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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

GHOST GUNNER FIREARMS CASES

Included actions:

30-2019-01111797-CU-PO-CJC *Cardenas v. Ghost Gunner, Inc. dba GhostGunner.net, et al.*

CIV-DS-1935422 *McFadyen, et al. v. Ghost Gunner, Inc., dba GhostGunner.net, et al.*

JCCP No. 5167

Superior Court of California
County of Orange
Case No. 30-2019-01111797-CU-PO-CJC

Superior Court of California
County of San Bernardino
Case No. CIV-DS-1935422

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT POLYMER80'S DEMURRER (PLCAA)

Date: May 6, 2022
Time: 9:00 a.m.
Dept.: CX 104
Judge: Hon. William D. Claster

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INTRODUCTION

The allegations of the Complaints that must be taken as true explain that defendants Polymer80, Inc. ("Polymer80") and James Tromblee, d/b/a USPATRIOTARMORY.COM[1] ("Tromblee") (together the "Demurring Defendants") recklessly and unlawfully supplied "ghost guns" kits/parts to prohibited persons, and caused Plaintiffs' injuries by arming the prohibited possessor who shot them ("Neal").[2]

Plaintiffs allege that Defendants intentionally marketed and advertised their ghost gun kits/parts to persons who cannot lawfully obtain or possess a firearm. McFadyen Compl., ¶¶ 3, 7, 49, 70, 73, 90-91, 104, and 154; Cardenas Compl., ¶¶ 7, 33, 54, 57, 74-75, 88, 132, and 168. Despite Plaintiffs' claims falling squarely within the predicate, negligence per se, and negligent entrustment exemptions to the Protection of Lawful Commerce in Arms Act ("PLCAA") (15 U.S.C. §§ 7901-7903), Demurring Defendants contend, incorrectly, that PLCAA bars this Court from enforcing California law to provide Plaintiffs redress for the harms foreseeably caused by their misconduct. Mem. of P. & A. in Supp. of Dem. of Def. Polymer80, Inc. on PLCAA Grounds ("MP&A") at 6-7. Demurring Defendants are wrong and their demurrer should be denied.

PLCAA only bars certain "qualified civil liability action[s]" which must both 1) fall within the general definition in § 7903(5)(A) and 2) not comprise an enumerated exception in § 7903(5)(A)(i-vi). Neither requirement is satisfied here. In fact, Plaintiffs' allegations satisfy multiple exceptions that exempt Demurring Defendants from any protection under PLCAA. Demurring Defendants knowingly violated applicable laws in ways which proximately caused Plaintiffs' harm, which satisfies PLCAA's predicate and negligence per se exceptions (§ 7903(5)(A)(iii), (ii)). Plaintiffs also satisfy PLCAA's negligent entrustment exception (§ 7903(5)(A)(ii)). These exceptions allow the entire "action" – including all claims – to proceed. Plaintiffs' action also does not fall within the general definition of a qualified civil liability action in § 7903(5)(A). Alternatively, if PLCAA bars Plaintiffs' claims, it is unconstitutional.

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[1] James Tromblee, d/b/a USPATRIOTARMORY.COM, filed a joinder to Polymer80's demurrer.
[2] *See* Plaintiffs' Opposition to Defendants' Demurrer to Plaintiffs' Complaints (the "Global Demurrer") for why Demurring Defendants are liable under a market share theory.

RELEVANT FACT SUMMARY AND CASE HISTORY

Plaintiffs incorporate by reference the relevant fact summary and case history as outlined in Plaintiffs' Opposition to the Global Demurrer. In brief, Plaintiffs in this case were injured in a shooting massacre that occurred in Tehama County, California on November 13-14, 2017. McFadyen Compl., ¶ 13; Cardenas Compl., ¶ 13. Kevin Neal, a mentally disturbed resident of California who was barred from possessing firearms, went on a rampage using weapons he assembled from gun parts/kits manufactured, advertised, and sold by one or more of the Defendants. *Id.* Neal acquired these weapons as a result of Defendants' negligent manufacturing, marketing, sales, and supplying of these ghost gun parts/kits with the intention or clear foresight that they would be sold to such dangerous individuals, as they understood the untraceable products were highly attractive to such dangerous individuals, targeted them through marketing, and took no meaningful precautions to avoid selling to such individuals. McFadyen Compl., ¶¶ 7, 49, 91; Cardenas Compl., ¶¶ 7, 35, 85.

