C.D. Michel – SBN 144258
Sean A. Brady – SBN 262007
MICHEL & ASSOCIATES, P.C.
180 E. Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Facsimile: (562) 216-4445
Email: sbrady@michellawyers.com

Attorneys for Defendants
Blackhawk Manufacturing Group, Inc.,
Ryan Beezley and Bob Beezley, Ghost Firearms, LLC,
MFY Technical Solutions, LLC, and Thunder Guns, LLC

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

CIVIL COMPLEX CENTER

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. JCCP 5167 *Assigned to the Honorable Judge William D. Claster, Coordination Trial Judge; Dept. CX104* **NOTICE OF DEMURRER AND DEMURRER OF DEFENDANTS GHOST FIREARMS, LLC; MFY TECHNICAL SOLUTIONS, LLC; & THUNDER GUNS, LLC; TO PLAINTIFFS' COMPLAINTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Hearing Date: May 6, 2022 Hearing Time: 9 a.m. Department: CX104 Reservation No.: 73662204

NOTICE OF DEMURRER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 6, 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, Defendants Ghost Firearms, LLC, MFY Technical Solutions, LLC, and Thunder Guns, LLC (the "Vendor-Defendants") will demur to Plaintiffs' Complaints on the grounds that the Complaints fail to set forth facts sufficient to constitute a cause of action.

This Demurrer is brought pursuant to Code of Civil Procedure section 430.10(e). Defendants generally demur to the Complaint, and to each and every cause of action therein, on the grounds that Plaintiffs do not state facts sufficient to constitute a cause of action as to the Vendor-Defendants. (Code Civ. Proc § 430.10, subd. (e).) For, mere vendors of a product like Vendor-Defendants are not subject to the already rarely-applied market share liability doctrine. (*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588; *Wheeler v. Raybestos-Manhattan* (1992) 8 Cal.App.4th 1152; *Sheffield v. Eli Lilly & Co*. (1983) 144 Cal.App.3d 583; *Ferris v. Gatke Corp*. (2003) 107 Cal.App.4th 1211.) Because all of Plaintiffs' causes of action depend on application of market share liability, they all fail.

This demurrer is based upon this notice, the accompanying demurrer, the accompanying memorandum of points and authorities, the concurrent Global Demurrer filed by all Defendants, the joint stipulation between the parties regarding this demurrer, 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.

Dated: January 24, 2022

MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady
Sean A. Brady
Attorneys for Defendants Ghost Firearms, LLC, MFY Technical Solutions, LLC, and Thunder Guns, LLC

DEMURRER

Defendants Ghost Firearms, LLC, MFY Technical Solutions, LLC, and Thunder Guns, LLC (the "Vendor-Defendants") demur to Plaintiffs' Complaints on the ground that each fails to state facts sufficient to constitute a cause of action as to Vendor-Defendants, who are only vendors of products and not manufacturers. (Code Civ. Proc § 430.10, subd. (e).) Mere vendors of a product like Vendor-Defendants are not subject to the already rarely-applied market share liability doctrine. (*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588; *Wheeler v. Raybestos-Manhattan* (1992) 8 Cal.App.4th 1152; *Sheffield v. Eli Lilly & Co*. (1983) 144 Cal.App.3d 583; *Ferris v. Gatke Corp*. (2003) 107 Cal.App.4th 1211.) As such, Plaintiffs cannot prove causation of their harm by Vendor-Defendants, which is an essential element of each of the causes of action Plaintiffs raise.

Dated: January 24, 2022

MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady
Sean A. Brady
Attorneys for Defendants Ghost Firearms, LLC, MFY Technical Solutions, LLC, and Thunder Guns, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION AND BACKGROUND

Defendants Ghost Firearms, LLC, MFY Technical Solutions, LLC, and Thunder Guns, LLC (the "Vendor-Defendants") bring this Unique Demurrer, which is separate from, but fully incorporates the facts and arguments of the Global Demurrer concurrently filed on behalf of all Defendants. The Vendor-Defendants bring this Unique Demurrer to make an additional argument that does not necessarily apply to other Defendants. For purposes of this Unique Demurrer only, there is no dispute that they only sold and did not manufacture the types of products at issue in this case prior to Neal's November 14, 2017 attack. (*See* Joint Stipulation Regarding Forthcoming Demurrers of Defendants Ghost Firearms, LLC, MFY Technical Solutions, LLC, and Thunder Guns, LLC ((("Joint Stip.")), p. 3.)

