AMY K. VAN ZANT (STATE BAR NO. 197426)
avanzant@orrick.com
RIC R. FUKUSHIMA (STATE BAR NO. 272747)
rfukushima@orrick.com
SHAYAN SAID (STATE BAR NO. 331978)
ssaid@orrick.com
ANNA Z. SABER (STATE BAR NO. 324628)
annasaber@orrick.com
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025-1015
Telephone: +1 650 614 7400
Facsimile: +1 650 614 7401

Attorneys for Plaintiffs
Francisco Gudino Cardenas and Troy McFadyen, et al.

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 DEFENDANTS' DEMURRER (GLOBAL)

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

California Cases

Other State Cases

Federal Statutes

California Statutes

INTRODUCTION

The demurrer filed by Defendants Juggernaut Tactical, Inc., MFY Technical Solutions, LLC, Blackhawk Manufacturing Group, Inc., Thunder Guns, LLC, Ghost Firearms, LLC, Tactical Gear Heads, LLC, Defense Distributors, Cody R. Wilson, Polymer80, Inc., and James Tromblee, Jr. d/b/a USPatriotArmory.com ("Defendants") asserts a series of flawed arguments that boil down to (1) disputing the facts as pled by Plaintiffs and (2) asserting theories for limiting the applicability of market share liability in ways that no prior California court has recognized.

In many instances, Defendants outright ignore facts pled in the Cardenas and McFadyen complaints ("the Complaints") to instead argue the facts as Defendants believe them to be. For example, Defendants dispute whether Plaintiffs "allege facts sufficient to establish the fungibility of Defendants' products and, in any event, Defendants' products are demonstrably not fungible." Memorandum of Points and Authorities ISO Demurrer of Defendants to Plaintiffs' Complaints (Global) ("MP&A"). But Plaintiffs have outright alleged in the Complaints that "'Ghost gun' parts/kits that can be used to assemble unserialized AR-15 style rifles are fungible products." McFadyen Compl., ¶ 108; Cardenas Compl., ¶ 92; *see also* McFadyen Compl., ¶ 133 ("Defendants are manufacturer/sellers of 'ghost gun' parts/kits . . . designed for assembly into AR-15 style rifles"); Cardenas Compl., ¶ 114 (same). And "it is well settled that a general demurrer admits the truth of all material factual allegations in the complaint." *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 496, (1970). Defendants are free to disagree that their ghost gun parts/kits are fungible, but for purposes of this demurrer, they must accept Plaintiffs' allegations to the contrary as true.

Defendants rely on similar tactics to argue that Plaintiffs have failed to allege causation. Here, they once again ignore the allegations as pleaded in favor of their own view of the facts and furthermore advance legal theories that have nowhere been adopted by any California courts. For example, Defendants contend that "Plaintiffs do not allege that Defendants' products are defective or inherently harmful" and argue that market share liability is limited to product liability cases arising from harm caused by an "inherently defective" product. MP&A at 24-26. However, there is no requirement that a plaintiff show that a product is "defective or inherently

harmful" to prove market share liability. *See Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 611-613 (1980), *cert denied* (market share liability appropriate where plaintiff is harmed by one or more of a group of tortfeasors who supply a "fungible" product, and the precise tortfeasor(s) are unable to be identified through no fault of the plaintiff). Moreover, Plaintiffs have alleged that Defendants ghost gun kits/parts are "highly lethal, illegal and dangerous weapons" and that Defendants "purposefully targeted a dangerous subclass of California consumers who had no or limited access to these weapons by virtue of disqualifying records, mental illness, and/or relevant legal restrictions." McFadyen Compl., ¶ 70; Cardenas Compl., ¶ 88.

The pending cases are complex. It may be that some Defendants will ultimately be able to show that their ghost gun kits/parts were not used in the massacre or that Plaintiffs will not be able to adduce sufficient evidence in support of one or more of their claims. But Plaintiffs have adequately pled their claims and the cases are nowhere near ready for determination of the ultimate facts. Defendants' demurrer should be denied on all grounds.

RELEVANT FACT SUMMARY AND CASE HISTORY

Plaintiffs were injured or are the relatives of people who were injured in a series of spree killings by a mentally disturbed man named Kevin Neal that occurred in Tehama County, California on November 13-14, 2017. McFadyen Compl., ¶ 13; Cardenas Compl., ¶ 13. At the time of the shootings, Neal was barred from legally possessing firearms, yet he had maintained a cache of prohibited weapons. *See* McFadyen Compl., ¶¶ 95-99; Cardenas Compl., ¶¶ 79-83. Those prohibited weapons included at least two AR-15 style unserialized and unregistered "ghost guns" assembled from kits and parts manufactured and sold by Defendants on the Internet. McFadyen Compl., ¶¶ 71-72; Cardenas Compl., ¶¶ 55-56. Defendants intentionally marketed their ghost gun kits/parts to prohibited individuals like Neal by highlighting the lack of registration and background checks required for the ghost guns made from Defendants' kits/parts. McFadyen Compl., ¶¶ 70-74; Cardenas Compl., ¶¶ 54-58.

Defendants are manufacturers and/or sellers of ghost gun parts/kits which are easily assembled to form fully functional firearms in minutes, including to make AR-15 style firearms that are prohibited "assault weapon[s]" under California law (Cal. Penal Code. §§ 30510, 30515,

30605) and banned "machinegun[s]" under federal law. 18 U.S.C. § 922(o). *See, e.g.*, McFadyen Compl., ¶¶ 61-64, 79-81, 131-151; Cardenas Compl., ¶¶ 44-48, 63-65, 112-129. Defendants also violate state and/or federal firearms laws in other ways. For example, Federal Firearms Licensees ("FFLs") may only sell firearms in accordance with certain federal requirements. McFadyen Compl., ¶¶ 54-56; Cardenas Compl., ¶¶ 38-40. Such requirements include conducting background checks on purchasers to make sure they do not belong to one of the groups prohibited from possessing guns, including stamped serial numbers on the firearms for record keeping and law enforcement tracing purposes, exercising discretion as to whom the FFL sells and general compliance with relevant federal and state laws. *Id.* However, Defendants were not FFLs in 2017 and many still are not FFLs today, and the ghost guns parts/kits they sell are intentionally designed to evade the federal definition of a "firearm" so as to avoid needing to comply with these requirements. McFadyen Compl., ¶¶ 58, 62; Cardenas Compl., ¶¶ 42, 46. The ghost guns assembled from Defendants' products pose a significant risk of harm because when fully assembled they can cause the same amount of damage as a factory-manufactured AR-15 style firearm, but without the requirement of following the regulations in place for public safety. *See* McFadyen Compl., ¶¶ 62-68; Cardenas Compl., ¶¶ 46-49.

Defendants' products intentionally sidestep these federal requirements, where the gun parts they manufacture and sell are unserialized and sold freely online without background checks. *E.g.*, McFadyen Compl., ¶ 66; Cardenas Compl., ¶ 50. The result of Defendants' actions is that dangerous and/or mentally disturbed individuals, like Neal, who ordinarily would not be permitted to possess firearms, are able to obtain untraceable gun parts that are easily assembled into fully functional assault weapons and/or machineguns. *E.g.*, McFadyen Compl., ¶¶ 64, 66-68; Cardenas Compl., ¶¶ 48, 50-52. Not only do Defendants manufacture and sell these dangerous products, they also directly advertise to dangerous individuals, using the untraceability of the ghost guns as the main selling point. *E.g.*, McFadyen Compl., ¶¶ 70-74; Cardenas Compl., ¶¶ 54-58.

