SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

MINUTE ORDER

DATE: 05/06/2022 TIME: 09:00:00 AM DEPT: CX104

JUDICIAL OFFICER PRESIDING: William Claster
CLERK: G. Hernandez
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: B. Allen, None

CASE NO: **JCCP 5167** CASE INIT.DATE: 03/26/2021
CASE TITLE: **Ghost Gunner Firearms Cases**
CASE CATEGORY: Civil - Unlimited CASE TYPE: PI/PD/WD - Other

EVENT ID/DOCUMENT ID: 73721957

EVENT TYPE: Status Conference

EVENT ID/DOCUMENT ID: 73662202

EVENT TYPE: Demurrer - Other
MOVING PARTY: Juggernaut Tactical Inc., MFY Technical Solutions LLC, Blackhawk Manufacturing Group Inc., Thunder Guns LLC, Ghost Firearms LLC
CAUSAL DOCUMENT/DATE FILED: Demurrer to Complaint, 01/24/2022

EVENT ID/DOCUMENT ID: 73662204

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MOVING PARTY: MFY Technical Solutions LLC, Thunder Guns LLC, Ghost Firearms LLC
CAUSAL DOCUMENT/DATE FILED: Demurrer to Complaint, 01/24/2022

APPEARANCES
Anne Malik, Shayan Said, Amy K. Van Zant, from Orrick Herrington & Sutcliffe LLP, present for Plaintiff(s) remotely.
Sean Brady, from Michel & Associates, P.C., present for Petitioner(s) remotely.
Kyle Gaines, from Edlin Gallagher Huie + Blum, present for Defendant(s) remotely.
Germain D. Labat, from Greenspoon Marder LLP, present for Defendant(s) remotely.
Crystal L. Van Der Putten, from Livingston Law Firm, present for Defendant(s) remotely.
Pisciotti Lallis Erreich by Ryan Erdreich appearing remotely for defendant James Tromblee, J Renzulli Law by Howard Schilsky app. remotely for defendant Juggernaut Tactical; Petit Koh by Christopher Reilly app. remotely for defendant Distributed;

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1. Defendants Juggernaut Tactical, Inc., Blackhawk Manufacturing Group, Inc.; Ghost Firearms, LLC; MFY Technical Solutions, LLC; Thunder Guns, LLC; Tactical Gear Heads, LLC, Defense Distributers, Cody R. Wilson, Polymer80 Inc.; and James Tromblee, Jr.'s Demurrer to Plaintiffs' Complaints ROA 286

2. Defendants Ghost Firearms, LLC; MFY Technical Solutions, LLC; & Thunder Guns, LLC's Demurrer to Plaintiffs' Complaints ROA 290

3. Defendant Polymer80, Inc.'s Demurrer to Plaintiffs' Complaints ROA 294

4. Defendant James Tromblee, Jr.'s Joinder to Defendant Polymer80, Inc.'s Demurrer ROA 315

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Tentative Ruling posted on the Internet.

Hearing held with all participants appearing remotely.

The Court hears oral argument and confirms its tentative ruling.

The Court's ruling is attached hereto and incorporated herein by reference.

Court orders clerk to give notice.

GHOST GUNNER FIREARMS CASES JCCP 5167

Before the Court are two demurrers to the operative complaints in the underlying *Cardenas* and *McFayden* actions. The two complaints are treated as a single pleading by the parties for demurrer purposes.

ROA 290 is the demurrer of Defendants Blackhawk Manufacturing Group, Inc.; Ghost Firearms, LLC; MFY Technical Solutions LLC; and Thunder Guns, LLC. Following the parties' naming conventions, these Defendants are referred to as the "Vendor Defendants," and their demurrer is referred to as the "Unique Demurrer." Ryan Beezley and Bob Beezley were Vendor Defendants at the time the Unique Demurrer was filed, but since have been dismissed from the case.

ROA 286 is the demurrer of the Vendor Defendants and Defendants Juggernaut Tactical, Inc.; Tactical Gear Heads, LLC; Defense Distributed; Cody R. Wilson; Polymer80, Inc.; and James Tromblee, Jr. dba USPatriotArmory.com. Following the parties' naming conventions, the Court refers to this demurrer as the "Global Demurrer." The Court also refers to the non-Vendor Defendants as the "Manufacturing Defendants."

For the reasons set forth below:

1. The Vendor Defendants' Unique Demurrer is SUSTAINED with leave to amend.

2. The Global Demurrer is SUSTAINED with leave to amend as to the Manufacturing Defendants on market share liability grounds. The Court does not reach the remaining arguments (as to either the Vendor Defendants or the Manufacturing Defendants) in the Global Demurrer.

