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Counsel to Defendant
Polymer80, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

FRANCISCO GUDINO CARDENAS, an individual; and

TROY MCFADYEN, in his Individual Capacity, and as Heir at Law and Successor in Interest to MICHELLE MCFADYEN, Deceased, ET AL.

Plaintiffs,

vs.

GHOST GUNNER INC., d/b/a GHOSTGUNNER.NET; DEFENSE DISTRIBUTED d/b/a GHOSTGUNNER.NET; CODY WILSON d/b/a GHOSTGUNNER.NET; BLACKHAWK MANUFACTURING GROUP INC., d/b/a 80PERCENTARMS.COM; RYAN BEEZLEY and BOB BEEZLEY d/b/a RBTACTICALTOOLING.COM; GHOST AMERICA LLC, d/b/a GHOSTGUNS.COM; GHOST GUNS LLC, d/b/a GRID DEFENSE and GHOSTRIFLES.COM; JUDGGERNAUT TACTICAL INC. d/b/a JTACTICAL.COM; MFY

Case No. JCCP 5167

[*Coordinated Cases CIVDS 1935422, date filed 11/14/2019, and 30-2019-01111797-CU-PO-CJC, date filed 11/14/2019*]

[Assigned for all purposes to Honorable William Claster, Department CX 104]

Filing Date: March 22, 2021
Trial Date: Not Yet Set

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF DEMURRER OF POLYMER80, INC. ON PLCAA GROUNDS

Reservation ID: 73662206 (provided by Clerk)
Date: May 6, 2022
Time: 9:00 am
Dept: CX104
Honorable William Claster

TECHNICAL SOLUTIONS LLC, d/b/a 5DTACTICAL.COM; TACTICAL GEAR HEADS LLC, d/b/a 80-LOWER.COM; AR-15LOWERRECEIVERS.COM and 80LOWERJIG.COM; JAMES TROMBLEE, JR., d/b/a USPATRIOTARMORY.COM; INDUSTRY ARMAMENT INC., d/b/a AMERICANWEAPONSCOMPONENTS.COM; THUNDER GUNS LLC, d/b/a THUNDERTACTICAL.COM; POLYMER80, INC.; and DOES 2 through 100, inclusive,

Defendants.

Defendant Polymer80, Inc. ("Polymer80" or "Company") respectfully submits this Reply Memorandum of Points and Authorities in further support of its motion ("Motion"), pursuant to Code of Civil Procedure Sections 430.10(a), (e), and (f), for an Order: (i) sustaining its Demurrer to the First, Third, Fourth, Fifth, and Sixth Causes Of Action in the pending Complaints on the grounds that the Protection Of Lawful Commerce In Arms Act ("PLCAA"), 15 U.S.C. § 7901 *et seq.*, bars each and all of them, and (ii) dismissing those Causes Of Action as against the Company with prejudice.[1] For all of the reasons set forth below and in the remainder of the record herein, this Motion is meritorious, and the Court should entirely grant it.

PRELIMINARY STATEMENT

The sum and substance of this Demurrer is that the PLCCA invalidates all of the Causes of Action challenged thereupon. Plaintiffs have proffered nothing in their opposition papers casting a meaningful doubt on that proposition. In other words, the record before the Court makes the following crystalline:

- The subject Actions are plainly "qualified civil liability actions."
- Even if plaintiffs had propounded an adequate "predicate exception," which they have not, the exception does not and cannot salvage the specifically targeted claims under governing law.
- In truth, plaintiffs have not alleged the requisite exception for the simple reason that they have not correctly averred that defendants have violated any applicable law and/or caused them any cognizable harm.
- Plaintiffs' attempt to discharge their burden of alleging a predicate exception by advancing an "aiding and abetting" theory of Polymer80's liability fails, since they do not maintain or establish that the Company sold Neal any products or knew in advance of his rampage about the crimes he intended to commit.

[1] Polymer80 hereby expressly incorporates by reference all arguments, facts, and definitions set forth in defendants' joint global Demurrer and the concurrently filed Reply Memorandum of Points and Authorities in further support thereof ("Reply"). In addition, James Tromblee, d/b/a/ U.S. Patriot Armory, joins in this submission. Collectively and for ease of reference, Polymer80 and U.S. Patriot Armory are described herein as the "PLCAA Defendants."