The ghost gun parts/kits that are manufactured, sold, and marketed by Defendants contain interchangeable parts made of generally the same materials and which can be used to assemble

prohibited assault weapons and/or machineguns presenting a similar risk of dangerous misuse, such that these kits are fungible. McFadyen Compl., ¶ 108; Cardenas Compl., ¶ 92. Because of the interchangeability and untraceability of Defendants' products, Plaintiffs are unable to determine the individual Defendant(s) who manufactured or sold the ghost guns Neal used in the Tehama shootings. McFadyen Compl., ¶ 98; Cardenas Compl., ¶ 82.

As a result of these above actions, the Complaints allege six causes of action against all Defendants, both manufacturers and sellers: (1) negligence; (2) negligence per se; (3) negligent entrustment; (4) public nuisance; (5) violation of Cal. B&P § 17200 (unfair and unlawful sales practices); and (6) violation of Cal. B&P § 17200 (unfair marketing tactics). McFadyen Compl., Counts I-VI; Cardenas Compl., Counts I-VI. There is a substantial probability that one or more of the Defendants is responsible for making, advertising, selling, and shipping Neal the ghost gun parts/ kits he used in the Tehama shootings. *E.g.,* McFadyen Compl., ¶¶ 105-07; Cardenas Compl., ¶¶ 89-91.

Defendants intentionally manufactured and sold these parts/kits that are easily assembled into prohibited firearms; as such, their products should not have been on the market. Defendants also owed a standard of care to the general public to take any and all reasonable steps to prevent dangerous individuals, like Neal, from gaining access to their products. McFadyen Compl., ¶¶ 113-14; Cardenas Compl., ¶¶ 97-98. Neal's rampage, and Plaintiffs' resulting injuries, were the direct, proximate, and foreseeable consequences of Defendants' failure to exercise the necessary standard of care. McFadyen Compl., ¶¶ 118-128; Cardenas Compl., ¶¶ 102-109. Furthermore, Defendants are also responsible for aiding and abetting Neal's unlawful possession of assault weapons and/or machineguns, and Defendants' violations of these and/or other state and/or federal firearms laws proximately resulted in Plaintiffs' harm. *See, e.g.,* McFadyen Compl., ¶¶ 104-111, 131-151; Cardenas Compl., ¶¶ 44-48, 63-65, 112-129.

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). A reviewing court must "draw[] inferences favorable to the plaintiff, not the defendant." *Perez v. Golden Empire Transit Dist.*, 209 Cal.App.4th 1228, 1235 (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 447 (quoting *Gressley v. Williams*, 193 Cal. App. 2d 636, 639 (1961)).

ARGUMENT

Defendants' arguments ignore the facts as pled and misinterpret case law or rely on non-binding out of state authority to advance a stricter test for market share liability than California law requires. Plaintiffs have pled ample facts that establish Defendants' liability for the Tehama County mass shooting event. The facts pleaded by Plaintiffs establish that Defendants were negligent, negligently entrusted Neal with their dangerous ghost gun products that were foreseeably used to assemble prohibited assault weapons for a criminal purpose, have created a public nuisance through their participation in the ghost gun market, and have engaged in unfair competition. The pleaded facts further establish that Defendants are jointly liable under the market share liability doctrine because Defendants have intentionally marketed dangerous, fungible products to inherently unstable, criminal, and prohibited individuals who could not obtain a firearm through a background check. Plaintiffs have established each of these causes of action and theories of liability, and accordingly Defendants' demurrer should be denied as to all causes of action.

A. Plaintiffs Have Sufficiently Pled Facts Supporting Market Share Liability.

Defendants' main argument on demurrer is that Plaintiffs' market share liability theory fails as a matter of law for multiple reasons. Defendants advance three core arguments supporting this claim. MP&A at 21-30. First, Defendants maintain that market share liability has been narrowly applied and question whether *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (1980), *cert denied*, the seminal case establishing market share liability, remains good law at all. 26 Cal. 3d at 21-24. Next, Defendants contend that Plaintiffs failed to adequately plead market

share liability because they do not claim that Defendants' products are defective. *Id.* at 24-27. Finally, Defendants complain that Plaintiffs have failed to "sufficiently" allege product fungibility and/or that the products at issue cannot be identified. *Id.* at 27-30. In each instance, Defendants have invented straw man arguments bereft of merit: *Sindell* has not been overturned, there has never been a requirement that products be deemed "defective" for market share liability to apply, and Plaintiffs have alleged that Defendants' products are fungible.

1. Market Share Liability Remains a Viable Doctrine in California.

Plaintiffs bring their claims in this action under the market share liability theory introduced in *Sindell v. Abbott Laboratories,* and as such, Plaintiffs are not required to identify the particular party or parties responsible for supplying the ghost gun kits for the assault rifles used in the Tehama Shootings in order for the Court to find Defendants liable for Plaintiffs' injuries. 26 Cal. 3d at 588 (1980), *cert denied.* In fact, under market share liability, once a plaintiff can show that they have sued a substantial portion of the market for fungible products and that plaintiff cannot identify the ultimate supplier of the particular products used to cause their injuries, the burden of proof on causation is shifted to the Defendants. *Id.*

Defendants improperly attempt to narrow the application of market share liability far beyond California law – to "only [strict] product liability cases arising from harm caused by an inherently defective product." Demurrer[1] at 5, ¶ 3. However, the *Sindell* case was remanded on both negligence and strict liability theories and thus the doctrine is obviously not limited to strict liability claims. 26 Cal. 3d at 613.

Defendants also argue that "Market share liability has a very limited application not available in this case." MP&A at 22. *Sindell* established four pleading requirements for market share liability: (1) the products in question caused the plaintiff's injury; (2) the products in question are fungible; (3) the plaintiff cannot identify the specific supplier of the product at no fault of their own; and (4) the plaintiff has named and joined a substantial share of the market. 26

[1] Defendants applied contiguous page numbering to their demurrer, table of contents and memorandum of points and authorities. Plaintiffs refer to pp. 5-7 as the "Demurrer" and to pp. 16-44 as the "MP&A."

Cal. 3d at 611-13. As discussed in detail *infra,* Plaintiffs allege that Defendants actively marketed their products, which could readily be assembled into lethal assault weapons prohibited by California law, to banned purchasers, including criminals, the mentally ill, and domestic abusers. Further, Plaintiffs allege Defendants took no reasonable precautions to avoid supplying their lethal products to prohibited jurisdictions and people. Further, the products at issue are fungible in that the ghost gun kits/parts for AR-15 style rifle allow users to assemble assault rifles that are capable of the same or equivalent harms and thus are equally dangerous. And ghost gun kits, as their name suggests, are designed to be difficult or impossible to trace to the ultimate supplier, as they lack any serial numbers or other means of registration. For all of these reasons and more, Plaintiffs' allegations meet the pleading requirements for asserting market share liability.

Moreover, the present cases are precisely the type of circumstances that the California Supreme Court found to justify an expansion of alternative liability. As the Supreme Court noted in *Sindell,* "the most persuasive reason for finding plaintiff states a cause of action is that advanced in *Summers*: as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury." 26 Cal.3d at 610-11 (internal citation omitted). *Sindell* involved a class of women who were injured in utero as a result of their mothers taking a drug called DES that was marketed as a miscarriage preventative, but which had long term carcinogenic health effects on female fetuses exposed to the drug. *Id*. at 595-596. The plaintiff, on behalf of the class, sued a substantial portion of the DES manufacturers, bringing both strict liability and negligence causes of actions. *Id*. The trial court dismissed the complaint because the plaintiff could not establish which particular named defendant had actually caused her injury. *Id*. On appeal, the California Supreme Court reversed the dismissal and remanded both plaintiff's strict liability and negligence causes of actions and established the requirements for pleading market share liability. *Id*. at 611-13.

