Electronically Filed by Superior Court of California, County of Orange, 04/04/2022 10:09:00 PM.
JCCP 5167 - ROA # 414 - DAVID H. YAMASAKI, Clerk of the Court By efilinguser, Deputy Clerk.

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

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

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

CIVIL COMPLEX CENTER

Coordination Proceeding Special Title (Rule 3.550)

GHOST GUNNER FIREARMS CASES

Included actions:

Cardenas v. Ghost Gunner, Inc., d/b/a GhostGunner.net, et al., Orange County Superior Court Case No. 30-2019-01111797-CU-PO-CJC

McFadyen v. Ghost Gunner, Inc. d/b/a Ghost Gunner.net, et al., San Bernardino Superior Court Case No. CIVDS1935422

Case No. JCCP 5167

Assigned to the Honorable Judge William D. Claster, Coordination Trial Judge; Dept. CX104

REPLY TO PLAINTIFFS' OPPOSITION TO DEMURRER OF DEFENDANTS GHOST FIREARMS, LLC, MFY TECHNICAL SOLUTIONS, LLC, & THUNDER GUNS, LLC TO COMPLAINTS

Hearing Date:	May 6, 2022
Hearing Time:	9:00 a.m.
Department:	CX104
Reservation No.:	73662204

INTRODUCTION

This Court should reject Plaintiffs' attempt to expand application of market share liability to non-manufacturers and sustain Vendor-Defendants' Unique Demurrer. Vendor-Defendants did not manufacture any product used in the attacks at issue here. They merely sell parts of the sort allegedly used. Plaintiffs do not cite a single case where mere vendors were held liable under a market share liability theory. Plaintiffs cite language from cases discussing market share liability that references "selling" or "marketing" as support for their argument that courts have not foreclosed application of the doctrine on mere vendors. But the contexts in which those terms are used are referring to *manufacturer* defendants who *also* sell or market their products.

Plaintiffs thus ask this Court not only to be the first court ever to extend market share liability to non-product liability claims (as explained in Defendants' Global Demurrer), but also the first to extend it to mere vendors. This Court should decline Plaintiffs' invitation. Indeed, neither caselaw nor public policy support extending market share liability to mere vendors. Market share liability has been applied very sparingly for a reason. It is an extreme doctrine. In California, only a handful of published cases have allowed market share liability theories to even proceed beyond demurrer. This Court should keep this case off of that very short list.

ARGUMENT

A. *Sindell* expressly confines market share liability to manufacturers.

As Vendor-Defendants explained in their Unique Demurrer, the rules that our Supreme Court articulated when first adopting the market share liability theory only contemplated manufacturers as potential defendants. (Vendor-Defendants' Unique Demurrer ("Demurrer"), at 5:4-16, [quoting *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 611-612].) Plaintiffs argue that *Sindell*'s express and exclusive mention of "manufacturers" in those rule statements is "no more than a pedestrian observation of the particular type of defendants at issue in that particular case" and that reference to "sales" or "marketing" in other parts of the opinion shows that non-manufacturers like Vendor-Defendants are subject to market share liability. (Opposition to Vendor Defendants' Unique Demurrer ("Opp."), at 6:9-10.) Plaintiffs are wrong.

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As an initial matter, Plaintiffs provide no authority supporting their suggestion that *Sindell*'s express and exclusive use of "manufacturers" in its rule statements leaves room for non-manufacturers to be included. That is likely because such an argument violates standard rules of construction. (See *People v. Guzman* (2005) 35 Cal.4th 577, 588 [discussing the principle known as *expressio unius est exclusio alterius* or "the expression of one thing . . . ordinarily implies the exclusion of other things"].) Regardless, there are additional indicators in *Sindell* that the Supreme Court did not intend to subject non-manufacturers to market share liability.

The glaring example is *Sindell*'s acknowledgment that doctors, hospitals, and pharmacies had sold the drug at issue there (DES) and yet were not named as defendants (See *Sindell, supra*, 26 Cal.3d at 595, fn. 13.) If, as Plaintiffs argue, mere vendors are part of the relevant "market" in a market share liability action, those doctors, hospitals, and pharmacies should have been included in the analysis. That they were not confirms mere vendors are not included. Plaintiffs speculate that their omission was "perhaps" a result of them being "too numerous to identify." (Opp., at 3:26-28.) But Plaintiffs' logic is backwards. If non-manufacturing-vendors like doctors and pharmacies that sold the DES are part of the "market," given that *Sindell* requires a "substantial share" of the market be named as defendants, excluding *all* vendors would be leaving *most* of the market unaccountable. That cannot be right. And, if the *Sindell* court was making a special exemption to the rules it laid out for when there is a large pool of vendors, it certainly would have made clear that was the case. It did not and that exemption cannot be assumed.