LEGAL STANDARD

"[I]t is well settled that a general demurrer admits the truth of all material factual allegations in the complaint," *Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 496, (1970) and should be denied unless the court finds a "failure to state facts constituting a cause of action." *Berger v. Cal. Ins. Guarantee Ass'n*, 128 Cal. App. 4th 989, 1006 (2005). To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged. *Ace Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 2 Cal. App. 5th 159, 192 (2d Dist. 2016). A reviewing court must "draw[] inferences favorable to the plaintiff, not the defendant." *Perez v. Golden Empire Transit Dist.*, 209 Cal. App. 4th 1228, 1238 (2012). The complaint must be read "as a whole and each part must be given the meaning that it derives from the context wherein it appears." *Zakk v. Diesel*, 33 Cal. App. 5th 431, 446 (2019). Moreover, the allegations "must be liberally construed with a view to substantial justice between the parties." *Id.* at 446-47 (quoting *Gressley v. Williams*, 193 Cal. App. 2d 636, 639 (1961)).

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ARGUMENT

A. These Cases Are Not Qualified Civil Liability Actions

1. Plaintiffs' Entire Actions Fall Within PLCAA Exceptions

Plaintiffs' actions come within PLCAA's "predicate," negligence per se, and negligent entrustment exceptions to protection under the statute. Therefore, all claims are permitted and not subject to dismissal.

PLCAA's predicate exception (15 U.S.C. § 7903(5)(A)(iii)) allows an entire "action in which" the defendant's misconduct proximately contributed to a plaintiff's injury by knowingly violating a law "applicable to the sale or marketing" of firearms. An overwhelming consensus of courts have recognized that where the predicate exception is satisfied, PLCAA allows all claims within a case to survive – including individual claims for negligence and nuisance. *See, e.g.*, *Englund v. World Pawn Exch.*, No. 16CV00598, 2017 Ore. Cir. LEXIS 3, *11-12 (June 30, 2017) ("the predicate exception's broad language provides that an entire 'action' survives – including all alleged claims") (Decl. of Amy K. Van Zant in Supp. of Pls.' Opp'n to Def. Polymer80, Inc.'s Dem. (PLCAA grounds) ("Van Zant Decl.") Ex. 1); *Fox v. L&J Supply, LLC*, No. 2014-24619 (Pa. Ct. Com. Pl. Nov. 26, 2018) (Van Zant Decl. Ex. 2); *Coxie v. Academy, Ltd.*, No. 2018-CP-42-04297 (S.C. Ct. Com. Pl. July 29, 2019) (Van Zant Decl. Ex. 3); *Chiapperini v. Gander Mountain Co.*, 13 N.Y.S.3d 777 (N.Y. Sup. Ct. 2014) (Van Zant Decl. Ex. 4); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. App. 2007), *transfer denied*, 915 N.E.3d 978 (Ind. 2009); *Williams v. Beemiller, Inc.*, 100 A.D.3d 143 (N.Y. App. Div. 2012), *amended by* 103 A.D.3d 1191 (N.Y. App. Div. 2013); *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123 (D. Nev. 2019).[3] Indeed, the *Chiapperini* court held: "as long as one PLCAA exception applies to one claim the entire action continues." 13 N.Y.S.3d at 785-87.

Demurring Defendants' reliance on *Ileto v. Glock,* 565 F.3d 1126 (9th Cir. 2009) (cited in MP&A at 6) to argue that it is entitled to PLCAA's protections is misplaced. *Ileto* found the

[3] Demurring Defendants misleadingly cite to an earlier ruling in *Prescott* without informing this court that that Court later found the amended complaint satisfied the predicate exception. *See* MP&A at 6, 9; *compare Prescott v. Slide Fire Solutions, LP*, 341 F. Supp. 3d 1175 (D. Nev. 2018), *with Prescott*, 410 F.Supp.3d at 1123.

predicate exception was not satisfied in that particular case, and thus did not consider whether the alleged negligence and public nuisance claims survived; here, the multiple exceptions are satisfied and thus the entire action (both cases) should continue. *Chiapperini*, 13 N.Y.S.3d at 785-87.