The California Supreme Court further "recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the

rules of causation and liability may be appropriate in these recurring circumstances." *Id.* at 610. The *Sindell* court noted that as technological advances increase the number of fungible goods on the market, "[t]he response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs." *Id*. Where, in such modern circumstances, a plaintiff is unable to establish causation by a particular defendant through no fault of her own, the *Sindell* court reasoned it was appropriate to instead shift the burden to the defendants who "played a significant role in creating the unavailability of proof." *Id*. at 611. Further, the Court reasoned that an industry can better bear the costs of injury than an individual defendant and thus required a plaintiff name a substantial portion of the market as defendants for market share liability to apply. *Id*. Under these circumstances, "[e]ach defendant [would] be held liable for the proportion of the judgment represented by its share of that market unless it demonstrate[d] that it could not have made the product which caused plaintiff's injuries." *Id*. at 612.

Each of the factors that drove the *Sindell* court to recognize market share liability are present and pled here. First, Plaintiffs have pled that they were harmed by Defendants' products, in that Neal foreseeably used banned assault rifles assembled from Defendants' ghost gun products in the Tehama shootings as a result of Defendants' negligent and/or unlawful marketing of those products.[2] *See e.g.*, Cardenas Compl., ¶¶ 80-88; McFadyen Compl., ¶¶ 94-102. Next, Plaintiffs have pled that Defendants' products are fungible goods with the same core characteristics and equivalent risk of danger to the public. *See e.g.*, Cardenas Compl., ¶¶ 3, 52, 84, 93-94; McFadyen Compl., ¶¶ 3, 66, 98, 107-08. Plaintiffs also have pled that they are not at fault if they are unable to identify the specific supplier of the ghost gun products Neal purchased. In fact, Defendants' conduct in advertising unserialized firearm products "played a significant role in creating the unavailability of proof." *See* e.g., Cardenas Compl., ¶ 82 ("Given DEFENDANTS' actions, 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

[2] While Defendants suggest this is not a product liability case (MP&A at 24), negligent supplying of a product is indeed a product liability issue. See CACI 1220.

attack."). Indeed, Defendants' intentional marketing of their gun products in violation of California law and targeted to dangerous individuals arguably makes the case for applying market share liability even stronger than in *Sindell*. And, without a doubt, Defendants, who represent a substantial share of the ghost gun product market, are better able to bear the cost of Plaintiffs' injuries. *See e.g.*, Cardenas Compl., ¶ 89 ("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.").

Defendants are simply wrong when they state that (MP&A at 23) "Plaintiffs [do not] allege that they cannot identify the manufacturer of the product used to cause them injury." *See, e.g.*, Cardenas Compl., ¶ 82 ("It is unknown how and where NEAL acquired the "ghost gun" parts/kits used to assemble the weapons used in the attack. Given DEFENDANTS' actions, 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."). Defendants misstate the law (as discussed further *infra*) when they claim (MP&A at 23) that Plaintiffs' pleadings are defective because they "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."[3] There is no "inherent defect" requirement and, in any event, as described *infra*, Plaintiffs have amply pled that Defendants' intentionally marketed their lethal products to criminals and unstable, prohibited individuals. Likewise, there is no requirement, as Defendants contend (MP&A at 23) that Plaintiffs allege that "Defendants collaborate in marketing, promoting, or testing their products" or that an "industrywide [sic] standard exists." These are simply made-up requirements invented by Defendants.

Finally, Defendants maintain that courts have only narrowed *Sindell* while Plaintiffs aim to "drastically expand the reach of market share liability in an unprecedented manner." MP&A at 24. Plaintiffs believe their allegations are well within the stated rationale in *Sindell* and closely

[3] This latter claim is particularly preposterous since guns are certainly capable of causing harm even when used "lawfully and in their intended manner."

mirror the circumstances in *Wheeler v. Raybestos-Manhattan*, 8 Cal. App. 4th 1152 (1992), but, in any event, their claims should not be dismissed in their infancy and instead they should be permitted to develop the facts before the Court or jury determines whether applying market share liability is ultimately proper.

2. "Inherent Product Defect" Is Not a Requisite of Market Share Liability Theory Under *Sindell*.

Defendants next maintain, "At bottom, market share liability is restricted to injuries resulting from *defective* products that present an inherently singular risk of harm," and because "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," "[m]arket share liability cannot apply to this case at as a matter of law." *Id.* at 26-27. However, neither *Sindell* nor its progeny have confined market share liability to cases where Plaintiffs have pled injuries from a defective product that posed an "inherently singular risk of harm." Instead, market share liability is "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,* 8 Cal. App. 4th at 1155. There is no requirement that the products be "defective" or "inherently dangerous."

Defendants attempt to invent an "inherently defective" requirement and rely primarily on *Sheffield v. Eli Lilly & Co.*, 144 Cal. App. 3d 583 (1983) and *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (2001) for support. MP&A at 25-26. Neither case alters the doctrine of market share liability in California to impose such a requirement.

Instead, the *Sheffield* plaintiffs sought to recover for injuries suffered by a child as a result of receiving a defective polio vaccine. 144 Cal. App. 3d at 590-91. Though the plaintiffs undertook "extensive efforts" to identify which of five possible polio vaccine manufacturers was responsible for the defective vaccine received by the child, they were unable to identify the specific manufacturer. *Id.* at 590-92. Critically, unlike *Sindell,* where the plaintiffs argued that all DES pills manufactured by every provider had dangerous side effects, the *Sheffield* plaintiffs recognized that though the child had received a defective injection, but did not contend that all

polio vaccines were defective. *Id.* at 594 ("Here, 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 *Sheffield* court further noted nothing underlying the rationale for market share liability articulated in *Sindell* "suggests that the costs of injury should be assessed against a manufacturer whose product is not harmful." *Id.* at 595. Having acknowledged the significant differences from *Sindell*, the *Sheffield* court concluded that nothing in *Sindell* "can furnish a key to unlock a treasure chest of a shared liability indiscriminately imposed on manufacturers of safe and defective products of the same nature" and thus "that the market share liability expounded in *Sindell* is not applicable in this case." *Id.* at 596, 599. In sum, nothing in *Sheffield* established a requirement that a product be defective and present "an inherently singular risk of harm" as Defendants incorrectly claim. MP&A at 26.

Defendants' reliance on the New York Court of Appeals case *Hamilton v. Beretta U.S.A., Corp.*, 96 N.Y.2d 222 (2001) in support of its "inherent defect" requirement is likewise misplaced. In *Hamilton*, relatives of people killed by handguns sued 49 handgun manufacturers alleging negligent marketing, design defect, ultra-hazardous activity, and fraud under a market share liability theory. *Id.* at 229-30. The *Hamilton* court held market share liability did not apply on those facts because (1) it is often possible to identify the caliber and manufacturer of the gun that caused injury to a particular plaintiff, and (2) "[e]ven more importantly — given the negligent marketing theory on which plaintiffs tried [the] case — plaintiffs have never asserted that the manufacturers' marketing techniques were uniform. *Id.* at 240-41. The court specifically distinguished *Hamilton* from *Hymowitz v Eli Lilly & Co.*, 73 N.Y.2d 487 (1989), the seminal New York case on market share liability, by stating that, in *Hymowitz*, "each manufacturer engaged in tortious conduct parallel to that of all other manufacturers, creating the same risk to the public at large by manufacturing the same defective product [as creating a defective product is uniform conduct]. Market share was an accurate reflection of the risk they posed." *Id.* at 241. Again, the case did not hold that an inherent product defect is a requisite of market share liability.[4]

[4] *Hamilton* is also non-binding on California courts, which have taken a more expansive view of market share liability than has New York.