Plaintiffs suggest that *Sindell* did tacitly express an intention to include mere vendors in its analysis because it referred to entities that had "supplied" or "sold" or "marketed" DES. (Opp., at 5:2-5.) In each instance that Plaintiffs cite, however, the *Sindell* court was referring to the specific *defendants* before them, all of whom were manufacturers. That language thus cannot be read as applying to non-manufacturing vendors. In sum, Plaintiffs cite no basis for applying *Sindell* to non-manufacturers like Vendor-Defendants.

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B. No case that Plaintiffs cite expands *Sindell* to mere vendors, either expressly or implicitly.

Plaintiffs accuse Vendor-Defendants of being misleading in their representations of post-*Sindell* cases as also restricting market share liability to manufacturers. Plaintiffs, however, misread those cases.

The first example Plaintiffs provide of Defendants supposedly being misleading is Defendants offering the following quote in their Unique Demurrer as support that *Sindell* was limited to manufacturers:

> From *Sindell* came a new theory of market share liability only available against the **makers** of a 'fungible product' which 'cannot be traced to a specific **producer**' and only applicable if plaintiff joins a 'substantial share' of the **makers** of the product.

(Demurrer, at 5:19-21, [quoting *Wheeler v. Raybestos-Manhattan* (1992) 8 Cal.App.4th 1152, 1155].) According to Plaintiffs, that quote was "simply summarizing a description of the accused defendants in *Sindell* who were, as noted, manufacturers (plus suppliers and vendors)." (*Id*. at 4:13-19.) But the subject of the quote is the "new *theory*" that *Sindell* adopted, not the specific defendants. Significantly, that new theory is described as "*only* available against *makers*" of products and then "*only*" if a substantial share of those "*makers*" are named as defendants. Any ambiguity that Plaintiffs point to in that quote as including non-manufacturers is thus contrived and should be rejected.

Plaintiffs next criticize Vendor-Defendants' reliance on a quote from another case that "[m]arket share liability applies when the plaintiff is unable to prove a given defendant was the 'cause in fact' of plaintiff's injury because several **manufacturers** produced and marketed the same injurious product." (Demurrer at 5:22-25, [quoting *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1404-1405, emphasis added].) According to Plaintiffs, the *Cottle* court's reference to the manufacturers in that case having "marketed" the products at issue is apparently relevant to the analysis; but Plaintiffs do not explain exactly how. (Opp., at p. 4:27-5:3, [quoting *Cottle*, *supra*, 3 Cal. App. 4th at 1404-05].) In any event, the very excerpt Plaintiffs cite from *Cottle* refers to "manufacturers" as the ones who marketed (whatever that term means) the products. What's more, market share liability was not even at issue in *Cottle*, the court simply used the doctrine as an analogy to the proportional liability it applied. (*Id*., at p. 1404.) Using its

one vague reference to "marketing" (whatever that term means) by manufacturers, thus can hardly justify expanding market share liability to non-manufacturers.

Plaintiffs likewise criticize Vendor-Defendants' reliance on a quote from another case that says "[t]he Supreme Court created a new theory of liability, known as market share liability, in which a plaintiff injured by such a fungible product could sue various **makers** of the product if a substantial share of those **makers** were joined as defendants." (Demurrer at 5:26-6:1, [quoting *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 812, emphasis added].) According to Plaintiffs, this rule statement expressly limiting application of market share liability theory to manufacturers cannot mean what is says because "the *Kennedy* plaintiffs had sued "manufacturers, distributors, and sellers of latex gloves" under a market share liability theory. (Opp. at 5:3-7.) Contrary to Plaintiffs' claim, however, there is no indication that the defendants involved in *Kennedy* were anything but manufacturers. The quote Plaintiffs cite to is simply that court's passing observation that market share liability cannot apply because, in addition to other reasons, the plaintiffs had not named all "manufacturers, distributors, and sellers" as defendants. (*Kennedy, supra,* 43 Cal. App. 4th at 812-813.) Significantly, the court followed that statement by saying "it is a reasonably simple matter for plaintiffs to identify the exact cause of their injuries. That is, they can determine **which defendant manufactured** the gloves they used by examining purchasing and/or shipping records." (*Ibid,* [emphasis added].)