- Likewise, plaintiffs' supposed "negligent entrustment" predicate exception is fatally defective, insofar as none of the moving defendants entrusted Neal with any of their products nor knew nor had reason to know that he was dangerous to others and himself.

- Finally, despite plaintiffs' strained and desperate protestations to the contrary, the PLCCA, as settled Ninth Circuit precedent attests, is fully Constitutional and must be applied here.

Therefore, the Court should dismiss, with prejudice, the First, Third, Fourth, Fifth, and Sixth Causes of Action of the operative Complaints.

ARGUMENT

I

THE COURT SHOULD SUSTAIN THE DEMURRER.

A. Plaintiffs' Lawsuits Are Undoubtedly "Qualified Civil Liability Actions," And So The PLCAA Bars Each And All Of The Causes Of Action Therein.

Plaintiffs somehow argue that their action "fall[s] outside of [the] PLCAA's general definition of a qualified civil liability action." Opp. at 9. Virtually nothing could be further from the truth.[2] Nonetheless, they see fit to cite *non*-PLCAA case law for the proposition that "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." Opp. at 10. Yet, the PLCAA's own words put the lie to the argument, clearly providing as follows:

> Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

15 U.S.C. § 7901(5). Thus, the protection afforded by the PLCAA is a threshold bar to litigation because "a qualified civil liability action may not be brought in any Federal or State court." *Id.* § 7902. Within the Act, Congress also clearly explained that a civil action for damages resulting from the criminal

[2] Indeed, plaintiffs are forced to acknowledge, buried in a footnote, that multiple courts have rejected this very argument. *See* Opp. at 11 n.15.

misuse of a firearm by a third party is a "qualified civil liability action," which cannot be maintained unless one of the enumerated exceptions is satisfied. *Id.* § 7903(5)(A).

It is no accident that the Ninth Circuit has correctly applied the PLCAA to cases such as this one, holding that "an examination of the text and purpose of the PLCAA shows that Congress intended to preempt general tort theories of liability even in jurisdictions, like California, that have codified such causes of action," namely, "'classic negligence and nuisance'" actions. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135-36 (9th Cir. 2009). The PLCAA's "unambiguous terms bar *any* civil cause of action, regardless of the underlying theory, when a plaintiff's injury results from the 'criminal or unlawful misuse' of the person or a third party, unless a specific exception applies" and "the provisions of the law indicate Congress intended to generally preempt common law torts." *Travieso v. Glock, Inc.*, 526 F. Supp. 3d 533, 542 (D. Ariz. 2021). If plaintiffs disapprove of this outcome, their recourse is to petition the legislature, not this Court.

Furthermore and even though academic (since plaintiffs do not adequately allege a predicate exception), the Opposition is incorrect in averring that "where the predicate exception is satisfied, [the] PLCAA allows all claims within a case to survive – including individual claims for negligence and nuisance." Opp. at 3 (emphasis in original). The predicate exception is narrowly constructed to allow only "an action in which [a defendant] knowingly violated a [predicate statute], and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii). The only logical reading of this exception is to allow causes of action that seek "relief" for harm proximately caused by a predicate violation. *See, e.g.*, *Ramos v. Wal-Mart Stores, Inc.*, 202 F. Supp. 3d 457, 466 (E.D. Pa. 2016) (explaining that the term "action" can be utilized for a single cause of action). Such a reading is logical when construed in conjunction with the PLCAA's express purpose, which is "[t]o prohibit causes of action" in cases involving the criminal or unlawful misuse firearms by third parties. 15 U.S.C. § 7901(b)(1).

Indeed, Plaintiffs' own cited authority for this proposition is, in actuality, diametrically opposed to such an expansive reading of the predicate exception. In *Prescott v. Slide Fire Solutions, LP*, 410 F. Supp. 3d 1123 (D. Nev. 2019), cited by Opp. at 3, the Court held that a Nevada consumer protection statute "serve[d] as [a] predicate statute" under the PLCAA "at the motion to dismiss stage" but

nevertheless dismissed with prejudice plaintiff's "claims for negligent entrustment and negligence per se . . . as independent claims for relief," insofar as "these claims d[id] not support an exception to the PLCAA because they are not cognizable under the facts of this case." *Id.* at 1139-40 & n.10, 1146.[3] This would be and is the correct result here. Plaintiffs tender no good reason why the Court should decline to dismiss inadequately pleaded and barred claims that will eventually and undoubtedly fail.