The present cases are not similar to *Sheffield* or *Hamilton.* Here, Plaintiffs have pled that Defendants intentionally targeted sales of kits/parts for prohibited weapons (specifically, AR-15 style rifles that are illegal in California) to dangerous individuals who were prohibited from owning firearms. *See, e.g.,* Cardenas Compl., ¶ 64 ("DEFENDANTS thus enabled anyone, including individuals prohibited from possessing any firearms or individuals prohibited from possessing assault weapons by virtue of state law, to build 'ghost guns,' including but not limited to assault weapons."); McFadyen Compl., ¶ 48 (same); *see also* Cardenas Compl., ¶¶ 51-54 ("DEFENDANTS intentionally targeted and continue to target" "criminals, prohibited domestic abusers, and other dangerous individuals who would otherwise be prevented from purchasing a gun due to the inability to pass a background check, including to individuals with psychological or behavioral issues who fear they may not be able to pass muster at a responsible FFL."); McFadyen Compl., ¶¶ 67-70 (same) and Cardenas Compl., ¶¶ 55-58 (Defendants emphasized that guns made from their products were untraceable and not subject to background checks or registration); McFadyen Compl., ¶¶ 72-74 (same). Further, Plaintiffs have pled that Defendants knew that their ghost gun kits/parts were being used by criminals in a dangerous manner and continued to market to criminal elements anyway. Cardenas Compl., ¶¶ 59-67; McFadyen Compl., ¶¶ 71-83.[5]

Plaintiffs further allege that Defendants could have changed their business practices to institute reasonable safety measures to minimize these dangers they created but failed to do so. *See e.g.,* Cardenas Compl., ¶¶ 10, 71, 75 (providing concrete examples of steps Defendants could have taken in supplying their products to minimize such harm); McFadyen Compl., ¶¶ 10, 85, 93 (same). Instead, Neal was able to easily access to Defendants' fungible ghost gun kit/parts for assembly into at least two banned AR-15 style assault weapons that he used to kill and maim the victims. This is not a situation where, "[i]nability to locate evidence . . . alone" justifies application of market share liability; instead, as discussed in Section A.1.a. above, the present

[5] Even were the Court to *sua sponte* impose an "inherent defect" requirement, Plaintiffs' allegations more than suffice. As Defendants appear to allege that their products' intended use is lawful use (*see* MP&A at 23), Defendants' designs of the products are defective as they instead attract and encourage the assembly of illegal assault weapons for unlawful use.

cases involve Defendants' intentional sale of prohibited, dangerous assault weapons kits/parts to criminals and other prohibited California individuals and Plaintiffs are unable to identify the precise parties responsible for the kits used by Neal in his rampage through no fault of their own. This is precisely the type of circumstances *Sindell* created market share liability to cover.

Defendants have cited no case establishing an inherent product defect is a requisite for pleading market share liability and, in any event, Plaintiffs have overwhelmingly pled facts alleging Defendants intentionally sold illegal weapons into California and targeted their products to dangerous individuals.

3. Plaintiffs Have Sufficiently Pled Fungibility.

Defendants challenge whether Plaintiffs have "sufficiently" pled the fungibility of Defendants' products. MP&A at 27-30. To do so, Defendants essentially ignore Plaintiffs' allegations altogether and attempt to argue facts that are not at issue on demurrer. However, Plaintiffs' have pled:

> '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 PLAINTIFF. These products provide dangerous parties like NEAL with an identical capability to possess untraceable assault weapons without going through an FFL and in violation of California's assault weapons ban.

Cardenas Compl., ¶ 94; McFadyen Compl., ¶ 108. This should be the beginning and end of Defendants' argument on this point, though Plaintiffs made numerous other allegations establishing the fungibility of Defendants' products. *See, e.g.,* Cardenas, Compl., ¶¶ 37-45 (describing sale of unserialized products online) and 50, 81-83 (ghost guns lack serial numbers, making it hard or impossible to trace to the suppliers).

When analyzing whether products are fungible, California courts have referred to the Webster's Dictionary definition: "[o]f such a kind or nature that one specimen or part may be used in place of another specimen or equal part in the satisfaction of an obligation" or "[i]nterchangeable." *See Wheeler*, 8 Cal. App. 4th at 1156 (*citing* Webster's New Collegiate Dict. (7th ed. 1969), p. 338). Critically, the *Wheeler* court clarified that "fungible" does not mean "absolutely interchangeable," but rather simply requires that the products are substantially similar

and present "nearly equivalent" risks of danger. *See* 8 Cal. App. 4th at 1156-1157 ("While brake pads are not absolutely interchangeable each for one another [due to, for example, variation in shape and size] and hence are not fungible from the standpoint of an auto mechanic, they are fungible for the purposes of *Sindell* by virtue of containing roughly comparable quantities of the single asbestos fiber, chrysotile.").

Accordingly, fungible does not mean "devoid of *any* differentiating or identifying features," as Defendants would have, but instead merely requires that the products pose equivalent risks of danger, as is the case here. *See, e.g., Pooshs v. Philip Morris USA, Inc.*, 904 F. Supp. 2d 1009, 1032 (N.D. Cal. 2012) (products not fungible where different levels of carcinogenics in each defendant's cigarettes rendered different risks of harm); *Sanderson v. Int'l Flavors and Fragrances, Inc.*, 950 F. Supp. 981, 991 (C.D. Cal. 1996) (difference in aldehydes made each defendant's market share disproportionate to the potential risk of their fragrances). Plaintiffs' allegations are most similar to those in *Wheeler*, where the court went so far as to acknowledge that skilled people in the brake pad industry likely *could* distinguish the defendants' products yet still found the brake pads at issue to be "fungible" because they posed the same risks to the users. 8 Cal. App. 4th at 1156.

Here, while the Defendants' "ghost gun" parts/kits at issue may not be "absolutely interchangeable" in the sense of all of them having the same shape and size, they are fungible because they present an equivalent risk of harm and are marketed by Defendants to dangerous individuals without adequate precautions. In fact, Defendants' products are so similar that even the police are often incapable of tracing them back to their manufacturer or supplier when they recover the ghost guns from crime scenes. *See e.g.*, Cardenas Compl., ¶ 3; McFadyen Compl., ¶ 3 ("such weapons lack a serial number unless specifically required by state law and are difficult, if not impossible, for law enforcement to trace back to their manufacturer/seller when recovered from a crime scene"). Plaintiffs sufficiently pled these similarities constituting fungibility within the Complaint. *See e.g., id.*; Cardenas Compl., ¶ 94; McFadyen Compl., ¶ 108 ("'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 PLAINTIFF. These products provide dangerous parties like NEAL with an identical capability to possess untraceable assault weapons without going through an FFL and in violation of California's assault weapons ban.").