2. Plaintiffs' Allegations Satisfy PLCAA's Predicate, Negligence Per Se And Negligent Entrustment Exceptions[4]

a. All Claims Survive Under PLCAA's Predicate Exception

Plaintiffs allege that Demurring Defendants knowingly violated several laws applicable to the sale or marketing of firearms, thereby proximately causing them harm. McFadyen Compl., ¶¶ 132-150; Cardenas Compl., ¶¶ 113-128. Any one of these violations is sufficient to exempt Demurring Defendants from PLCAA's protections. However, Demurring Defendants are exempted from protection under both the predicate and negligence per se exceptions.[5]

(1) Demurring Defendants Knowingly Violated Cal. Penal Code §§ 30510, 30515, 30605 and 18 U.S.C. § 922(o) In A Way Which Proximately Caused Plaintiffs' Harm

Demurring Defendants knowingly aided and abetted Neal's unlawful possession of firearms classified as either prohibited "assault weapon[s]" under California law and/or "machinegun[s]" under federal law. McFadyen Compl., ¶¶ 132-35; Cardenas Compl., ¶¶ 113-16. "Assault weapon[s]" include, *inter alia*, the "Colt AR-15 series" (Cal. Penal Code § 30510(a)(5)) and "all other models that are only variations, with minor differences, of those models listed in

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[4] Demurring Defendants incorrectly suggest that PLCAA's product liability exception, 15 U.S.C. § 7903(5)(A)(v), is not implicated. *See* MP&A at 8, n.5. However, the alleged facts make out a product liability claim which satisfy this exception. *See* McFadyen Compl., ¶¶ 70-74, 90-92; Cardenas Compl., ¶¶ 56-60, 76-78 (providing examples of marketing tactics used by Defendants emphasizing the lack of serial numbers and background checks with the sole purpose of targeting criminal purchasers); *Candelore v. Tinder, Inc.*, 19 Cal. App. 5th 1138, 1143 (2018) (finding error in trial court sustaining demurrer where there was no strong public policy justifying the defendant's actions that were allegedly in violation of the UCL).

[5] Though PLCAA's negligence per se exception applies whether or not California recognizes negligence per se as a separate cause of action, California does recognizes the doctrine of negligence per se. *Millard v. Biosources, Inc.*, 156 Cal. App. 4th 1338, 1353 n.2 (2007) (noting that negligence per se may apply when there is a "valid underlying cause of action for negligence"). In any event, PLCAA does not require that a state recognize negligence per se claims in order for the exception to apply. 15 U.S.C. § 7903(5)(A)(ii).

subdivision (a), regardless of the manufacturer." Cal. Penal Code § 30510(f); *see also* § 30605(a). Federal law prohibits the general public from possessing "machinegun[s]" under 18 U.S.C. § 922(o) (incorporating the definition from 26 U.S.C. § 5845(b)). ATF Rule 82-8 explains that machine guns "include[] those weapons which have not previously functioned as machineguns but possess design features which facilitate full automatic fire by a simple modification or elimination of existing component parts." *Id*. at 1 (Van Zant Decl. Ex. 5).[6] The "ghost gun" AR-15 style firearms assembled from Defendants' ghost gun kits/parts and used by Neal are machineguns, a variation on the prohibited Colt AR-15 model, and contain features rendering them readily susceptible to modification to fire in a fully automatic fashion.[7]

Demurring Defendants' business practices were intended to enable dangerous California residents like Neal to make unserialized, untraceable AR-15 style firearms which constitute prohibited assault weapons and machineguns. *See, e.g.*, McFadyen Compl., ¶¶ 7, 33, 74; Cardenas Compl., ¶¶ 7, 49, 90. Demurring Defendants knowingly aided Neal's illegal possession of assault weapons in violation of Cal. Penal Code § 30605(a), and unlawful machineguns under 18 U.S.C. § 922(o). *See also* Cal. Penal Code § 31, 18 U.S.C. § 2.[8] These violations proximately caused Plaintiffs' harm. *See* McFadyen Compl., ¶¶ 138-49; Cardenas Compl., ¶¶ 121-27.

Demurring Defendants contend that the ghost gun parts/kits it provided were not, in and of themselves, "firearms" or outlawed under California or federal law and thus it did not aid and abet the violation of such laws. MP&A at 2, 9-14. Demurring Defendants are wrong. A supplier can aid and abet the unlawful possession of an unlawful product where it supplies components with the knowledge and intent that they will be used to create the outlawed product. Courts have repeatedly applied this rationale to suppliers of component parts/kits used to create prohibited firearms. *See, e.g., United States v. Evans*, 712 F. Supp. 1435, 1440 (D. Mont. 1989), *aff'd*, 928

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[6] Plaintiffs' Request for Judicial Notice In Support of their Opposition to Polymer80's Demurrer ("RJN") Ex. 1.

