At minimum, this shows that the parts at issue in this case can be made from different materials, e.g., polymer or metal. ATF likewise acknowledges that precursors can be made from various materials. (RJN, Exhibit A [ATF regulation proposal noting that "ATF has long held that a piece of metal, plastic, or other material becomes a frame or receiver when it has reached a critical stage of manufacture."].)

Revealingly, Plaintiffs' Complaints do not allege that Defendants' products constitute some special subset of the precursor market that are made according to a single, identical formula and lack distinguishing features. To the contrary, Plaintiffs allege that Defendants "were responsible for manufacturing and/or selling a substantial percentage of all "ghost gun" parts/kits enabling assembly of AR-15 style "ghost gun" rifles which entered into California leading up to and during November 2017." (*Cardenas* Compl. ¶ 89; *McFadyen* Compl. ¶ 105). Beyond all of that, their Complaints depict a receiver blank with a unique emblem, further demonstrating that these products can possess distinguishing characteristics. (*Cardenas* Compl. ¶ 57; *McFadyen* Compl. ¶ 73). As a result, Plaintiffs have failed to allege that Defendants' products are indistinguishable and thus fungible.

This conclusion is affirmed by California appellate courts' refusal "to extend the market share theory of liability to the cases seeking removal of asbestos products from residential housing" on the basis that "the prerequisite of fungibility had not been met because asbestos products were not produced from an *identical* formula and carried more than one risk of harm." (*Fibreboard Corp. v. Hartford Accident & Indemnity Co.* (1993) 16 Cal.App.4th 492, 508, fn. 4, [citing *Mullen*, *supra*, 200 Cal.App.3d at p. 252, 257, emphasis added].) If asbestos, composed of a naturally occurring mineral, is insufficiently homogenous to be considered a fungible good, then manufactured products like those of Defendants, which can be made of such markedly different materials as metal and plastic, and exhibit unique identifying-markers, certainly cannot be either.

Additionally, to succeed under a market share liability theory, Plaintiffs must show that the manufacturer of the product that caused their injury *cannot* be identified *through no fault of Plaintiffs*. (*Sindell*, *supra*, 26 Cal.3d at pp. 610-11.) Plaintiffs fall short on both aspects of this mandatory showing. They do *not* allege that the manufacturer of the items used to make Neal's rifles cannot be identified upon inspection of the rifles. Instead, Plaintiffs merely allege that they currently do not know the identity of the manufacturer whose products Neal used. Inability to know (which is the test) and not knowing (which is what Plaintiffs allege) are very different concepts. As the *Hamilton* court concluded, "Inability to locate evidence, however, does not alone justify the extraordinary step of applying market share liability." (*Hamilton*, *supra*, 96 N.Y.2d at pp. 229-30.) Moreover, the inability to identify the item that caused the harm must not result from Plaintiffs' fault, meaning that Plaintiffs must take reasonable steps to determine the identity of the manufacturer. Yet, Plaintiffs do *not* allege that they have performed any such investigation.

In sum, Plaintiffs fail to allege any elements of fungibility as to Defendants' products. They do not allege that Defendants' products are indistinguishable from each other. Nor do they allege that, through no fault of their own, they cannot identify the manufacturer of the item(s) Neal employed in his attacks. As such, market share liability does not and cannot apply here.

* * * *

In sum, Plaintiffs seek to pound the square peg of market share liability, which is narrowly reserved for injuries caused by an inherent defect in generic items that are mass-produced

according to an identical formula, into the round hole that is Defendants' products, which Plaintiffs themselves do not allege are indistinguishable or inherently defective. This Court should reject Plaintiffs' effort to expand the doctrine of market share liability in an unprecedented manner and sustain Defendants' demurrer in its entirety without leave to amend.

III. Plaintiffs' Negligence Claim Should Be Dismissed For The Separate And Additional Reason That They Fail To Allege That Defendants Owed Them A Duty Or The Breach Of A Duty Proximately Caused Their Injuries.