Similarly, while Plaintiffs refer to another case where "manufacturers, suppliers, and distributors" of asbestos were sued, (Opp. at 5:8-13, [citing *Ferris v. Gatke Corp.* (2003) 107 Cal.App.4th 1211, 1214]), that case also limited its substantive discussion to *manufacturer* liability, and more importantly, it referred to market share liability's requirement that plaintiffs "join as defendants those **manufacturers** that compose a 'substantial share' of the market." (*Ferris, supra,* 107 Cal.App.4th at fn. 1, citing *Mullen* v. *Armstrong World Indus.* (1988) 200 Cal.App.3d 250, 255, fn. 6.)

Attempting to bolster their argument that Defendants misread the case law as limiting market share liability to manufacturers, Plaintiffs point to a case they claims says that market share liability applies where the defendant "manufactured or ***sold***" defective products. (Opp., at

5:13-16, citing *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 957.) But it said no such thing. That quote was in reference to product-liability actions generally, not market share liability specifically. Indeed, *Rutherford* involved only one defendant so market share liability was not even at issue, as that court expressly noted. (*Rutherford, supra,* 16 Cal.4th at fn. 10.) Plaintiffs' reliance on *Magallanes* because it refers to defendants who "manufactured ***and*** distributed DES" in discussing *Sindell* is equally misplaced. (Opp., at 5:16-18, [citing *Magallanes v. Super. Ct.* (1985) 167 Cal. App. 3d 878, 881].) The quote contemplates manufacturers doing the distributing. *Magallanes* even described the named defendants there as only manufacturers. (*Magallanes, supra,* 167 Cal.App.3d at fn. 1.)

Finally, Plaintiffs claim that "California courts" have "suggested that market share liability can apply to vendors." (Opp., at 5:19-20.) Despite using a plural, Plaintiffs cite only one case, which ultimately ruled that market-share liability did not apply. (*Ibid*., citing *Edwards v. A.L. Lease & Co*. (1996) 46 Cal. App. 4th 1029, 1032.) Plaintiffs rely on the quote from *Edwards* that "[i]n a product liability action, every supplier in the stream of commerce or chain of distribution, from manufacturer to retailer, is potentially liable." (*Ibid,* italics added.) But that is irrelevant here because this is *not* a product liability case. What is relevant from *Edwards*, however, is its explanation that market share liability shifts "the burden to the individual **manufacturers** to demonstrate they **did not manufacture** the [product] causing plaintiffs' injuries." (*Edwards, supra*, 46 Cal.App.4th at p. 1034, bold added.) It is thus one more example of a case discussing market share liability exclusively in terms of *manufacturer* liability.

Plaintiffs' discussion of persuasive authority from other states, (Opp., at pp. 6-9), essentially mirrors their arguments above about California cases. The key takeaway is that, like the California cases, Plaintiffs do not cite any out-of-state case applying market share liability to a defendant who was not a manufacturer either.

In sum, Plaintiffs do not cite any precedent that applied or supported applying market share liability to a defendant who was not a manufacturer, whether within California or anywhere else in the country. This Court thus has no reason to expand market share liability in the extreme and unprecedented way that Plaintiffs request.

C. Public policy does not support Plaintiffs' expansion of market share liability.

Plaintiffs conclude with a plea to expand market share liability to non-manufacturers like Vendor-Defendants in the name of public policy. Their arguments for doing so are unavailing. It is noteworthy from a public policy perspective that courts have been reluctant to apply and extend market share liability, as it is a doctrine that shifts the burden of proof to defendants in contravention of longstanding American legal principles. (*Comcast Corp. v. Nat'l Ass'n of African American-Owned Media* (2020) ___U.S.___ [140 S.Ct. 1009, 1014, 206 L.Ed.2d 356, 361-362], citing *Univ. of Tex. Southwestern Med. Ctr. v. Nassar* (2013) 570 U.S. 338, 346.) Courts "employ such group liability concepts with great caution and only after being satisfied that the circumstances invoked in support of their application are truly compelling." (*Ferris*, *supra*, 107 Cal. App. 4th at p. 1223.) No compelling reason to shift the burden of proof to Defendants exists here.