[7] The allegations are sufficient to invoke 18 U.SC. § 922(o). McFadyen Compl., ¶ 80; Cardenas Compl., ¶ 64.

[8] Demurring Defendants are incorrect, *see* MP&A at 11, that Plaintiffs failed to allege that they acted with specific intent to facilitate unlawful possession of illicit firearms. *See, e.g.*, McFadyen Compl., ¶ 155; Cardenas Compl., ¶ 133.

F.2d 858 (9th Cir. 1991) (allegations of aiding and abetting the possession of a machine gun were sufficient where defendant suppliers of firearm parts had knowledge the components would be assembled into a machine gun); *United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (upholding defendants' convictions for aiding and abetting the possession and manufacture of machine guns where one co-defendant ordered parts and tools used to manufacture fully automated weapons). Were there any doubt, a pending proposed ATF rule clarifies that ghost gun parts/kits like Demurring Defendants' are firearms under federal law even prior to assembly.[9] Hence, the sale of ghost gun parts/kits without serial numbers and Brady background checks is illegal. *See id*. and 18 U.S.C. §§ 922(t), 923.

Demurring Defendants also assert that even ghost guns *assembled from* its parts/kits are not firearms under federal law. MP&A at 9-10. But the federal definition of "firearm" includes "any weapon . . . which will **or is designed to** . . . expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3)(A) (emphasis added).[10] The massacre perpetrated by Neal shows that the assembled weapons unquestionably meet that definition.[11]

Demurring Defendants mistakenly contend that PLCAA bars Plaintiffs' claims because the complaints do not reference violations of federal law with sufficient specificity. MP&A at 12-14. However, Demurring Defendants cite no authority that requires Plaintiffs to preemptively allege specific facts or laws needed to defeat an affirmative defense. *Id.* In fact, in *Williams,* the New York Court of Appeals rejected this very argument, holding: "although the complaint does not specify the statutes allegedly violated, it sufficiently alleges facts supporting a finding that defendants knowingly violated federal gun laws." 100 A.D.3d at 149. Indeed, even were this

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[9] ATF, *Definition of Frame or Receiver and Identification of Firearms,* 86 Fed. Reg. 27720, 27726 (May 21, 2021) (Van Zant Decl. Ex. 6, RJN Ex. 2).

[10] California law contains a near identical definition of firearms. Cal. Penal Code § 16520(a). Demurring Defendants further cite a recent bill, AB-1621, in their argument concerning the definition of ghost guns, which would not be subject to judicial notice even had Demurring Defendants requested as the facts within are subject to dispute. MP&A at 10.

[11] Demurring Defendants' reliance on *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. 2021) (*cited* in MP&A at 13-14) is misplaced. That case considered whether a magazine packaged with a rifle was a component part. It has no bearing on the question of whether *a fully assembled weapon* built from component parts/kits provided by Demurring Defendants is a "firearm" under 18 U.S.C. § 921(a)(3)(A).

Court to find contrary to *Williams* that Plaintiffs must allege Demurring Defendants' violation of federal laws with more specificity, the appropriate remedy would be to allow Plaintiffs to amend their complaints. *See Corporan v. Wal-Mart Stores East, LP*, No. 16-2305-JWL, 2016 U.S. Dist. LEXIS 93307, at *10 (D. Kan. July 18, 2016) (Van Zant Decl. Ex. 7) ("Assuming that plaintiff amends her complaint as described here, her claims are sufficient to survive the PLCAA filter.").

b. Demurring Defendants Knowingly Violated California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 et seq.) in a Way Which Proximately Caused Plaintiffs' Harm

Demurring Defendants also violated California's Unfair Competition Law ("UCL") by marketing its products in a manner which made them especially attractive to a dangerous class of violent criminals. *See* McFadyen Compl., ¶¶ 3, 7, 49, 70, 73, 90-91, 104, 154; Cardenas Compl., ¶¶ 7, 33, 54, 57, 74-75, 88, 132, 168. The complaints describe how Demurring Defendants' violation of the UCL helped motivate Neal to acquire and misuse its products, thereby proximately resulting in the Plaintiffs' harm. *See* McFadyen Compl., ¶¶ 2-5; Cardenas Compl., ¶¶ 167-170; *see also* McFadyen Compl., ¶¶ 73-74; Cardenas Compl., ¶¶ 57-58 (citing several illustrative examples of the types of marketing tactics used in the industry to attract and target criminal purchasers).