B. The PLCAA Bars The Actions, As Plaintiffs Have Not Adequately Or Properly Alleged That Any Exception Proximately Caused Their Harm.

Plaintiffs contend that their "allegations satisfy [the] PLCAA's predicate, negligence *per se*, and negligent entrustment exceptions." Opp. at 4. Plaintiffs are wrong in every respect.[4]

1. Plaintiffs Fail To Satisfy The Predicate Exception, Since They Do Not Sufficiently Allege That Defendants Knowingly Contravened Any Law And/Or Caused Them Any Harm.

Plaintiffs tacitly concede that they are required to plausibly allege that PLCAA Defendants "knowingly violated" a predicate statute "thereby causing them harm." Opp. at 4. However, they are unable to do so. As explained in defendants' opening papers and plaintiffs do not contest, the PLCAA Defendants did not run afoul of any of the California Penal Code Sections -- 30510(a)(5), 30510(f), and 30605(a) -- cited in the Complaints, because those provisions all apply to fully formed firearms, not the "unfinished firearms parts (such as frames and receivers) or firearms assembly kits" at issue in these proceedings. *Cardenas* Compl. ¶ 43; *McFadyen* Compl. ¶ 59. In an attempt to sidestep this obvious deficiency, plaintiffs' life-raft is an "aiding and abetting" theory concerning these statutes and 18 U.S.C.

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[3] In their initial briefing, defendants cited the first *Prescott* opinion for the anodyne and uncontested propositions that "a plaintiff must plausibly allege that . . . the [PLCAA predicate] violation proximately caused [p]laintiffs' alleged harm,'" and that components that "'become[] an integral part of a rifle'" fall within the ambit of the PLCAA, Mot. at 6, 9, which is in no way "misleading[]" to the Court, Opp. at 3 n.3. In fact, plaintiffs are the ones who have led the Court astray by mischaracterizing the holding of the second *Prescott* decision.

[4] Plaintiffs do not seriously contend that the negligence *per se* exception applies, given that they offer no substantive argument in its favor. In fact, as they admit in their Opposition To Defendants' Demurrer (Global), "[d]efendants' argument is technically correct that negligence *per se* does not establish an independent cause of action." *Id.* at 20. That admission alone is fatal to their negligence *per se* position, and for all the reasons stated in the joint global Demurrer, plaintiffs' negligence *per se* cause of action fails. Similarly, their passing mention of "product liability" is inconsequential, Opp. at 4 n.4, and, in any event, completely derivative of their UCL arguments, which fail for all the reasons set forth in this paper.

§ 922(o).[5] *See* Opp. at 4-6. But, as explained in the global Reply, plaintiffs do not plausibly allege that any PLCAA Defendants sold Neal products or knew the specifics of the crime he intended to commit, thus dooming the tenuous aiding and abetting gambit. *See People v. Beeman*, 35 Cal.3d 547, 560 (1984). Indeed, the case law that plaintiffs cite illuminates the infirmities in their position. For instance, In *United States v. Evans*, defendants were accused of providing the parts at issue with precise knowledge of how they would be used. 712 F. Supp. 1435, 1437-40 (D. Mont. 1989).[6] To the contrary, plaintiffs here do not allege that the PLCAA Defendants supplied Neal with any materials, or that they knew of his proposed heinous crimes. Moreover, plaintiffs' overbroad aiding-and-abetting theory contravenes the PLCAA. If, as plaintiffs postulate, any sale of a legal gun component could lead to aiding-and-abetting liability for the seller, should that component eventually be used in a crime unbeknownst to the seller, then the entire purpose and structure of the PLCAA would be vitiated. Such an expansive theory of liability is a bridge much too far.