Plaintiffs primarily argue that the same reasons for applying market share liability to manufacturers support its application to mere vendors like Vendor-Defendants essentially because they are in a position to know the products' impacts on consumers and to control product-distribution to the public. (Opp. at 9:8-17.) But, if that was enough, *Sindell* would have found the pharmacies and doctors that had sold DES to be part of the relevant "market" and thus proper defendants. Doctors and pharmacists were exceptionally capable of identifying any problems with DES, given their advanced training. Yet, the *Sindell* court did not even consider them as potentially liable, despite specifically referencing them. (*Sindell, supra*, 26 Cal.3d at 595, fn. 13.)

Additionally, Plaintiffs ignore Vendor-Defendants' argument that applying market share liability to mere vendors would not be practical because the number of vendors of a product could be much larger than its manufacturers, and could fluctuate, making the universe difficult to ascertain. (Demurrer, at 8:16-19.) This case is a great illustration of that problem. Plaintiffs allege that the products at issue here are untraceable, (*Cardenas* Compl. ¶ 92; *McFadyen* Compl. ¶ 108), yet simultaneously allege that they can ascertain a "substantial portion" of the universe of vendors. The two allegations are mutually exclusive and demonstrate one more reason why, as a

practical matter, subjecting mere vendors to market share liability is not good public policy.

CONCLUSION

For the foregoing reasons, and those explained in prior briefing on both demurrers, this Court should sustain Vendor-Defendants' Unique Demurrer as to all of Plaintiffs' causes of action without leave to amend.

Dated: April 4, 2022

MICHEL & ASSOCIATES, P.C.

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

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF ORANGE

I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

On April 4, 2022, I served the foregoing document(s) described as:

REPLY TO PLAINTIFFS' OPPOSITION TO DEMURRER OF DEFENDANTS GHOST FIREARMS, LLC, MFY TECHNICAL SOLUTIONS, LLC, & THUNDER GUNS, LLC TO COMPLAINTS

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

Please see Attached Service List.

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

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

Executed on April 4, 2022, at Long Beach, California.

s/ Laura Palmerin
Laura Palmerin

SERVICE LIST

Amy K. Van Zant avanzant@orrick.com Ric T. Fukushima rfukushima@orrick.com Shayan Said ssaid@orrick.com Orrick, Herrington & Sutcliffe LLP 1000 Marsh Road Menlo Park, CA 94025-1015	*Liaison Counsel for Plaintiffs*
Craig A. Livingston clivingston@livingstonlawyers.com Crystal L. Van Der Putten cvanderputten@livingstonlawyers.com Jasmine J. Jenkins jjenkins@livingstonlawyers.com LIVINGSTON LAW FIRM A Professional Corporation 1600 South Main Street, Suite 280 Walnut Creek, CA 94596	*Attorneys for Defendant Tactical Gear Heads, LLC*
Grant D. Waterkotte gwaterkotte@pettitkohn.com Christopher Reilly creilly@pettitkohn.com Petit Kohn Ingrassia Lutz & Dolin PC 5901 W. Century Blvd., Suite 1100 Los Angeles, CA 90045	*Attorneys for Defendants Defense Distributed and Cody R. Wilson*
Michael E. Gallagher mgallagher@eghblaw.com Nicholas Maxwell nmaxwell@eghblaw.com Kyle Gaines kgaines@eghblaw.com Desiree Caudillo dcaudillo@eghblaw.com Edlin Gallagher Huie & Blum LLP 515 S. Flower Street, Suite 1020 Los Angeles, CA 90071	*Attorneys for Defendant Juggernaut Tactical, Inc.*
Christopher Renzulli crenzulli@renzullilaw.com Howard B. Schilsky hschilsky@renzullilaw.com Renzulli Law Firm, LLP	

One North Broadway, Suite 1005
White Plains, NY 10601

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

Attorneys for Defendant Polymer80, Inc.

James J. McGuire
james.mcguire@gmlaw.com
Michael Marron
michael.marron@gmlaw.com
Michael Patrick
michael.patrick@gmlaw.com
GREENSPOON MARDER LLP
590 Madison Avenue, Suite 1800
New York, New York 10022

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

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