Demurring Defendants argue that state marketing statutes like the UCL cannot meet the definition of predicate statutes under PLCAA because they are not specifically or exclusively "applicable to the sale or marketing of" firearms. MP&A at 1-2, 7-8; 15 U.S.C. 7903(5)(A)(iii). However, courts throughout the country have concluded otherwise. For example, in *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262 (Conn. 2019), *cert. denied sub nom., Remington Arms Co., LLC v. Soto*, 140 S. Ct. 513 (2019), the Supreme Court of Connecticut rejected this exact argument and instead held that PLCAA allowed claims that were premised on reckless advertising that violated a similar state statute to the California UCL at issue here. *Prescott* held similarly as to an analogous Nevada law. 410 F.Supp.3d 1123.

Demurring Defendants' other cited cases on this issue are similarly unavailing. For example, in *City of New York v. Baretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008) (cited in MP&A at 7), the Second Circuit "*reject[ed]* . . . the . . . argument that the [PLCAA] predicate

exception is necessarily limited to statutes that expressly regulate the firearms industry." 524 F.3d at 400 (emphasis added). However, the Second Circuit ultimately determined that, since the statute at issue there was a generally applicable nuisance statute which was not targeted at "sales or marketing" activity, it did not satisfy the PLCAA predicate exception. *Id.* at 399 ("It is not disputed that New York Penal Law § 240.45 is a statute of general applicability that has never been applied to firearms suppliers for conduct like that complained of by the City."). In contrast, the complaints at issue here assert California UCL claims for unfair, unlawful, and/or fraudulent advertising and marketing. *See* McFadyen Compl., ¶¶ 2-5; Cardenas Compl., ¶¶ 167-70.

Demurring Defendants also rely on *Soto* (cited in MP&A at 7), which, in fact, actually supports Plaintiff's contentions. In *Soto,* the Supreme Court of Connecticut held that a similar unfair business practice statute to the California UCL at issue here that did not specifically regulate firearms nonetheless still "regulate[d] commercial sales activities and [wa]s, therefore, narrower in scope and more directly applicable than . . . general tort and nuisance statutes." 202 A.3d at 308 n.53; *see also Prescott*, 410 F. Supp. 3d at 1138 (emphasizing similar distinction).[12] Generally, a UCL claim is appropriate where Plaintiff alleges an injury in fact under one of several categories of economic injury.

c. Plaintiffs' Allegations Also Satisfy PLCAA's Negligent Entrustment Exception

PLCAA expressly exempts actions that satisfy Congress' definition of "negligent entrustment," from protection under the statute. Negligent entrustment claims involve "the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B). Plaintiffs' allegations satisfy this definition. *See, e.g.*, McFadyen Compl.,

[12] Demurring Defendants also cite *In re Firearm Cases*, 126 Cal. App. 4th 959 (2005), which was decided *prior to PLCAA's enactment* and, thus, did not consider whether the UCL could be a predicate statute. It simply held that a UCL claim failed if, *at the summary judgment stage*, a plaintiff could not produce proof of causation. *See In re Firearm Cases*, 126 Cal. App. 4th at 977-82.

¶¶ 90-93; Cardenas Compl., ¶¶ 74-77 (alleging that Defendants, including Polymer80, "purposefully emphasized features of their products they knew to be particularly attractive to criminals and dangerous parties like Neal" and knew that their products "are frequently used by criminals and… have continued to gain additional knowledge of this reality"). Because Plaintiffs have pled claims for negligent entrustment, PLCAA does not bar the present cases.

Contrary to Demurring Defendants' suggestion, *see* MP&A at 1-2, 6-7, PLCAA does not create or modify the elements of the common law tort of negligent entrustment or impose an additional pleading requirement. Rather, § 7903(5)(A)(ii) allows claims recognized by relevant state law if, as here, they come within Congress's definition of the exemption. Courts in California and elsewhere have routinely allowed negligent entrustment claims involving firearms. *See, e.g., Hoosier v. Lander*, 14 Cal. App. 4th 234 (1993); *see also Chiapperini*, 13 N.Y.S.3d at 789 (finding negligent entrustment sufficiently alleged for supplying a gun to a dangerous individual).[13] The allegations thus state a claim under California law and satisfy PLCAA's negligent entrustment exception.