Defendants' attempt to narrow the definition of "fungible" to mean having an "absence of discernable distinguishing features or characteristics of the instrumentalities produced by the industry defendants," *i.e.*, that Defendants' products must be "indistinguishable from each other." MP&A at 27-28. In particular, Defendants argue that some Defendants may mark their products with an identifying emblem, and thus are distinguishable. *Id.* Defendants further argue that Plaintiffs could have used such identifying features to determine which Defendants' products were used in the Tehama shootings. *Id.* But these are all issues of fact, nowhere pled in the Complaints. Defendants' arguments that their products were distinguishable impermissibly contradicts Plaintiffs' allegations (*see e.g.*, Cardenas Compl., ¶ 84; McFadyen Compl., ¶ 98) – allegations which this Court must accept as true. *Alcorn,* 2 Cal. 3d at 496. Plaintiffs' allegations that the Defendants excluded identifying features like serial number (*e.g.*, Cardenas Compl., ¶ 3; McFadyen Compl., ¶ 3) strongly supports the reasonable inference that these firearms should be assumed to lack any distinguishing features.[6] *See Perez,* 209 Cal. App. 4th at 1235. Accordingly, just as in *Wheeler*, where the manufacturer of the asbestos-containing brake pads were deemed fungible because it was difficult for the plaintiffs to identify at the time of injury (due to wear) even though mechanics could identify them, the gun kits Neal used are fungible because Plaintiffs likewise are not readily able to discern the ultimate supplier (even if Defendants say they can). Indeed, the fact that Defendants claim they can identify whether their gun kits were used in the Neal shootings is reason for shifting the burden of proof on causation to them, just as the Court found in *Sindell* and *Wheeler*.[7]

[6] It is also worth noting that Defendants' products are kits/parts – the weapons assembled from those parts do not resemble the kits/parts as received. *See e.g.*, Cardenas Compl., ¶ 49, 82; McFadyen Compl., ¶¶ 63, 96.

[7] Defendants incorrectly argue cases, including *Ferris v. Gatke Corp.,* 107 Cal. App. 4th 1211 (2003), to suggest *Wheeler* is no longer good law. MP&A at 24. But *Ferris* involved a plaintiff bringing claims against manufacturers in a variety of industries for injuries incurred after exposure to asbestos. 107 Cal. App. 4th at 211. The *Ferris* plaintiff, however, was suing based on multiple, different types of products that each contained different levels of asbestos. *Id.* And

Defendants further cite to Cal. Penal Code, § 16531, subd. (a)(1) and ATF Regulations to argue their firearm components are demonstrably not fungible, as those sources recognize that firearm components may be made out of different materials. MP&A at 28. This misses the point. Even if Defendants' products can be made out of different materials, they still present "nearly equivalent" risks of danger (*see Wheeler*, 8 Cal. App. 4th at 1156-57) because they can equally be used by dangerous parties to assemble prohibited assault weapons and/or machineguns. Further, Defendants' claim that their products are made of different substances is not pled in Plaintiffs' Complaints and therefore is not pertinent on demurrer.

Defendants not only argue for an unduly narrow reading of "fungible," but seek to override the entire policy behind market share liability, which is to shift the burden of proof to a substantial share of the market who are better able to prove whether their products were actually used and better able to bear the risk of injuries. This is particularly apt when Defendants' own recklessness, as here, created the difficulty to identify the party at fault.

As Plaintiffs have sufficiently plead fungibility of Defendants' products, taking the facts presented in the light most favorable to Plaintiffs, the Court should not terminate this case on this issue on demurrer.

B. Plaintiffs Have Sufficiently Plead Negligence.

Defendants' claim that Plaintiffs have failed to allege that Defendants owed them a duty or breached a duty that proximately caused their injuries. MP&A at 30-32. In part, this argument is a retread of the causation arguments already made by Defendants about the applicability of market share liability, and Plaintiffs will not retread the reasons why that argument fails. However, Plaintiffs have pled that Defendants owed them a duty and Defendants are really arguing with whether they did, in fact, owe Plaintiffs that duty, an issue not for demurrer.

First, Plaintiffs have alleged Defendants owed them a duty. For example, Plaintiffs have alleged that "A seller of 'ghost gun' parts/kits — particularly parts/kits intended to be assembled into highly dangerous AR-15 style weapons commonly used by mass shooters like NEAL owes

---

that was why the *Ferris* court declined to apply market share liability. *Id*. at 1220.

the highest degree of care to the general public when selling such items." McFadyen Compl., ¶ 114; *see also id.*, ¶ 115 ("Such safety precautions would include, but are not limited to, carefully learning and continually checking relevant state and federal firearms laws regarding assault weapons, never shipping to states where the possession of an AR-15 style weapon created from one of a defendant's parts/kits would be deemed illegal, and blocking all IP addresses from such states."). Similarly, Plaintiffs have alleged the specific safety precautions that Defendants were required to take in connection with their duty to Plaintiffs. *Id.* ¶ 115 (Defendants have a duty to carefully learn and continually check relevant state and federal firearms laws regarding firearms, never ship to states where the possession of an AR-15 style weapon created from one of the Defendants' parts/kits would be deemed illegal, and taking steps to block all IP addressed from such states (like California). Additionally, Plaintiffs allege that responsible sellers—which Defendants are not—would take steps to verify that only individuals legally permitted to possess firearms (and not displaying signs of significant psychological disturbance) were buying its products by requiring all such transactions to go through an FFL in the buyer's home state. *Id.* Defendants breached their duty of care by not adopting any of the reasonable precautions alleged by Plaintiffs.

Defendants' argument that Plaintiffs are seeking to impose a duty to "control" third persons (MP&A at 31-32) is also incorrect. Plaintiffs do not claim that Defendants had a duty to control third-party mass shooters such as Neal. Rather Plaintiffs are alleging that Defendants breached a duty to control *their own sales and marketing practices* so as to avoid arming dangerous parties with unserialized, illegal, lethal firearms readily assembled from their products. *See, e.g.*, McFadyen Compl., ¶¶ 114-115.

Courts have consistently emphasized this distinction and recognized that firearms industry actors have a duty to refrain from conduct which foreseeably arms dangerous parties that exists *independent* of any duty to control such third parties. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1204

(9th Cir. 2003) (discussed below)[8]; *Cincinnati v. Beretta* U.S.A. Corp., 768 N.E.2d 1136, 1144 (Ohio 2002) ("[T]he negligence issue before us is not whether appellees owe appellant a duty to control the conduct of third parties. Instead, the issue is whether appellees are themselves negligent by manufacturing, marketing, and distributing firearms in a way that creates an illegal firearms market that results in foreseeable injury.") (Declaration of Amy K. Van Zant ("Van Zant Decl."), Ex. 1); *see Boston v. Smith & Wesson Corp.*, No. 1999-02590, 2000 Mass. Super. LEXIS 352, *65-68 (Jul. 13, 2000) (rejecting defendants' misconstruction of the complaint as alleging that the defendants' had "a duty to protect [the city] from the criminal acts of third parties" and finding that allegations defendants had supplied an unlawful secondary market in firearms established that defendants had violated "a duty to refrain from affirmative acts that unreasonably expose others to a risk of harm") (citation omitted) (Van Zant Decl., Ex. 2). Of greatest relevance, *Ileto* underscored that, under California law, "a defendant's duty of care *extends to those individuals a defendant puts at an unreasonable risk of harm through the reasonably foreseeable actions of a third party*" and found that victims of another mass shooting in California had adequately alleged how various gun industry "distribution practices. . . [which] created an illegal secondary market targeting prohibited purchasers that placed plaintiffs in a situation in which they were exposed to an unreasonable risk of harm through the reasonably foreseeable conduct of a prohibited purchaser." 349 F.3d 1191 at 1204 (emphasis added). The allegations in this case mirror those in and require a similar result. *See, e.g.*, Cardenas Compl., ¶¶ 97-110.