"The elements of negligence are: (1) defendant's obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks (duty); (2) failure to conform to that standard (breach of the duty); (3) a reasonably close connection between the defendant's conduct and resulting injuries (proximate cause); and (4) actual loss (damages)." (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 279.) Plaintiffs bear the burden of proving each of these elements. (*Gordon v. Aztec Brewing Co*. (1949) 33 Cal.2d 514, 528.) Plaintiffs cannot make that showing because they do not allege which manufacturer produced the product(s) causing their claimed injuries, a fatal defect in a negligence cause of action. Because, as set forth above, market share liability is not viable in this case, Plaintiffs' negligence cause of action fails for lack of causation. In addition, it is fundamental that "liability . . . based upon . . . negligence 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. Here, Plaintiffs' Complaints make clear that it was Neal's unlawful misuse of the products at issue that caused their injuries.

Moreover, even if this case qualified for application of market share liability (it does not), Plaintiffs have also failed to identify, as they must, any duty that Defendants owed to them and breached. To be sure, Plaintiffs posit that Defendants should have adhered to the strict requirements imposed on "firearm" sales when selling their products. Yet, Plaintiffs do not allege that Defendants' products are "firearms" under either federal or California law. Nor could they possibly have done so, as these products are not "firearms" under any applicable definition. (*See* 18 U.S.C. § 921(a)(3) [federal "firearm" definition]; Cal. Pen. Code § 16520 [California "firearm" definition].) Nevertheless, Plaintiffs allege that Defendants owed a duty to, at least:

a. block Internet Protocol ("IP") addresses associated with California from accessing their websites and/or portions of their websites listing products enabling assembly of AR-15 style "ghost gun" rifles;

b. refuse to ship products enabling assembly of AR-15 style "ghost gun" rifles to California;

c. require that their products enabling assembly of AR-15 style "ghost gun" rifles only be transferred through a sale carried out by an FFL;

d. require that only individuals who could legally purchase and possess firearms could purchase their products; and

e. include serial numbers on their products.

(*Cardenas* Compl. ¶ 69; *McFadyen* Compl. 85.) Despite California law imposing no such duties on the sale of non-"firearms" like Defendants' products, Plaintiffs seek to impose them on Defendants. That Plaintiffs cannot do. Those duties do not exist. To the contrary, California law expressly provides a process for people who make their own firearm from parts to apply for a serial number and undergo a background check. (Pen. Code, §§ 29180-29184; Cal. Code Regs., tit. 11, § 5516.) The necessary implication is that it is lawful to purchase (and for Defendants to sell) parts that lack a serial number for the purpose of privately building a firearm. While Plaintiffs allege that Defendants' products *can be* made into illegal "assault weapons," they never allege that those products constitute or can *only be* made into such firearms. Defendants thus have no duty to treat their products as "assault weapons" as Plaintiffs demand. Finally, California law expressly prohibits vendors of non-firearms from requiring a background check on purchasers. (Cal. Pen. Code § 30105, subd. (h), [with some unrelated exceptions, "a person or agency shall not require or request an individual to obtain a firearms eligibility check or notification of a firearms eligibility check [of the sort required to obtain a firearm" and so requiring is a misdemeanor].) As such, there is no lawful mechanism available to Defendants (or an FFL) to determine whether a purchaser of Defendants' products is disqualified from legally possessing actual "firearms."

Moreover, Plaintiffs seek to impose a duty to control third persons over whom Defendants have no control. (See *Regents of Univ. of Cal. V. Super. Ct*. (2018) 4 Cal.5th 607, 619; *Todd v.*

Dow (1993) 19 Cal.App.4th 253, 259 [stating, "The absence of a duty to control is fatal to a claim of legal responsibility."].) It would make little sense, then, to hold Defendants responsible for how a purchaser chooses to criminally misuse their products.

To the extent that Plaintiffs' negligence claim is based on Defendants' purported marketing practices, their claim is untenable. "Common negligence concepts of duty and causation do not allow the unfortunate victims of the criminal use of a dangerous, but not defective, product to recover from the product's manufacturer simply because the manufacturer's marketing schemes allegedly promoted a secondary market that purportedly facilitated the illegal purchase of the product. California law does not support this imposition of the equivalent of strict liability." (*Ileto v. Glock, Inc.* (9th Cir. 2004) 370 F.3d 860, 862 (Callahan, J., dissenting from denial of rehg. en banc).) Plaintiffs generally allege that Defendants' marketing targets criminals. Yet, they do not allege that Neal saw or relied upon any of Defendants' marketing materials. Nor do they allege any concrete nexus between Defendants' marketing and Plaintiffs' claimed injuries. California law does not countenance such an expansive and attenuated application of negligence principles.