Plaintiffs' salvo regarding California's Unfair Competition Law ("UCL") fares no better. Even if the UCL were a legitimate predicate statute -- and it is not, *see* Motion at 7-8[7] -- plaintiffs do not adequately allege any violation of the UCL that *proximately caused them* harm. For one thing, plaintiffs are not consumers of the PLCAA Defendants' products and so have no standing to pursue UCL claims pursuant to well-established California law. *See, e.g.*, *Kwikset Corp. v. Superior Ct.*, 51 Cal.4th 310, 317

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[5] Plaintiffs are flatly incorrect that the PLCAA Defendants' products "are firearms under federal law even prior to assembly." Opp. at 6. Notably, plaintiffs are left to rely upon a *proposed* regulation to support this flawed contention. *See id.*, citing ATF, Definition of Frame or Receiver and Identification of Firearms, 86 Fed. Reg. 27720, 27726 (May 21, 2021). The PLCAA Defendants' products are not "firearms," as that term of art is defined by federal law, since, as explicated in the Motion at 12-14, unfinished frames and receivers simply cannot be considered "firearms" pursuant to the Gun Control Act of 1968, which only applies to completed or finished frames and receivers. *See* 18 U.S.C. § 921(a)(3). Likewise, plaintiffs' attempt to distinguish *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. 2021), falls flat, insofar as that case established that non-firearms do not become "firearms" under federal law just because they are packaged with other materials.

[6] *United States v. Branch* involved the Waco, Texas tragedy and merely held that 18 U.S.C. "§ 922(o) did not exceed Congress' power under the Commerce Clause." 91 F.3d 699, 711 (5th Cir. 1996). Moreover, the defendant accused of aiding and abetting there "purchased large amounts of weapons and ammunition" to support the cult's aims. *Id.* at 733. Here, there are no specific allegations that the PLCAA Defendants supplied Neal with any parts or knew of his intended crimes.

[7] The Ninth Circuit has recognized that broadly interpreting the phrase "applicable to the sale or marketing of [firearms or components]" to include any general statute that *could be applied* would entirely gut the PLCAA because such a reading would permit the very types of general tort claims that Congress expressly designed the statute to prevent. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1137 (9th Cir. 2009). Thus, the UCL is not a predicate statute within the meaning of the Act.

(2011); *Clayworth v. Pfizer*, *Inc.*, 49 Cal.4th 758, 788-89 (2010). Further, plaintiffs have not sufficiently alleged that Neal actually was in any way influenced by the "marketing" of the PLCAA Defendants, Opp. at 7, and therefore do not plausibly aver that any purported UCL violation proximately caused their harm.

2. Plaintiffs Do Not Satisfy The Negligent Entrustment Exception.

For all of the reasons set forth in the Global Demurrer and Reply, plaintiffs' negligent entrustment argument is meritless. In short, plaintiffs do not properly allege that any PLCAA Defendant actually entrusted Neal with any product or had the requisite knowledge of Neal's potential danger to himself or others. And, plaintiff's pet "market share liability" theory does not absolve them of having to meet this requirement. This absolution, they cannot obtain. Likewise, claiming that defendants supposedly "engaged in marketing designed to attract criminals, which put them on notice that their customers were inherently dangerous," does not discharge their burden. Opp. at 9 n.9. Plaintiffs simply are without the necessary allegations and evidence to state a negligent entrustment claim or exception to the PLCAA.

C. The PLCAA Is Indubitably Constitutional.

Plaintiffs unsurprisingly neglect to inform the Court that every federal Court -- including the Ninth Circuit -- that has ruled on the issue has found the PLCAA to be Constitutional. Indeed, Courts have been nearly unanimous in so holding.[8] *See, e.g.*, *Prescott*, 410 F. Supp. 3d at 1146 (collecting cases). As a result, plaintiffs hang their hat on the only *two* cases that remain operative and have been decided to the contrary, albeit by lower and intermediate Courts in Indiana and Wisconsin.[9] *See* Opp. at 14, citing *City of Gary v. Smith & Wesson Corp.*, No. 45D05-0005-CT-00243 (Ind. Super. Ct. Oct. 23,

[8] Since the PLCAA's enactment sixteen years ago, the United States government has routinely intervened to defend the constitutionality of the statute when such challenges have been raised. For example, the government recently intervened in two California cases (*Goldstein v. Earnest* and *Towner v. Gilroy Garlic Festival Association, Inc.)* and filed briefs in support of the constitutionality of the PLCAA. Copies of the filed briefs are annexed as Exhibits C-D to the concurrently filed Request For Judicial Notice In Further Support Of Demurrer. Defendants respectfully request that the Court take judicial notice of these briefs, the arguments raised therein, and the stated position of the United States government.