As was discussed in the Global Demurrer, Plaintiffs have sued various manufacturers, distributors, and/or retailers of "receiver blanks" and other firearm parts under a market share liability theory. Vendor-Defendants entirely agree with and join all arguments set forth in the Global Demurrer as to why market share liability does not apply in this case generally. They do not reiterate those arguments here. Rather, Vendor-Defendants additionally argue that they cannot even be subjected to a market share liability theory, as a matter of law, because that doctrine only applies to *manufacturers* of products, not mere vendors, like them.

Vendor-Defendants thus demur to Plaintiffs' complaints generally on the grounds that Plaintiffs fail to state a cognizable cause of action under a market share liability theory against them as mere vendors of the products at issue.

ARGUMENT

I. Vendors that Do Not Manufacture Products Are Not Even Candidates for Application of the Rarely Applied Market Share Liability Doctrine

A. California courts restrict market share liability to manufacturers.

The reasons that market share liability does not apply in this case a are covered extensively in the Global Demurrer. (*See* Global Demurrer, pp 21-27.) In addition to those arguments, whatever types of products may be subject to market share liability doctrine, its application is

limited to *manufacturers* of those products, not to mere vendor-distributors like the three defendants who bring this Unique Demurrer. (Joint Stip., p. 3.) Applicable caselaw has clearly established that the sparingly-used doctrine is only intended to apply to the makers or manufacturers of the product at issue. The language used in *Sindell*, the case that first announced this doctrine, makes this clear:

> "Where, as here, 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, a modification of the rule of *Summers* is warranted. As we have seen, an undiluted *Summers* rationale is inappropriate to shift the burden of proof of causation to defendants because if we measure the chance that any particular **manufacturer** supplied the injury-causing product by the number of producers of DES, there is a possibility that none of the five defendants in this case **produced** the offending substance and that the responsible **manufacturer**, not named in the action, will escape liability…

(*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 611-612, [bold added].) Indeed, *Sindell* even suggested that defendants could absolve themselves of responsibility by proving they did not make the product at issue: "Each defendant will be held liable for the proportion of the judgment represented by its share of that market **unless it demonstrates that it could not have made the product which caused plaintiff's injuries**." (*Ibid*, [emphasis added].) The smattering of cases on this topic in California since *Sindell* have also confirmed that market share liability, as established in *Sindell*, is a doctrine limited to makers or manufacturers.

"From *Sindell* came a new theory of market share liability only available against the **makers** of a 'fungible product' which 'cannot be traced to a specific **producer**' and only applicable if plaintiff joins a 'substantial share' of the **makers** of the product." (*Wheeler v. Raybestos-Manhattan* (1992) 8 Cal.App.4th 1152, 1155, [emphasis added]). "Market share liability applies when the plaintiff is unable to prove a given defendant was the 'cause in fact' of plaintiff's injury because several **manufacturers** produced and marketed the same injurious product." (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1404-1405, [emphasis added].) "The Supreme Court created a new theory of liability, known as market share liability, in which a plaintiff injured by such a fungible product could sue various **makers** of the product if a substantial share of those **makers** were joined as defendants." (*Kennedy v. Baxter Healthcare Corp.* (1996)

43 Cal.App.4th 799, 812, [emphasis added].) "Under this doctrine, the traditional prerequisite of identifying the **manufacturer** of the injury-causing product is eliminated when the product is a generic item **produced** by several **manufacturers**. In such cases, plaintiffs need only allege inability to identify the actual **manufacturer** and join as defendants those **manufacturers** that compose a 'substantial share' of the market. … Th[e] theory shifts the burden of proof to each **manufacturer** to prove its innocence…A defendant can avoid liability only by proving that it did not **produce** the specific product that harmed the plaintiff." (*Ferris v. Gatke Corp.* (2003) 107 Cal.App.4th 1211, 1215, fn. 1, citing *Mullen v. Armstrong World Indus.* (1988) 200 Cal.App.3d 250, 255, fn. 6, and *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 Nw. U.L. Rev. 300, 301-02 (1981), [emphasis added].) Vendor-Defendants are unaware of a single California case that does not expressly apply to manufacturers.

B. Other state and federal courts also restrict market share liability's reach to manufacturers only.

Many other states' courts have outright rejected or heavily criticized market share liability theory. (See *Smith v. Eli Lilly & Co.* (1990) 137 Ill.2d 222, 238 [explaining that "from its inception *Sindell* has not been widely accepted" and discussing numerous states that have rejected the doctrine].) The courts that have entertained it, consistently consider it a manufacturer-specific doctrine. For example, the Supreme Court of Illinois warned that market share liability would cause major issues because it would "surely broaden **manufacturers'** liability exposure because they will need to insure against losses arising from the products of others in the industry as well as their own." (*Id.*, at p. 261, [emphasis added].) The Supreme Court of Ohio, for its part, defined market share liability even more explicitly as applying to only manufacturers: "The common-law elements for market-share liability are as follows: (1) the product at issue must be fungible, (2) the plaintiff is unable to identify the specific **manufacturer**, (3) there must be joinder of **manufacturers** representing a substantial share of the market, (4) the product is defective, and (5) the plaintiff was injured as a proximate result of the defective aspect of the product." (*Sutowski v. Eli Lilly & Co.*, 1998-Ohio-388 [82 Ohio St.3d 347, 362, 696 N.E.2d 187, 197], [emphasis added].) Likewise, the Supreme Court of Florida has stated that "[t]he market share theory of liability was