GHOST GUNNER FIREARMS CASES JCCP 5167

INTRODUCTION TO BOTH DEMURRERS

Defendants in this coordinated proceeding are "ghost gun" part manufacturers sued by Plaintiffs, the victims of a shooting spree in Tehama County that was allegedly committed with ghost guns. Because ghost guns are untraceable by design, Plaintiffs filed suit against numerous ghost gun part manufacturers and vendors, seeking to proceed on a market share liability theory. As noted above, Defendants are grouped into the Vendor Defendants, who sell ghost gun parts at retail, and the Manufacturing Defendants, who manufacture them. (The Manufacturing Defendants may also sell their parts at retail, but it is undisputed at this stage that no Vendor Defendant manufactures parts.)

Both the Global Demurrer and the Unique Demurrer are based upon Plaintiffs' failure to state a cause of action. In reviewing the sufficiency of a complaint against a demurrer for failure to state facts sufficient to state a cause of action, the Court is guided by long-settled rules. The Court "treat[s] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) "The complaint must be construed liberally by drawing reasonable inferences from the facts pleaded." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.) "Further, [the Court] gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.)

The Global Demurrer is additionally based upon uncertainty. "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.)

VENDOR DEFENDANTS' UNIQUE DEMURRER

The Vendor Defendants argue that regardless of whether market share liability might apply in this case generally (as discussed in the Global Demurrer), market share liability doesn't apply to vendors at all, only manufacturers. The Court agrees.

The seminal case on market share liability is *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588. In *Sindell*, a number of pharmaceutical companies manufactured a drug known as DES according to an identical formula. Because the formula was identical across all manufacturers, the plaintiff could not discover which drug manufacturer had actually injured her, i.e., which manufacturer had made the drugs the plaintiff's mother took during pregnancy that caused the plaintiff's injuries later in life. The California Supreme Court concluded that if a substantial share of DES manufacturers were joined as defendants, liability could be apportioned according to their market share, unless a manufacturer could prove its DES wasn't the cause of the plaintiff's injuries.

The Vendor Defendants note that *Sindell* speaks of liability in manufacturing terms, not vending terms. *Sindell* notes that "all defendants *produced* a drug from an identical forumla and the *manufacturer* of the DES which caused plaintiff's injuries cannot be identified." (*Id.*, at p. 611 (emphasis added).) It goes on to explain that each defendant in the case can will be held liable "unless it demonstrates that it could not have *made* the product." (*Id.*, at p. 612 (emphasis added).) Post-*Sindell* cases are to similar effect. (See, e.g., *Wheeler v. Raybestos-Manhattan* (1992) 8 Cal.App.4th 1152, 1155 ("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*'") (emphasis added); *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 812 (under market share liability, "a plaintiff injured by such a fungible product could sue various *makers* of the product") (emphasis added); *Ferris v. Gatke Corp.* (2003) 107 Cal.App.3d 1211, 125, fn. 1 ("Under this doctrine, the traditional prerequisite of identifying the *manufacturer* of the injury-causing product is eliminated when the product is a

generic item *produced* by several *manufacturers*.") (emphasis added).)

In opposition, Plaintiffs argue the Vendor Defendants misrepresent *Sindell*. Specifically, they point to language where the Supreme Court explained that "the likelihood that any of the defendants *supplied* the product which allegedly injured plaintiff" can be measured by "the percentage [of] the DES *sold* by each of them." (*Sindell*, *supra*, 26 Cal.3d at pp. 611-12 (emphasis added).) They similarly argue the Vendor Defendants omit important context from *Wheeler*: that the plaintiff there sued *only* manufacturers, not vendors, on a market share theory. And, Plaintiffs argue, Vendor Defendants' other authority never actually holds that vendors *cannot* be sued on a market share basis. Those cases reject market share liability for other reasons. (See, e.g., *Ferris*, *supra*, 107 Cal.App.4th at p. 1221-24 (noting, among other things, that defendants' products were not fungible).)

The Court is persuaded by the Vendor Defendants' argument in reply. As the Vendor Defendants point out, *Sindell* recognized that doctors, hospitals and pharmacies sold DES. (*Sindell*, *supra*, 26 Cal.3d at p. 601) If doctors, hospitals, and pharmacies also sold DES, and if *Sindell* permits the application of market share liability to mere vendors, then doctors, hospitals, and pharmacies must have been part of the "market" for purposes of determining whether the plaintiff had named a sufficient portion of the market as defendants. But *no* doctors, hospitals, or pharmacies were named as defendants, only manufacturers. If vendors were part of the market, but no vendors were named defendants, how was a substantial share of the market joined as defendants? The only way *Sindell* makes sense on its own terms is if mere vendors are excluded. To be sure, *Sindell* mentions the supply, sale, and marketing of DES, but this was in the context of the named defendants in the case: *manufacturers* who supplied, sold, and marketed DES.

Courts "employ . . . group liability concepts" such as market share liability "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.) Absent authority expressly extending the manufacturer-based reasoning of *Sindell* to mere vendors, the Court will follow this cautious approach

and sustain the Unique Demurrer.

Because the Court concludes market share liability is inapplicable to the Vendor Defendants, Plaintiffs are granted leave to amend to attempt to plead a non-market share case against the Vendor Defendants.