3. <u>Even If No Exception Applies, These Cases Survive Because They Fall Outside of PLCAA's General Definition of a Qualified Civil Liability Action</u>

The concept of federalism and canons of statutory construction require construing PLCAA to minimize federal intrusion into California's traditional authority to make and apply tort law applicable within the state. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Bond v. United States*, 572 U.S. 844 (2014); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). As the Supreme Court cautioned, courts should "not [be] looking for a plain statement that [common law claims like Plaintiffs'] are excluded" from the PLCAA bar, but instead, should "not read [PLCAA] to [bar common law claims like Plaintiffs'] unless Congress has made it clear that [they] are *included*" in the ambit of the claims intended to be barred by PLCAA. *Gregory*, 501 U.S. at 467

[13] *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015) is inapposite. *See* MP&A at 7. *Phillips*, applying Colorado law, dismissed a negligent entrustment claim where, unlike here, there were *no allegations* that defendants engaged in marketing designed to attract criminals and which put them on notice that their customers were inherently dangerous. Demurring Defendants' reliance on *Phillips* to suggest that Plaintiffs have failed to adequately allege proximate cause under the predicate exception, MP&A at 9, is misplaced for the same reason.

(emphasis in original). The Supreme Court further clarified that even when the "express language" of a statute mandates some preemption, the "presumption [against preemption] reinforces the appropriateness of a narrow reading" of the "scope" of the preemption. 505 U.S. at 516-18; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (discussing *Cipollone*) (emphasis omitted).

PLCAA lacks the requisite clear statement of intent to include claims like Plaintiffs' within the scope of the general definition of prohibited qualified civil liability actions in § 7903(5)(A). On the contrary, PLCAA reflects an intent to *allow* a claim where, as here, a gun industry actor's misconduct is alleged to be one cause of the harm. Indeed, PLCAA never states that tort claims against gun industry actors are barred outright. Instead, it provides a general definition of presumptively prohibited qualified civil liability actions against licensed gun companies for harm "resulting from the criminal or unlawful misuse" of a gun by a third party. 15 U.S.C. § 7903(5)(A). The term "resulting from" as used in PLCAA is undefined, and should be read consistently with PLCAA's Purposes and Findings, which express Congress's intent to only "prohibit causes of action … for the harm solely caused by the criminal or unlawful misuse of firearm products." 15 U.S.C. § 7901(b)(1) and § 7901(a)(6) (similar "solely caused" language). Only this reading complies with "[t]he primary rule of statutory construction," which is "to give effect to the intention of the legislature." *Rodgers v. United States,* 185 U.S. 83, 86 (1902)*; see also Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) (statute must "be read as a whole").

This reading furthers Congress' intent not to protect gun companies where their misconduct and a later criminal act were *both* contributing causes of the resultant harm. As PLCAA's chief Senate sponsor emphasized: "[PLCAA] … does not protect firearms [industry actors] from . . . lawsuits based on their own negligence or criminal conduct . . . If manufacturers or dealers break the law or commit negligence, they are still liable **.** . . *See* 151 Cong. Rec. S9061, S9099 (July 27, 2005) (Sen. Craig) (Van Zant Decl. Ex. 8, RJN Ex. 3).

Further, "[s]olely" was added to PLCAA's first Purpose as one of the few changes made to an earlier version of PLCAA that failed to pass. *Compare* S. 1805, 108th Cong. (2003) (Van

Zant Decl. Ex. 9) *with* S. 397, 109th Cong. (2005) (Van Zant Decl. Ex. 10).[14] No statutory word should be read as "superfluous" (*see Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991)) – especially not one that appears critical to PLCAA's passage. The Supreme Court in *Soto* cited PLCAA's "solely caused" language together with the holdings from *Bond* and *Cipollone*, in support of its finding that "in the absence of a clear statement in the statutory text or legislative history [of PLCAA] that Congress intended to supersede the states' traditional authority . . . we are compelled to resolve any textual ambiguities in favor of the plaintiffs." *See Soto,* 202 A.3d at 312-13, 313 n.58 (broadly interpreting PLCAA's predicate exception to allow a claim).[15] A similar result is required here.