In sum, Plaintiffs are asking this Court to impose on Defendants the duties applicable to sales of "*firearms*" when selling non-firearm products, despite the law being clear that Defendants cannot owe such duties (and necessarily did not breach any duties) or any obligations to control third persons with whom they have no special relationship. As such, and regardless of whether market share liability can be applied here, Plaintiffs fail to state a cause of action for negligence.

IV. Plaintiffs Fail to State a Claim for Negligence Per Se.

"'Negligence per se' is an evidentiary doctrine codified at Evidence Code section 669. Under subdivision (a) of this section, the doctrine creates a presumption of negligence if four elements are established: (1) the defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. These latter two elements are determined by the court as a matter of law." (*Quiroz v.*

Seventh Ave. Center (2006) 140 Cal.App.4th 1256, 1285.) "Even if the four requirements of § 669, subd. (a), are satisfied, this alone does not entitle a plaintiff to a presumption of negligence in the absence of an underlying negligence action. Accordingly, to apply negligence per se is not to state an independent cause of action. Instead, it operates to establish a presumption of negligence for which the statute serves the subsidiary function of providing evidence of an element of a preexisting common law cause of action." (*Ibid.* [citations omitted].) In sum, for the above reasons, Plaintiffs have failed to state a cause of action for negligence and, therefore, negligence per se is necessarily unavailable to them.

In any event, Plaintiffs fail to meet even the first element of negligence per se, as they do not identify any law that they allege that Defendants violated in distributing their products. While purporting to invoke California's Assault Weapon Control Act, Plaintiffs do not even allege that Defendants' products are illegal "assault weapons" under that law. (*Cardenas* Compl. ¶ 92; *McFadyen* Compl. ¶ 108, ["'Ghost gun' parts/kits . . . *can be* used to assemble unserialized AR-15 style rifles . . .."] [emphasis added].) To be sure, parts like the ones at issue here *cannot* by themselves meet California's definition of "assault weapon." Indeed, fully functional lower receivers do not qualify for that definition, even when accompanied by a detached upper receiver, which, when attached could make the item an "assault weapon." (See Cal. Code Regs., tit. 11, § 5471, subd. (hh), (3)-(4), [excluding from definition of "semiautomatic" (which is a prerequisite for "assault weapon" status) complete lower receivers, even when in custody of person with an upper receiver.) Thus, even if Plaintiffs' allegations could be construed as alleging that Defendants' products are "assault weapons," such allegations would be false as a matter of law.

Tellingly, rather than claim that Defendants directly violated any law by selling their products, Plaintiffs instead assert that Defendants have aided and abetted violations of laws by third parties who purchase their products. (*Cardenas* Compl. ¶113-18; *McFadyen* Compl. ¶ 129-34). This argument must fail.[5] Plaintiffs cannot simultaneously concede that they do not know

[5] Plaintiffs do allege that "Defendants may also be responsible, either directly or as an accomplice, for violation one or more additional state or federal firearms laws, including, but not limited to, various provisions of the Gun Control Act of 1968 or the National Firearms Act." (*Cardenas* Compl. ¶ 116; *McFadyen* Compl. ¶ 132.) Such an equivocating, vague allegation that

which, if any, of the Defendants' products Neal used, and then allege that they know that Defendants aided and abetted Neal. Aiding and abetting liability for specific intent crimes requires that the aider and abettor share the perpetrator's specific intent. (*People v. Acero* (1984) 161 Cal.App.3d 217, 224.) "[A]n aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) If Plaintiffs cannot identify which, if any, specific Defendant(s) supplied Neal with the items he used to cause Plaintiffs' injuries, they surely cannot allege in good faith that Defendants shared Neal's specific intent to harm them. This glaring pleading deficiency precludes Plaintiffs alleged aiding and abetting liability theory, further warranting dismissal of their negligence per se cause of action as a matter of law.