developed to provide a remedy where there is an inherent inability to identify the **manufacturer** of the product that caused the injury." (*Celotex Corp. v. Copeland* (Fla. 1985) 471 So.2d 533, 537, [emphasis added].) Pennsylvania's high court has also described market share liability as applying to manufacturers specifically: "Market share liability is grounded on the premise that it ensures that 'each **manufacturer's** liability would approximate its responsibility for the injuries caused by its own products.' " (*Skipworth by Williams v. Lead Indus. Ass'n* (1997) 547 Pa. 224, 234, citing *Sindell, supra*, 26 Cal.3d at 612, [emphasis added].) Similarly, a New York court described market share liability as a "seldom used exception to the general rule in products liability action that a plaintiff "must establish by competent proof … that it was the defendant who **manufactured** and placed in the stream of commerce the injury-causing defective product." (*Brenner v. American Cyanamid Co.* (App.Div. 1999) 263 A.D.2d 165, 170-171, citing *Healey v Firestone Tire & Rubber Co*., 87 NY2d 596, 601, [emphasis added].) And when another New York state court declined to apply market share liability to breast implants, it did so because "such products are not fungible and the **manufacturers** of the implants can often be identified." (*In re New York State Silicone Breast Implant Litig.* (Sup.Ct. 1995) 166 Misc.2d 85, 89, [emphasis added].)

The situation is no different in federal courts. The Ninth Circuit Court of Appeals has explained that "when it is impossible for a plaintiff alleging injury to prove which of the numerous **manufacturers** produced the offending product, each **manufacturer** is responsible for a percentage of the plaintiff's recovery corresponding to its share of the market . . .." (*Doe v. Cutter Biological, Inc.* (9th Cir. 1992) 971 F.2d 375, 379, [emphasis added].) The Fifth Circuit Court of Appeals has described market share liability as a theory "under which liability is imposed on the basis of each **manufacturer's** share of the product market." (*Jefferson v. Lead Indus. Ass'n* (5th Cir. 1997) 106 F.3d 1245, 1251, [emphasis added].) And a federal district court in Georgia, while ruling against a Plaintiff because Georgia banned market share liability, went even further and pointed out that there is no indication that market-share liability as a doctrine applies to product sellers: "Williamson argues that because the statute only references manufacturers, it should be read to permit market-share liability claims against product sellers…*Williamson offers no authority to support her assertion that the doctrine of market-share liability*, which evolved to

relax the causation rules against **manufacturers** of fungible goods, *applies to product sellers*." (*Williamson v. Walmart Stores, Inc.* (M.D.Ga. Apr. 8, 2015, No. 3:14-CV-97 (CDL)) 2015 U.S.Dist.LEXIS 45657, at *22-23, [emphasis added].)

Vendor-Defendants could cite many more examples but believe they have sufficiently made their point. Both in and outside of California, in state and federal courts alike, market share liability is not only a sparingly-used doctrine, but one that has only ever been understood to apply to product *manufacturer*s, never mere vendors like Vendor-Defendants here.

C. Justifications for market share liability's adoption do not support applying it to non-manufacturers

The *Sindell* court's reasoning for allowing application of the controversial market share liability doctrine to DES was that "the manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety." (*Sindell, supra,* 26 Cal.3d at 611.) Neither rationale applies to those wholly disconnected from the manufacturing process, like Vendor-Defendants.

Nor is its application to non-manufacturers practical. Unlike manufacturers, which are likely a relatively small, finite group, the number of mere product vendors could be exponentially larger. What's more, there numbers could fluctuate quickly due to market conditions, making the vendor-only universe much more difficult to ascertain. It is telling that only one court has even allowed a market share liability case that did not involve DES (the product at issue in *Sindell*) to proceed past the pleading stage. (*Wheeler, supra,* 8 Cal.App.4th at 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].)[1] Courts are rightly reluctant to take the extraordinary step of making defendants prove their innocence. Plaintiffs ask this Court to ignore that caution. This Court should thus reject Plaintiffs' invitation to take the unprecedented

[1] Other courts have since seriously questioned whether *Wheeler* remains good law following *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953. (*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.)

step of expanding application of the market share liability doctrine to mere vendors of products uninvolved with manufacturing, like Vendor-Defendants.