B. In The Alternative, PLCAA Is An Unconstitutional Nullity

This court need not decide whether PLCAA is unconstitutional because it does not bar this case. When a court is confronted with two "plausible" interpretations of a statute, "if one [statutory construction] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). Thus, the principle of constitutional avoidance supports adoption of Plaintiffs' proposed reading of PLCAA. The arguments below assume *arguendo* that PLCAA bars this action, in which case it is unconstitutional.

1. PLCAA Exceeds Congress' Enumerated Powers

Congress, in PLCAA, exceeded its Commerce Clause authority. PLCAA does not regulate commerce; it imposes no conditions or regulation on gun companies whatsoever. It only targets entities who have not engaged in any commercial conduct related to the firearms industry -- private parties like the Plaintiffs, state lawmaking functions and state judges. These targets are

[14] See RJN Exs. 4 and 5.

[15] Although a few courts, have failed to read PLCAA with the required federalism-protective lens, those opinions are flawed and/or distinguishable. For example, the court in *Delana v. CED Sales, Inc.*, 486 S.W.3d 316 (Mo. 2016) incorrectly stated that *Bond* and *Gregory* only involved "implied preemption." *Delana*, 486 S.W.3d at 322-323. But *Cipollone* and *Medtronic* explain that the presumption against preemption requires narrowly construing the reach of even express preemption language.

outside the scope of the Commerce Clause, and PLCAA lacks a foundation in any other enumerated power reserved to the federal government.

The Commerce Clause only authorizes Congress to regulate existing "commercial activity" – it may not force passive actors not engaged in commerce to bear costs of misconduct that would normally be imposed on the firearms industry. *See Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 558 (2012).[16] A state appellate court found PLCAA unconstitutional on these grounds, emphasizing that PLCAA impermissibly "regulates the inactivity of individuals who may *never* have engaged in a commercial transaction with the gun industry" and "forces [plaintiffs] to serve as financial sureties for the negligen[ce]'" of the industry by blocking otherwise valid suits. *Gustafson v. Springfield, Inc.*, 207 WDA 2019, 37-39 (Pa. Super. Ct. Sept. 28, 2020), *opinion withdrawn subject to en banc reargument at* 2020 Pa. Super. LEXIS 957 (Dec. 3, 2020) (Van Zant Decl. Ex. 11) (applying *Nat'l Fed'n of Indep. Bus.*) (emphasis in original).[17]

Further, as the Supreme Court recognized in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), "every form of [permissible] preemption [under the Commerce Clause] is based on a federal law that regulates the conduct of private actors, not the States" and state lawmaking functions are not sufficiently commercial activities to fall within the ambit of the Commerce Clause. *See id*. at 1481; *see also id*. at 1485 (J. Thomas, concurring) ("even assuming the Commerce Clause allows Congress to prohibit intrastate sports gambling directly, it does not authorize Congress to regulate state governments regulation of interstate commerce") (internal quotation omitted). Permissible preemption laws target private actors actively engaged in a given industry and require them to meet a defined federal standard, and as an incidental impact, override inconsistent state claims. *See, e.g., Riegel v. Medtronic, Inc.,* 552 U.S. 312, 323-36 (2008).

PLCAA, however, does not regulate gun companies at all.

PLCAA only regulates passive non-market participants like the Plaintiffs, judges, and state lawmakers. It bars certain lawsuits by private plaintiffs, and requires states to utilize their

[16] Four dissenting Justices joined Chief Justice Roberts on this point regarding the requirement of active commercial conduct without joining his opinion.

[17] While the opinion was withdrawn pending *en banc* review, its reasoning remains persuasive.

legislatures, rather than their judiciaries if they wish to impose liability standards on gun companies. *See* 15 U.S.C. § 7903(5)(iii). PLCAA is not a permissible preemption statute

2. PLCAA Violates The Tenth Amendment

PLCAA violates the Tenth Amendment in multiple ways. The Tenth Amendment limits federal intrusion on state sovereignty, including by prohibiting "commandeering." PLCAA violates the "anticommandeering rule" in several ways – including by commanding states not to enforce judicially-created liability standards against the firearms industry unless they are codified into statute. *See* § 7903(5)(A)(iii). The "Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). How states allocate lawmaking authority among the branches of their governments is an essential aspect of their sovereignty reserved under the Tenth Amendment. "[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a *decision is not a matter of federal concern.*" *Erie R.R. Co. v. Tompkins***,** 304 U.S. 64, 78 (1938) (emphasis added).