V. Plaintiffs Fail to State a Claim for Negligent Entrustment.

Plaintiff's negligent entrustment claim is not legally viable because (1) Plaintiffs do not allege any facts that Defendants actually supplied Neal with the products he used to cause their claimed injuries; and (2) Plaintiffs do not allege any facts to support that the Defendants knew or should have known that Neal was a danger to himself or others. A claim for negligent entrustment arises from the transfer of a "dangerous instrumentality to a person who the supplier knows, or has reason to know, is a danger to himself or herself, or others." (*Jacoves v. United Merch. Corp.* (1992) 9 Cal.App.4th 88, 116.) A "duty is not normally imposed absent a special relationship between the parties or the knowledge of particular facts making clear the danger in entrusting the instrumentality to the individual involved." (*Dodge Ctr. v. Super. Ct.* (1988) 199 Cal.App.3d 332, 341 (citing Prosser & Keeton, Torts (5th ed. 1984) ch. 5, § 33, pp. 197–205.)

As explained above, Plaintiffs concede they do not know which, if any, Defendant(s) actually supplied Neal with the parts he used to cause Plaintiffs' injuries. This pleading deficiency alone warrants dismissal of Plaintiffs' negligent entrustment claim. (See *Wise v. Super. Ct.* (1990)

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someone might have violated some law somehow, however, is merely a contention or legal conclusion that this Court can and should refuse to accept as true. (*See Blank*, *supra*, 39 Cal.3d at p. 318.)

222 Cal.App.3d 1008, 1015 [dismissing negligent entrustment claim because "no facts have been shown which would prove petitioner actually entrusted decedent with the weapons which he used to inflict the injuries."].)

Plaintiffs, however, also rely on the faulty premise that a negligent entrustment claim can lie against companies merely for putting products into the general stream of commerce. There is no precedential support for such a theory. For example, in the case of an automobile, the supplier "who entrusts the automobile to a known reckless driver, can be held liable for injuries to third persons." (*Jacoves*, *supra*, 9 Cal.App.4th at 116.) But the supplier cannot be held liable merely because it is known generally that reckless drivers exist. (See *Dodge Ctr.*, *supra*, 199 Cal.App.3d at p. 341 [a duty arises from defendant's knowledge of "the individual involved"].) In *Jacoves*, for example, the parents of a young man who committed suicide with a firearm sued the vendors of the firearm for negligent entrustment. The court, however, dismissed the plaintiffs' negligent entrustment claim, holding that there were no facts establishing that the vendor knew or should have known that the young man would commit suicide. Here, Plaintiffs seek to hold Defendants liable merely for placing products into the stream of commerce on the ground that the products were allegedly marketed to criminals generally. However, Plaintiffs do not allege any facts that any of the Defendants knew Neal was the purchaser (if, in fact, he was), let alone that he—the individual involved—was a danger to himself or others. Their negligent entrustment cause of action cannot be sustained on these allegations.

VI. Plaintiffs Fail to State a Claim for Public Nuisance.

Plaintiffs' public nuisance cause of action is subject to demurrer under Code of Civil Procedure Section 430.10(e) because it fails to allege the necessary elements. To have standing to bring a public nuisance action, Plaintiffs must allege facts "showing special injury to [themselves] in person or property of a character different in kind from that suffered by the general public." (*Venuto v. Owens Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 124.) Both complaints identically purport to allege that Plaintiffs have suffered such special injuries, as follows:

> DEFENDANTS' unlawful, negligent and/or intentional creation and maintenance of the public nuisance directly and proximately caused significant harm, including serious physical injury and associated harm to PLAINTIFF that is different from

> the harm suffered by other members of the public, including loss of enjoyment of life, as well as those damages set forth in paragraphs 121-131 above, all to their damage in an amount to be determined at a trial of this matter.

(*McFadyen* Complaint, at 39:12-18; *Cardenas* Complaint, at 33:22-28.) Plaintiffs, however, do not link that injury to Defendants, as they must.

"Causation is an essential element of a public nuisance claim; a plaintiff must establish a 'connecting element' or a 'causative link' between the defendant's conduct and the harm alleged." (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 359.) As already established, Plaintiffs admit that they do not know which, if any, of Defendants' products Neal used to inflict their injuries. Yet, they assert that all Defendants are liable for their injuries under California's public nuisance doctrine. In doing so, Plaintiffs seem to suggest that market share liability theory applies here and relieves them of their burden to prove causation. That is not the case. As detailed above, Defendants are unaware of any example of market share liability ever being applied outside of a products liability claim involving an inherently defective product. As such, Plaintiffs' public nuisance cause of action does not even qualify as a candidate for market share liability and so fails to state the requisite causation element of such a claim. (See *In re Firearm Cases* (2005) 126 Cal.App.4th 959, 967, 990, [citing *Ileto, supra,* 349 F.3d at p. 1216.)