CONCLUSION

For the above reasons, each of Plaintiffs' causes of action fail to state a claim against the Vendor-Defendant. As such, even if this Court overrules the Global Demurrer, it should sustain this demurrer in its entirety without leave to amend.

Dated: January 24, 2022

MICHEL & ASSOCIATES, P.C.

s/ Sean A. Brady
Sean A. Brady
Attorneys for Defendants Ghost Firearms, LLC, MFY Technical Solutions, LLC, and Thunder Guns, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF ORANGE

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 January 24, 2022, I served the foregoing document(s) described as:

NOTICE OF DEMURRER AND DEMURRER OF DEFENDANTS GHOST FIREARMS, LLC; MFY TECHNICAL SOLUTIONS, LLC; & THUNDER GUNS, LLC; TO PLAINTIFFS' COMPLAINTS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof by the following means, addressed as follows:

Please see Attached Service List.

X (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission through One Legal. Said transmission was reported and completed without error.

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 January 24, 2022, at Long Beach, California.

s/ Laura Palmerin
Laura Palmerin

SERVICE LIST

Amy K. Van Zant avanzant@orrick.com Shayan Said ssaid@orrick.com Anna Z. Saber annasaber@orrick.com Orrick, Herrington & Sutcliffe LLP 1000 Marsh Road Menlo Park, CA 94025-1015	*Attorneys for McFadyen and Cardenas Plaintiffs*
Ric T. Fukushima rfukushima@orrick.com Orrick, Herrington & Sutcliffe LLP 2050 Main Street, Ste. 1100 Irvine, CA 92614-8255	
Douglas Mudford doug@ca-lawyer.com Estee Lewis estee@ca-lawyer.com Catie Barr catie@ca-lawyer.com Brandon Storment brandon@barrandmudford.com Jenni L. Ritter jenni@ca-lawyer.com Barr & Mudford, LLP Post Office Box 994390 Redding, CA 96099-4390	*Attorneys for McFadyen Plaintiffs*
Gerald B. Singleton gerald@SLFfirm.com SINGLETON LAW FIRM 450 A Street, 5th Floor San Diego, CA 92101	*Attorneys for Cardenas Plaintiffs*
Ben Rosenfeld ben.rosenfeld@comcast.net ATTORNEY AT LAW 115 ½ Bartlett Street San Francisco, CA 94110	*Attorneys for Cardenas Plaintiffs*
Craig A. Livingston clivingston@livingstonlawyers.com	*Attorneys for Defendant Tactical Gear Heads, LLC*

Crystal L. Van Der Putten
cvanderputten@livingstonlawyers.com
LIVINGSTON LAW FIRM
A Professional Corporation
1600 South Main Street, Suite 280
Walnut Creek, CA 94596

Grant D. Waterkotte
gwaterkotte@pettitkohn.com
Tina Robinson
trobinson@pettitkohn.com
Petit Kohn Ingrassia Lutz & Dolin PC
5901 W. Century Blvd., Suite 1100
Los Angeles, CA 90045

Attorneys for Defendants Defense Distributed and Cory R. Wilson

Michael E. Gallagher
mgallagher@eghblaw.com
Nicholas Maxwell
nmaxwell@eghblaw.com
Kyle Gaines
kgaines@eghblaw.com
Desiree Caudillo
dcaudillo@eghblaw.com
Edlin Gallagher Huie & Blum LLP
515 S. Flower Street, Suite 1020
Los Angeles, CA 90071

Attorneys for Defendant Juggernaut Tactical, Inc.

Christopher Renzulli
crenzulli@renzullilaw.com
Howard B. Schilsky
hschilsky@renzullilaw.com
Renzulli Law Firm, LLP
One North Broadway, Suite 1005
White Plains, NY 10601

Germain D. Labat
germain.labat@gmlaw.com
Guinevere Malley
guinevere.malley@gmlaw.com
Puneet Bhullar
puneet.bhullar@gmlaw.com
GREENSPOON MARDER LLP
1875 Century Park East, Suite 1900
Los Angeles, California 90067

Attorneys for Defendant Polymer80, Inc.

James J. McGuire
james.mcguire@gmlaw.com
Michael Marron
michael.marron@gmlaw.com

Michael Patrick
michael.patrick@gmlaw.com
GREENSPOON MARDER LLP
590 Madison Avenue, Suite 1800
New York, New York 10022

David A. Melton
dmelton@porterscott.com
Daniel B. Phung
dphung@porterscott.com
Porter Scott, A Professional Corporation
350 University Avenue, Suite 200
Sacramento, CA 95825

Attorneys for Defendant James Tromblee, Jr., d/b/a USPatriotArmory.com