Defendants' arguments regarding its marketing practices are equally mistaken. Contrary to Defendants' understanding of Plaintiffs' Complaint, Plaintiffs do allege that Neal was an individual who could not have lawfully purchased a firearm because of the active court orders against him, and therefore would have failed a background check. Cardenas Compl., ¶ 79. Moreover, Plaintiffs allege that Neal could not have legally acquired an AR-15 style rifle from an

[8] A later decision in this case (*Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009)) found that a federal law applied to bar certain claims but did not alter the prior decision's analysis of California law.

FFL either inside or outside of California. *Id.* ¶¶ 83-84. The only way that Neal was able to obtain such weapon is by purchasing ghost gun parts/kits from Defendants and assembling the weapons himself. *Id.* ¶ 86. This is exactly what Neal did. If Neal was in the market for such ghost gun parts/kits, Defendants' advertising, specifically its advertising that no background check would be required, would have been attractive to someone like Neal. And certainly, the fact that Neal ultimately purchased at least two sets of ghost gun parts/kits is indicative of the fact that Defendants' marketing was indeed successful.

C. Plaintiffs Have Sufficiently Plead Negligence Per Se.

Under California law, negligence per se is codified at Cal. Evid. Code Ann. § 669, where violation of a statute creates a presumption of negligence. *Quiroz v. Seventh Ave. Ctr.*, 45 Cal. Rptr. 3d 222 (Cal. Ct. App. 2006). Plaintiffs' negligence per se theory alleges that Defendants violated California and/or federal firearms statutes (including, but not limited to California's prohibition on the possession of assault weapons and the federal prohibition on the possession of machineguns) either directly or by aiding and abetting others. *See, e.g.*, McFadyen Compl., ¶¶ 104-111, 131-151; Cardenas Compl., ¶¶ 88-95, 112-129; *see also* Cal. Penal Code. §§ 30510, 30515, 30605; 18 U.S.C. § 922(o). Plaintiffs adequately pled the four required elements under § 669; namely, (1) Defendants violated California and/or federal statutes, (*e.g.*, McFadyen Compl., ¶¶ 104-111, 131-151; Cardenas Compl., ¶¶ 88-95, 112-129); (2) these violations of state and/or federal law proximately caused Plaintiffs' harm (*id.*); (3) the injuries resulting Defendants' violations of these statutes was the exact kind of harm the statutes sought to prevent (*e.g.*, Cardenas Compl., ¶¶ 118-20; McFadyen Compl., ¶¶ 137-39); and (4) that Plaintiffs were the class sought to be protected as California citizens innocently injured by assault weapons and/or machineguns. *Id.*

Defendants claim that negligence per se is "necessarily unavailable" to Plaintiffs because negligence per se "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." MP&A at 33 (quoting *Quiroz*, 45 Cal. Rptr. 3d at 244). However, this argument would essentially render the statute meritless. Indeed, "the doctrine of negligence per se is within

the scope of pleadings that allege general negligence, as proof of a breach of duty is not limited to common law standards of care." *Jones v. Awad*, 252 Cal. Rptr. 3d 596, 605 (Ct. App. 2019) (citing *Brooks v. E.J. Willig Truck Transp. Co.*, 40 Cal. 2d 669, 680 (1953)). Therefore, although Defendants' argument is technically correct that negligence per se does not establish an independent cause of action, Plaintiffs have sufficiently pled the elements of negligence per se such that this Court may evaluate these claims together with the other negligence-based claims for purposes of the demurrer.

Defendants also claim that Plaintiffs cannot allege violations of the California Assault Weapon Control Act ("AWCA"). MP&A at 33. As mentioned *supra*, Plaintiffs have sufficiently pled the elements of negligence per se, including as applied to ACWA. Cardenas Compl., ¶¶ 114-15, 118-27; McFadyen Compl., ¶¶ 133-34, 137-49. Additionally, Plaintiffs have sufficiently pled facts supporting a violation of AWCA, namely that Defendants, either directly or as knowing accomplices, violated the law. Cardenas Compl., ¶¶ 114-15; McFadyen Compl., ¶¶ 133-34. Because California law prohibits both the sale and possession of assault weapons (*see, e.g.*, Cal. Penal Code § 30910, Cal. Code Regs. tit. 11, § 5469), Plaintiffs' allegations are sufficient and demurrer on this ground is inappropriate.

Similarly, Defendants take issue (MP&A at 33-34) that Plaintiffs allege that they "aided and abetted" consumers, like Neal, in violating California's ban on possession of assault weapons and other laws, including the specific knowledge that they were assisting their customers in in such violations. Plaintiffs have adequately pled facts supporting the allegations of accomplice liability such that demurrer on this ground is inappropriate. *See* Cardenas Compl., ¶¶ 114-15; McFadyen Compl., ¶¶ 133-34. Additionally, California law does not even require pleading aiding and abetting if the allegations treat a defendant as a principal. *See* Cal. Penal Code Ann. § 971; *People v. Greenberg*, 168 Cal. Rptr. 416 (1980); *see also* Plaintiffs' Opposition to Polymer80's Demurrer (PLCAA) for greater detail as to how Defendants' conduct knowingly violated state and/or federal laws and a rebuttal of Defendants' arguments about the definition of a "firearm."

Defendants further claim that Plaintiffs' allegations are improper for purposes of the demurrer because Plaintiffs are unable to name the individual Defendant responsible and

therefore cannot allege the intent necessary for aiding and abetting. *See* MP&A at 34. This argument is based on Defendants categorizing the relevant crimes as "specific intent" crimes without any support for such claims. *Id.* Additionally, Defendants argue that the relevant intent is "Neal's specific intent to harm" Plaintiffs. However, as identified above, Plaintiffs' claims are based on violations of state and federal laws preventing the sale or possession of assault weapons and/or machineguns. The requisite specific intent involves an intent to aid and abet such unlawful possessions and/or other similar violations. As Plaintiffs allege, the shootings, and in turn Plaintiffs' injuries, are the direct, proximate, and foreseeable consequences of Defendants' and Neal's knowing violation of relevant statutes related to such firearms. *See, e.g.,* Cardenas Compl., ¶¶ 118-127; McFadyen Compl., ¶¶ 134-49. Therefore, Defendants' demurrer simply misstates Plaintiffs' allegations in the Complaint, which are sufficient for purposes of the demurrer.

D. Plaintiffs Have Sufficiently Pled Negligence Entrustment.

California law allows for negligent entrustment liability where an entrustor negligently entrusts a dangerous instrumentality to a person the supplier knows or has reason to know is a danger to themself or others. Specifically, "a person owes a duty of care not to provide a dangerous instrumentality to an individual whose use of the instrumentality the supplier knows, or has reason to know, will result in injury." *Jacoves v. United Merch. Corp.*, 9 Cal. App. 4th 88, 116 (1992). Included in the supplier category of potential defendants are sellers of these instrumentalities. *Knighten v. Sam's Parking Valet*, 206 Cal. App. 3d 69, 75 (1988). Moreover, the seller of such instrumentalities "may not assume that human beings will conduct themselves properly if the facts which are known or should be known to him should make him realize that they are unlikely to do so." *Jacoves*, 9 Cal. App. 4th at 115 (quoting Restatement Second of Torts § 390 and citing *Semeniuk v. Chentis*, 117 N.E.2d 883, 884–885 (Ill. App. Ct. 1954)) (store owner who sold BB gun pellets to minor liable to father of girl injured by pellets shot by minor since store owner permitted a third person to engage in an activity when he knew or should have known the minor was likely to cause harm to others). Other states have repeatedly allowed negligent entrustment claims to proceed specifically against negligent sellers of firearms. *See,*

e.g., Chiapperini v. Gander Mountain Co., 13 N.Y.S.3d 777 (N.Y. Sup. Ct. 2014) (Van Zant Decl., Ex. 3); *Coxie v. Academy, Ltd.*, No. 2018-CP-42-04297 (S.C. Ct. Com. Pl. July 29, 2019) (Van Zant Decl., Ex. 4).