The *Ileto* case is instructive on this point. There, the Ninth Circuit was reviewing a trial court's granting of a Federal Rules of Civil Procedure, Rule 12(b)(6) motion to dismiss—a federal analogue to California Code of Civil Procedure Section 430.10(e)'s demurrer—of a suit for public nuisance by individuals killed or injured in a shooting against "multiple defendants involved in the manufacture, marketing, and distribution of various firearms found in [the] possession" of the shooter. (*Ileto, supra,*349 F.3d at pp. 1194-1196. 1198-1999.) Despite the fact that some of the firearms carried by the perpetrator in *Ileto* during his crimes were manufactured by named defendants, because he did not fire them in his attack, the Ninth Circuit affirmed the lower court's dismissal of the public nuisance claim as to those manufacturers, reasoning that "a claim for nuisance and negligence cannot stand where the weapons were not actually fired." (*Id.* at p. 1216.)

Upon that same rationale, Plaintiffs have likewise failed to state a public nuisance cause of action because they have admitted that they do not know which, if any, Defendant(s) manufactured

(or sold) the products that Neal used to inflict Plaintiffs' injuries and have instead only alleged a "substantial probability" that "one or more" of the Defendants sold Neal "ghost gun" kits or parts. (*Cardenas* Complaint, at 21:13-15, *McFadyen* Complaint, at 24:10-14.) The California Court of Appeals has expressly sanctioned the *Ileto* Court's reasoning in upholding a ruling rejecting a public nuisance claim brought by city attorneys of several jurisdictions against various "manufacturers, distributors and retailers of handguns and their trade associations, asserting that their conduct of distributing firearms in a manner that enables criminals to acquire the firearms constituted a public nuisance . . .," commenting, in pertinent part, that:

> "In *Ileto v. Glock, Inc.* (9th Cir. 2003) 349 F.3d 1191 (*Ileto*), a Ninth Circuit panel majority reinstated claims of negligence and nuisance against gun manufacturers and distributors brought by individual victims and survivors of an assault by a gunman. *It is significant that the court declined to reinstate the action against manufacturers and distributors whose guns were not actually fired during the shooting because the claims for nuisance and negligence could not stand without a showing that those guns caused the alleged injury*."

(*In re Firearm Cases* (2005) 126 Cal.App.4th 959, 967, 990, [citing *Ileto, supra,*349 F.3d at p. 1216, emphasis added].) Indeed, that same court went on to suggest that it believed the *Ileto* majority should have dismissed the case as to all the named defendants, noting:

> We find the views expressed by the dissenters to the denial of rehearing en ban in *Ileto* instructive. Circuit Judge Callahan explained the potential reach of the *Ileto* decision allowing the nuisance claim against defendant Glock, Inc., to go forward. 'The potential impact of the panel's decision is staggering: Any manufacturer of an arguably dangerous product that finds its way into California can be hauled into court in California to defend against a civil action brought by a victim of the criminal use of that product. The manufacturer's liability will turn not on whether the product was defective, but whether its legal marketing and distribution system somehow promoted the use of its product by 'criminals and underage end users.' Thus, General Motors could be sued by someone who was hit by a Corvette that had been stolen by a juvenile. The plaintiff would allege that 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. This is not California law . . .'

(*Ileto v. Glock, Inc.* (9th. Cir. 2004) 370 F.3d 860, 862 (Callahan, J., dis. From denial of rehg. en banc).) (*Id*. at pp. 990-991.) California precedent thus, at a minimum, rejects a public nuisance

cause of action where, as here, the Plaintiffs do not allege that the named Defendants' products were actually used to inflict the Plaintiffs' injuries. Because Plaintiffs have failed to do just that, Defendants' demurrer as to their public nuisance cause of action should be sustained.