[9] As plaintiffs are forced to admit, the opinion in *Gustafson v. Springfield, Inc.*, was "withdrawn pending *en banc* review." Opp. at 12, citing 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). They also cite various federal and State Court cases (one from an intermediate appellate court) concerning *other* statutes, the inappositeness of which could hardly be more apparent. *See, e.g.*, *id.* at 13, citing *Matter of Vargas*, 131 A.D.3d 4 (2d Dep't 2015).

2006); Mot. Hr'g Tr. at 24:14-25:6, *Lopez v. Badger Guns, Inc.*, No. 10-cv-18530 (Wis. Cir. Ct. Mar. 24, 2014). Those decisions plainly do not bind this Court and are of no moment here.

The Ninth Circuit's opinion in *Ileto* perfectly encapsulates why plaintiffs' Constitutional arguments are meritless. There, the Circuit panel correctly dismissed Due Process and Equal Protection challenges to the PLCAA, holding that "[t]here is nothing irrational or arbitrary about Congress' choice here: It saw fit to 'adjust the incidents of our economic lives' by preempting certain categories of cases brought against federally licensed manufacturers and sellers of firearms." 565 F.3d at 1140. The Ninth Circuit also implicitly dispensed with the echoes of plaintiffs' exhortations here that the PLCAA somehow "exceeds Congress' enumerated powers," noting that "Congress carefully constrained the [PLCAA]'s reach to the confines of the Commerce Clause." *Id.* Finally, numerous Courts -- including those cited by plaintiffs -- have resoundingly disfavored the defective argument that the PLCAA violates the Tenth Amendment to the United States Constitution. *See, e.g.*, *City of New York v. Baretta U.S.A. Corp.*, 524 F.3d 384, 396-97 (2d Cir. 2008), cited in Opp. at 7-8; *Estate of Kim v. Coxe*, 295 P.3d 380, 388-89 (Ala. 2013); *see also Travieso*, 525 F. Supp. 3d at 549-51 ("[T]he Court finds that the PLCAA is not unconstitutional under the Fifth Amendment's due process or equal protection requirements"; and "the Court finds the PLCAA is a constitutional exercise of Congress's enumerated power to regulate interstate commerce"; and "[t]he statute is constitutional and suffers no defect under either the Fifth or Tenth Amendment to the United States Constitution."). Consequently, all of plaintiffs' Constitutional challenges must fail.[10]

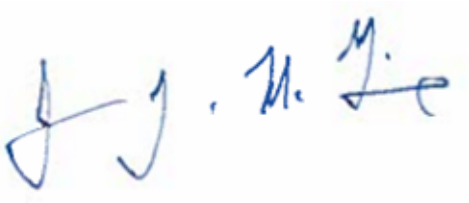
[10] Given the numerous cases that have rejected constitutionality challenges to the PLCAA during the last sixteen years, PLCAA Defendants do not feel the need to provide more in-depth briefing on the issue. If the Court were to require additional or further briefing, however, Defendants will certainly submit an additional brief focused on the flawed constitutional arguments raised by plaintiffs.

CONCLUSION

For all of the foregoing reasons and those arising from the remainder of the record of the Actions, the Court should: (i) grant the instant Motion pursuant to California Code of Civil Procedure Sections 430.10(a), (e), and (f); (ii) dismiss the First, Third, Fourth, Fifth, and Sixth Causes Of Action of the Complaints against the PLCAA Defendants with prejudice; (iii) award the PLCAA Defendants their attorneys' fees and costs; and (iv) grant such other and further relief as may be deemed just and proper.

Dated: April 4, 2022

GREENSPOON MARDER LLP



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