In a case considering a similar statute in *Matter of Vargas* ("*Vargas*"), 131 A.D.3d 4 (2d Dep't 2015), the New York Court of Appeal recognized that Congress "cannot, consistent with the core principles of state sovereignty guaranteed by the Tenth Amendment, vest in the federal government the right to take away from the state its authority to determine which coequal branch of government should exercise the power of the sovereign." 131 A.D.3d at 26–27 (rejecting reading of federal statute so as to require a legislative opt-out from its terms where state had chosen to allocate authority to the judiciary); *see also Alden v. Me.*, 527 U.S. 706, 739, 752-54 (1999) ("Congress c[annot] displace a State's allocation of governmental power and responsibility" between its judicial and legislative branches). Further, the federal government may not "regulat[e] [a] state government['s] regulation" of its own citizens by limiting the ability of one branch of state government to exercise lawmaking authority in a given way. *See Murphy*, 138 S. Ct. at 1478, 1485 (internal quotation and alteration omitted) (applying the "anticommandeering rule"). PLCAA represents similar federal overreach into how states delegate lawmaking functions and/or regulate their own citizens as illustrated by *Vargas*, *Alden*, and *Murphy*.

PLCAA also impermissibly purports to define one or more substantive rules of common law. "Congress has no power to declare substantive rules of common law applicable in a State." *Erie*, 304 U.S. at 78. "There is no federal general common law." *Id*. *Gustafson* recently acknowledged that "[b]y defining a 'qualified-civil-liability action,' Congress [in PLCAA] pronounced substantive rules of common law and therefore exercised a police power reserved for the several States under the Tenth Amendment." (Van Zant Decl. Ex. 11 at 57).

3. PLCAA Violates Due Process

PLCAA purports to completely deny certain victims of gun industry misconduct of any remedy whatsoever from those companies who caused them injury. No other federal law purports to so utterly deprive claimants of any recovery. The Constitution does not allow it.

"[W]here there is a legal right, there is also a legal remedy by suit or action at law." *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (internal quotation omitted). Consistent with this teaching, the Supreme Court has never permitted Congress to eradicate all rights to redress for victims of a negligent and/or unlawful industry. When the Supreme Court held that Congress may limit or eliminate certain state tort claims, Congress provided a reasonably adequate alternative remedy. *See Duke Power Co. v. Carolina Env't Study Grp.*, 438 U.S. 59, 93 (1978) (finding that "[t]h[e] panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by [the act]."); *see, e.g.*, the September 11th Victim Compensation Fund of 2001 (Pub. L. No. 107-42, 115 Stat. 237).[18] If read to bar Plaintiffs' claims while leaving *no* remedy, PLCAA is an unconstitutional aberration.

An Indiana court held PLCAA unconstitutional for due process concerns. *City of Gary v. Smith & Wesson Corp.*, No. 45D05-0005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006) (Van Zant Decl. Ex. 13). A Wisconsin court held that PLCAA would violate due process if it barred the plaintiffs' claims, which were similar to those at issue here. Mot. Hr'g Tr. at 24:14-25:6, Lopez v. Badger Guns, Inc., No. 10-cv-18530 (Wis. Cir. Ct. Mar. 24, 2014) (Van Zant Decl. Ex. 14)*; see also* Patricia Foster, *Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional*, 72

[18] Van Zant Decl. Ex. 12*;* RJN Ex. 6.

U. Cin. L. Rev. 1739 (Summer 2004). Similarly, it would be a violation of due process to bar Plaintiffs' claims here.

4. PLCAA Violates Equal Protection

To apply PLCAA to bar recovery for gun violence victims in California while allowing recovery for otherwise similarly situated victims in states that have codified gun liability statutes with the same elements as the judicially created standards at issue here would violate equal protection principles. *See* 15 U.S.C. § 7903(5)(A)(iii). Such discrimination cannot survive even rational basis review. *See McBride v. General Motors Corp*., 737 F. Supp. 1563 (M.D. Ga. 1990); *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432 (1985).

CONCLUSION

PLCAA does not apply to bar Plaintiffs' claims and, if it did, would be an unconstitutional act without force or effect. Demurring Defendants' Unique Demurrer on PLCAA Grounds should be denied.

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