VII. Both of Plaintiffs UCL Cause of Actions (V & VI) Fail.

Plaintiffs assert two Business & Professions Code Section 17200 ("UCL") causes of action, one for unfair and unlawful competition and the other for unfair marketing. (*Cardenas* Compl. ¶¶ 158-173; *McFadyen* Compl. ¶¶ 183-8 [sic].) This Court should sustain this demurrer as to both for multiple reasons. First, Plaintiffs lack standing to assert such claims as a matter of law because they are not consumers whose injury resulted from direct business relationships with Defendants. Second, Plaintiffs fail to allege the necessary element of causation of an injury that is cognizable in a UCL action. Third, to the extent Plaintiffs allege that Defendants' marketing was misleading, they fail to allege reliance. Fourth, to the extent Plaintiffs' UCL claim is premised on "unfairness," it insufficiently connects Defendants' conduct to any illegal practice. Fifth, Plaintiffs' UCL claim warrants dismissal because Plaintiffs' fail to allege that they lack adequate remedies at law.

A. Plaintiffs lack standing to state a UCL claim

Prior to November 2004, a UCL lawsuit could be brought "by any person acting for the interests of itself, its members or the general public." (Former Cal. Bus. & Prof. Code § 17204, added by Stats. 1977 ch 299 § 1, later Amendment approved by voters, Prop. 64 § 3, effective November 3, 2004.) Because of abuses by private counsel misusing UCL actions, the People of the State of California voted to adopt Proposition 64 to eliminate "representative" actions by private counsel. (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 64, p. 109-110.) It did so by adding an additional requirement that a private party may bring a Section 17200 lawsuit only if they suffered a direct injury in fact, i.e., lost money or property. "The amended section [of Bus. & Prof. 17200] now allows a private party other than a public prosecutor to file or maintain an action *only* if the party 'has suffered injury in fact and has lost money or property as a result of such unfair competition.'" (*Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 91, [emphasis added, citing to Bus. & Prof.Code, § 17204].) Simply put, Proposition 64's changes to the UCL limit private-party standing to only those defendants with whom the plaintiff had direct dealings.

As the California Supreme Court confirmed, "[t]he intent of this change was to confine standing to those actually injured by a defendant's business practices and to curtail the prior practice of filing suits on behalf of 'clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant . . ..' " (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 788-789 [citing *Californians for Disability Rights*, at p. 228, quoting Prop. 64, § 1, subd. (b)(3)]; see also *Acad. of Motion Pictures Arts & Scis. v. GoDaddy.com, Inc.* (C.D.Cal. Sep. 20, 2010, No. CV 10-3738 ABC (CWx)) 2010 U.S.Dist.LEXIS 145104, at *24-25.) Courts have confirmed this limitation on UCL standing. "The unfair competition statutes come with an express standing requirement []. An action can be brought only "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition. (§ 17204.)" (*Mayron v. Google LLC* (2020) 54 Cal.App.5th 566.)

So Private parties can no longer bring UCL claims against companies on behalf of third parties if they did not themselves use those companies' products. That is especially the case where, as here, the claim arises from the misuse of a non-defective product. Indeed, it appears that there are "no cases finding a manufacturer has engaged in an unfair practice solely by legally selling a nondefective product based on actions taken by entities further along the chain of distribution." (*In re Firearm Cases, supra,* 126 Cal.App.4th at p. 985.) Because Plaintiffs had no direct relationship with any Defendant, they lack standing to assert a UCL cause of action against them.

B. Plaintiffs UCL claims fail to allege the requisite element of causation.

Even assuming Plaintiffs have standing to assert a UCL action against Defendants, both of their UCL causes of action still fail to allege the element of causation. "It is not enough that a plaintiff lost money; to have standing, there must be a causal link between the unlawful practice and the loss. (*Hall v. Time, Inc.* (2008) 158 Cal.App.4th 847, 849 ["We hold the phrase 'as a result of' in the [UCL] imposes a causation requirement; that is, the alleged unfair competition must have caused the plaintiff to lose money or property."].)" (*Mayron*, *supra*, 54 Cal.App.5th at 574.) As set forth above, Plaintiffs admit they do not know which, if any, of the Defendants provided Neal items that he used to cause Plaintiffs' injuries. (*Cardenas* Compl. ¶ 82; *McFadyen* Compl. ¶ 98). Plaintiffs seem to suggest that market share liability theory also applies here and relieves them of

their burden to prove causation. But market share liability cannot apply outside the context of a products liability claim. "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." (*In re Firearm Cases*, *supra*, 126 Cal.App.4th at 666-67.) As such, Plaintiffs' UCL causes of action do not qualify.