Plaintiffs have alleged all the required elements of a negligent entrustment claim. First, Defendants supplied dangerous instrumentalities to a mentally unstable and violent criminal. Under California law, firearms and ammunition are dangerous instrumentalities. *Warner v. Santa Catalina Island Co.*, 44 Cal. 2d 310, 317 (1955). Second, Defendants *knew* that their ghost gun kits could and would be purchased by individuals who otherwise were prohibited from owning firearms, and thus knew that such purchasers were seeking to skirt the legal requirements to own a firearm in the State of California. *See, e.g.*, Cardenas Compl., ¶¶ 54-58. Further, Plaintiffs alleged that Defendants purposefully targeted residents of states with strict gun violence prevention regimes, *such as California*, who were seeking to bypass the firearm regulations of their home state. Cardenas Compl., ¶ 131; *see also id.*, ¶ 76 ("Defendants knew that 'ghost guns' are frequently used by criminals and dangerous individuals and have continued to gain additional knowledge of this reality"). Thus, accordingly, by targeting these individuals seeking to bypass state and/or federal gun laws—individuals who were already showing contempt for rule of law and disrespect toward the safety rules accepted by their communities—the Defendants were intentionally targeting and selling to a class of purchasers who were inherently showing in high likelihood of misusing these ghost gun parts and kits in a dangerous manner that would cause harm to third parties like Plaintiffs. *See, e.g.*, McFadyen Compl., ¶¶ 104-111, 131-151; Cardenas Compl., ¶¶ 88-95, 112-129.

Under California law, the knowledge requirement is satisfied when the entrust knew or *should have known* that the entrustee is a danger to himself or other. *McKenna v. Beesley*, 67 Cal. App. 5th 552, 566 (2021). This element is satisfied because here the manufacturers and sellers of ghost gun kits knew that some of their clientele were individuals seeking to skirt California and/or federal gun laws. Not only did Defendants know of this category of customers, but Defendants actively took steps to make their product more enticing to these customers. *See, e.g.*, Cardenas Compl., ¶ 55 (marketing and advertising the untraceable nature of ghost guns as a major selling

point and thus more attractive to individuals that Defendants know would otherwise not be allowed to legally purchase a firearm in California); ¶ 56 (emphasizing that their products can be purchased without a background check, and thus once again making it more likely that a prohibited firearm purchaser could purchase their products); and ¶¶ 74-75 (intentionally designing, advertising, manufacturing, marketing, and/or selling ghost gun kits that were intended to be assembled to AR-15 style rifles to purchasers like Neal by making their product more intentionally attractive to criminals like Neal who would otherwise be prohibited from purchasing a firearm).

Defendants unsuccessfully try to diminish their role to merely "putting products into the general stream of commerce." MP&A at 35. Moreover, Defendants claim that their conduct is comparable to an automobile seller that generally knows that a reckless driver exists. *Id.* But that is a gross simplification of the facts that Plaintiffs have pled (and the facts that this Court must take as true). Plaintiffs are not simply alleging the Defendants are liable because "some" dangerous gun owner "may" exist. No—Plaintiffs are specifically alleging that Defendants specifically targeted and advertised to customers who would otherwise be *prohibited from purchasing or owning a firearm because of their dangerous proclivities*. It is this additional step that distinguishes Defendants' conduct here from what they are trying to present as analogous.

Similarly, Defendants' reliance on *Jacoves* is misplaced. First, nothing in the *Jacoves* decision precludes a supplier of a firearm from being held liable for negligently entrusting a dangerous instrumentality. In fact, the *Jacoves* court specifically acknowledged that there is no California case law precluding such application and then goes further to find cases from other jurisdictions where sister courts have found liability for someone negligently entrusting a person with a firearm. *Jacoves*, 9 Cal. App. at 116-17. Second, *Jacoves* involves the sale of a firearm to someone who was otherwise allowed to own one. *Id.* Nothing about Big 5's advertising or marketing scheme targeted an individual with suicidal ideation. *Id.* Nor did the buyer's demeanor rise to the level that would have indicated that he was contemplating killing himself. *Id.* at 119. Here, however, Defendants specifically targeted purchasers who *would not have been allowed to legally purchase a firearm*, accordingly Defendants should have known that some of these

purchasers were purchasing parts/kits to fashion untraceable, unserialized AR-15 style rifles in order to commit dangerous, violent acts. *See, e.g.*, McFadyen Compl., ¶¶ 104-111, 131-151; Cardenas Compl., ¶¶ 88-95, 112-129. Accordingly, Plaintiffs have sufficiently pled the elements of negligent entrustment.

E. Plaintiffs Have Sufficiently Plead Public Nuisance.

The public nuisance doctrine focuses on "the protection and redress of *community* interests." *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1103 (1997) (emphasis in original). Public nuisances at common law are "offenses against, or interferences with, the exercise of rights common to the public," such as public health, safety, peace, comfort, or convenience. *Id.* at 1103-04. In finding liability for a public nuisance, liability "does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." *Melton v. Boustred*, 183 Cal. App. 4th 521, 542 (2010). Importantly, in *In re Firearm Cases*, 126 Cal. App. 4th 959, 987 n.21 (2005)—a case that Defendants rely on heavily—the court concluded that public nuisance actions do not have to relate to the use or condition of real property—"public nuisance is not so limited." *See also City of Gary v. Smith & Wesson*, 801 N.E.2d 1222, 1233 (Ind. 2003) ("there is no requirement that the activity [causing the nuisance] involve . . . use of land").

Defendants have created a public nuisance, and Plaintiffs have pled accordingly. For example, Plaintiffs allege that by selling ghost gun parts/kits to buyers in California in violation of, at minimum, California's prohibition on the possession of assault weapons and the federal prohibition on the possession of machineguns, the Defendants have participated in the creation of unreasonable interferences with the rights held in common by the general public. *E.g.*, Cardenas Compl., ¶ 146.[9] Specifically, Plaintiffs allege that numerous members of the public are threatened, killed, injured, or are victims of criminal acts as a result of the ghost gun parts/kits

[9] For sake of brevity, we cite exemplary paragraphs from only one complaint, however, in each instance where Plaintiffs have cited only one of the complaints, the identical allegation is made in the other complaint as well.

sold by Defendants. *Id.* ¶ 147; *see also* ¶ 59 (alleging increase in the sales of ghost gun parts/kits, which has led to the increased use of ghost guns in crimes); ¶ 60 (alleging that according to the ATF, 30 percent of all guns recovered at crime scenes involving firearms are now untraceable ghost guns); and ¶ 61 (alleging that AR-15 style ghost gun rifles have been used in shootings that garnered significant media attention). There is no doubt that as Defendants become more successful in the sale of their ghost gun parts and kits, instances where a ghost gun is used to violate the rights held in common by the general public will become more common. Defendants not only continue to engage in public nuisance, their impingement of the collective's rights to safety, peace, and comfort is exponentially increasing.