C. Plaintiffs fail to allege that they relied on Defendants' marketing nor do they tether their UCL claim to any specific violation by Defendants.

Plaintiffs' Complaints suggest that Defendants' marketing practices were somehow misleading. (*Cardenas* Compl. ¶¶ 159, 167; *McFadyen* Compl. ¶ 184). To the extent their UCL claims sound in fraud, Plaintiffs "are required to prove actual reliance on the allegedly deceptive or misleading statements, and that the misrepresentation was an immediate cause of their injury-producing conduct." (*Sateriale v. R.J. Reynolds Tobacco Co.* (9th Cir. 2012) 697 F.3d 777, 793 [internal quotations omitted].) Here, Plaintiffs do not allege that they or Neal even saw, let alone relied on any of Defendants' marketing.

D. Plaintiffs' UCL claim should be dismissed because they are not entitled to equitable remedies and have not alleged inadequate remedies at law.

Plaintiffs cannot plead a right to relief available under the UCL. (*See* Bus. & Prof. Code §§ 17200, 17203; *see also Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1144 [demurrer to UCL claim properly sustained where relief sought not available].) Plaintiffs' remedies under the UCL are limited to restitution or an injunction. (*In re Sony Gaming Networks & Customer Data Sec. Breach Litig.* (S.D. Cal. 2012) 903 F. Supp. 2d 942, 970 [dismissing UCL claim for failure to plead entitlement to equitable relief].) In the first instance, Plaintiffs are not entitled to restitution because they do not allege, and cannot allege, that they are consumers of Defendants' products. The money Plaintiffs seek to disgorge was not taken directly from Plaintiffs by Defendants and is thus not recoverable. (See *Korea Supply*, 29 Cal.4th at p. 1149.) Moreover, it is well-established that, "to obtain an equitable remedy, a plaintiff must lack an 'adequate remedy at law.'" (*Anderson v. Apple Inc.* (N.D. Cal. Nov. 16, (2020) No. 3:20-CV-02328-WHO, 2020 WL 6710101, at *7 (citing *Mort v. U.S.* (9th Cir. 1996) 86 F.3d 890, 892.) Because Plaintiffs must but have not pled that they lack an adequate remedy at law, their UCL causes of action fail.

VIII. Plaintiffs' Complaint is Too Uncertain to Survive Special Demurrer.

In addition to the above arguments for a general demurrer, Defendants alternatively request that the Court sustain their special demurrer to the Complaints because Plaintiffs' allegations are too uncertain. It is a fundamental principle of legal pleading that the essential facts upon which a determination of the controversy depends should be stated with clearness and precision so that nothing is left to surmise. (See *Strongman v. County of Kern* (1967) 255 Cal.App.2d 308, 311.) Where the uncertainty is material to the causes of action, a demurrer should be sustained. (See *Khouri v. Maly's of California Inc*. (1993) 14 Cal.App.4th 612, 616.)

Here, Plaintiffs generally refer to all Defendants throughout the entire Complaints with minimal, if any, references to specific Defendants or their individual, specific conduct forming the basis for liability. In fact, as set out previously, Plaintiffs concede they do not know how or when Neal acquired the firearm(s), let alone parts making up the firearm(s), that he used to inflict Plaintiffs' injuries and the Complaints are devoid of allegations pertaining to any specific Defendant. Plaintiffs do not even trouble themselves to discern which Defendants are manufactures, designers or retailers/distributors of the products that Neal allegedly used to cause harm to Plaintiffs. As such, Plaintiffs' allegations lack the requisite clarity and definitiveness. A special demurrer should thus be sustained.

CONCLUSION

For the above reasons, each of Plaintiffs' causes of action fail to state a claim. As such, this Court should sustain this demurrer in its entirety. Moreover, because causation is an element for each cause of action that Plaintiffs assert, and they have admitted that they do not know which, if any, of the Defendants' products caused their injuries, they should not be granted leave to amend unless they can responsibly and verifiably represent that they can allege which specific Defendant(s) manufactured the product(s) that caused their injuries. If they cannot, there is no theory of liability under which Plaintiffs can assert a cause of action against Defendants. Sustaining a demurrer without allowing leave to amend is sound and appropriate when the complaint appears incapable of being amended to state a proper cause of action. (*Frederick v. Curtright* (1955) 137 Cal.App.2d 610, 615.)

Respectfully submitted.

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