While it is true that causation is an element of a public nuisance and other tort claims claim (MP&A at 30, 36), Defendants misunderstand what is required to plead causation, fail to acknowledge the distinction between superseding causes and foreseeable intervening acts and rely on inapposite cases. First, Defendants assert that Plaintiffs cannot rely on market share liability to establish liability under public nuisance. *Id.* However, Defendants erroneously rely on the fact that a majority of cited market share liability cases involve defective pharmaceuticals to reach the conclusions that market share liability should not apply to ghost gun products. MP&A at 36-37. Defendants cite no authority for why this should be the case. *Id.* Market share liability cases under California law do not limit application of market share liability to defective products. As explained *supra,* Plaintiffs are entitled to rely upon the market share theory of liability at this stage to prove causation

Second, Defendants falsely suggest that Neal's criminal misuse of the firearms assembled from their products was an intervening act that automatically cuts off their liability. MP&A at 36-37. This is not the law. Courts addressing torts by the firearms industry have repeatedly emphasized that intervening acts – even if criminal in nature – do not cut off the initial tortfeasor's liability where they are enabled and assisted by the initial tortfeasor's misconduct. *See Ileto*, 349 F.3d at 1204-09 (if the wide "category" of third-party misconduct into which the intervening act falls "is the hazard or one of the hazards which makes the actor negligent . . . an [intervening] act whether innocent, negligent, intentionally tortious, or criminal does not prevent

the actor from being liable for harm caused thereby"); *City of Boston*, Mass. Super. LEXIS 352 at *65 n.65 ("To the extent Defendants argue that liability is barred by the intervening acts of third persons, such an argument fails . . . if the third person's acts could have been foreseen . . ."") (Van Zant Decl., Ex. 2); *City of Cincinnati*, 768 N.E.2d at 1147-49 (similar) (Van Zant Decl., Ex. 1); *City of Gary*, 801 N.E.2d at 1243-45 (similar).

Third, Defendants rely on inapposite cases. In describing the facts of the *Ileto* case, Defendants themselves point to the distinction. MP&A at 36 ("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 is attack**…") (emphasis added). The linchpin in *Ileto* was that because the perpetrator in the attack did not fire defendants' firearms, defendants necessarily could not have caused the public nuisance. *Ileto*, 349 F.3d at 1216. That is not the case here. As alleged by Plaintiffs, Neal assembled at least two AR-15 style ghost gun rifles and used those ghost guns in the Tehama County shooting rampage. *See, e.g.*, Cardenas Compl., ¶¶ 13, 80 ("During his rampage, Neal was in possession of **and used** at least two AR-15 style semiautomatic rifles. Both of these firearms were "ghost guns.") (emphasis added). Thus, this is not the case where Neal was merely in possession of a ghost gun, but did not use it—rather Neal specifically used ghost guns in his massacre.

Defendants' reliance on *In re Firearm Cases* also is also easily refuted. Like with *Ileto*, Defendants rely on the following passage from *In re Firearm Cases*, "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." MP&A at 37 (quoting *In re Firearm Cases*, 126 Cal. App. 4th 959, 967 (2005)). Of course, if the shooter did not even fire the gun, then there is no causal link. But that is not the circumstances here. Neal did fire the weapons made from Defendants products and the weapons that he fired were untraceable ghost guns without a serial number that Neal was otherwise prohibited from lawfully purchasing. *E.g.*, Cardenas Compl., ¶¶ 8l, 83, 84. Defendants use *In re Firearms Cases* to reach the conclusion that "California precedent thus, at minimum rejects a public nuisance causes of action where . . .

Plaintiffs do not allege that the named Defendants' products were actually used to inflict that Plaintiffs' injuries." MP&A at 37-38. *This is simply not true.* Plaintiffs have alleged that Neal (1) used at least two AR-15 style ghost guns in committing his massacre, (2) could not have lawfully purchased these weapons, and (3) could only have purchased these ghost gun kits from the Defendants—this is not a case where Plaintiffs are seeking to hold Defendants liable for the use of "any" gun available in commerce. Additionally, *In re Firearm Cases* is procedurally inapposite because it was decided at the summary judgment stage.

F. Plaintiffs Have Sufficiently Plead Their Unfair Competition Claim.

Plaintiffs have standing to bring their Unfair Competition Law ("UCL") claims. Defendants correctly cite that a UCL claim requires a "direct injury"—a private party can file an action "only if the party has suffered injury in fact and has list money or property as a result of such unfair competition." MP&A at 38 (quoting *Schulz v. Neovi Data Corp.*, 152 Cal. App. 4th 86, 91 (2007)). But then Defendants overstate this standing requirement to improperly require that the plaintiff must have had "direct dealings" with the defendant. MP&A at 38-39 (UCL claims apparently can only be brought if the Plaintiff used the product, not if they were injured by someone else's use). Defendants offer no case law in support of their "direct dealings" requirements – because there is no such requirement. *Id.* A plaintiff has standing to bring a UCL claim if the plaintiff's injury is a "result of such unfair competition," not just if the plaintiff is the direct customer of the defendant. *Id.*

Finally, contrary to the Defendants' suggestion that Plaintiffs failed to allege that Neal was exposed to Defendants' marketing practices in a manner which caused him to select their products to assemble ghost gun firearms (*see* MP&A at 40), the allegations of the Complaints and the reasonable inferences derived therefrom *do* state this theory. *See e.g.*, McFadyen Compl., ¶¶ 183-190 (including the allegation that "upon information and belief, had DEFENDANTS not violated California's prohibition on such unethical and unlawful marketing and business practices, Neal could not have acquired the parts/kits used to assemble his AR-15 style "ghost gun" rifles or used these items to harm PLAINTIFFS."). Plaintiffs were harmed *directly* by the ghost gun kits manufactured and sold by Defendants in terms of having themselves and/or their

loved ones injured and or killed and having to expend money for medical, funeral, or legal bills and suffered loss of companionship and income. Thus, Plaintiffs have sufficiently plead the causation and/or damages to having standing to sue under the UCL.

CONCLUSION

Plaintiffs have sufficiently pled each element of each cause of action it has alleged, including pleading the applicability of market share liability. Accordingly, Defendants' general demurrer should be dismissed. In the alternative, Plaintiffs should be afforded leave to amend the Complaints.

Dated: March 10, 2022

ORRICK HERRINGTON & SUTCLIFFE LLP
AMY K. VAN ZANT
RIC R. FUKUSHIMA
SHAYAN SAID
ANNA Z. SABER

By: */s/ Amy K. Van Zant*
AMY K. VAN ZANT
Attorneys for Plaintiffs
Francisco Gudino Cardenas and
Troy McFadyen, et al.

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, 2050 Main Street, Suite 1100, Irvine, California 92614.

On March 10, 2022, I served the foregoing document described as:

- PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER (GLOBAL)

upon the interested parties in this action listed below in the manner described as follows:

	(VIA EMAIL) I caused to be transmitted via electronic mail the document(s) listed above to the electronic address(es) set forth below.
X	**(VIA Electronic Means)** I caused to be transmitted via electronic means the document(s) listed above to the electronic address(es) set forth below.

C.D. Michel
Sean A. Brady
MICHEL & ASSOCIATES, P.C.
180 E. Ocean Blvd., Suite 200
Long Beach, CA 90802
cmichel@michellawyers.com
sbrady@michellawyers.com

Liaison Counsel and Attorneys for Defendants
GHOST FIREARMS, LLC, THUNDER GUNS, LLC, RYAN BEEZLEY and BOB BEEZLEY, and MFY TECHNICAL SOLUTIONS, LLC

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

Executed on March 10, 2022 at Irvine, California.

Donna M. Bourgeois