DEFENDANTS' GLOBAL DEMURRER

I. Requests for Judicial Notice

The Manufacturing Defendants have filed two requests for judicial notice. Their first request (ROA 272) seeks notice of (1) a proposed Bureau of Alcohol, Tobacco and Firearms rule regarding the definition of "frame or receiver" (a rule adopted as final after the demurrer was filed), (2) an online guide from the ATF's website regarding definitions in the federal Gun Control Act, and (3) an online Q&A from the ATF's website regarding the legality of so-called "80% receivers." Because these documents are immaterial to the Court's ruling on this demurrer, the first request for judicial notice is DENIED without prejudice. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748 fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"].)

The second request (ROA 406) seeks notice of a ruling of the San Diego County Superior Court that the Manufacturing Defendants rely upon for its persuasive value. "Even assuming for the sake of argument that [this case] involves the same issue as the case before [the Court] . . . a written trial court ruling has no precedential value." (*Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 831.) Furthermore, this document is immaterial to the Court's ruling. The second request for judicial notice is therefore DENIED.

II. Market Share Liability

In light of the foregoing ruling on the Unique Demurrer, the market share liability arguments in the Global Demurrer are moot as to the Vendor Defendants. The Court therefore considers these arguments only in relation to the Manufacturing Defendants.

A. Product Defect

Sindell's adoption of market share liability was based on policy concerns unique to the defective product context:

> From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product. As was said by Justice Traynor in *Escola*, "(t)he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." (Citation.) The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety. (Citations.) These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometimes permanent, sometimes fatal, injuries caused by deleterious drugs. (*Sindell, supra*, 26 Cal.3d at p. 611.)

Subsequent case law clarified that market share liability lies only when an inherent, general product defect is alleged. In *Sheffield v. Eli Lilly & Co.* (1983) 144 Cal.App.3d 583, the plaintiff was paralyzed after inoculation with a live-virus polio

vaccine. Due to a lack of historical records, it was impossible to determine which of the authorized manufacturers of the vaccine had made her dose, which was prepared according to a uniform, government-approved formula. But in *Sheffield*, the plaintiff didn't allege that the live-virus polio vaccine was generally inherently defective. Instead, she alleged that her particular dose was defective. (*Id.*, at p. 594 ("The product that allegedly injured the plaintiff[] was itself not a unit of a total generic pharmaceutical product but a deviant defective vaccine.").) Because the alleged defect was particular to plaintiff's dose, application of market share liability would "unlock a treasure chest of a shared liability indiscriminately imposed on manufacturers of safe and defective products of the same nature." (*Id.*, at p. 596.) The Court of Appeal therefore "decline[d] to extend the theory behind [*Sindell*] to the manufacturers of a product not intrinsically defective for the purpose for which it was used." (*Id.*, at p. 593.)

Here, Plaintiffs do not allege the Manufacturing Defendants' products are generally, inherently defective. Rather, as the Manufacturing Defendants point out, Plaintiffs' complaint is that the guns used in the Tehama County shooting worked exactly as intended—except they were misused for criminal ends. That is, the Manufacturing Defendants' products are "not defective—if anything, the problem is that they work too well." (*Hamilton v. Beretta U.S.A. Corp.* (2021) 96 N.Y.2d 222, 235.)

In opposition, Plaintiffs argue the Manufacturing Defendants are asking the Court to "invent" an "inherently defective" requirement. The Court disagrees. Following *Sheffield*, market share liability is not appropriate unless the product at issue is "intrinsically defective for the purpose for which it was used." Significantly, while Plaintiffs contend the "inherently defective" requirement is an invention, they point to no case allowing a market share liability theory to proceed *without* an inherently defective product.

As to actually alleging an inherent defect, Plaintiffs make two attempts in footnotes in their opposition. First, they argue that they have alleged the Manufacturing Defendants negligently supplied ghost gun parts, and CACI 1220

allows the negligent supplier of products to be held liable on a product defect theory. But the directions for use say CACI 1220 should be used when the plaintiff "allege[s] a manufacturing or design defect under a negligence theory." That is, the product *itself* must allegedly be defective for CACI 1220 to be an accurate statement of the law. Again, there is no allegation that the Manufacturing Defendants' products did anything other than work exactly as intended.

Second, Plaintiffs argue "Defendants appear to allege [in their opening papers] that their products' intended use is lawful use (citation), [so] Defendants' designs of the products are defective as they instead attract and encourage the assembly of illegal assault weapons for unlawful use." (Opp. at p. 12, fn. 5.) It appears Plaintiffs are attempting to recast the Manufacturing Defendants' demurrer arguments as allegations in the very complaints the Manufacturing Defendants demur to. The Court is not aware of any authority allowing this practice, and Plaintiffs point to none.

Because Plaintiffs have not adequately alleged an inherent product defect, they have not adequately pled market share liability.

B. Fungibility

Market share liability also hinges on the product at issue being fungible across manufacturers. In *Sindell*, "DES was produced from a common and mutually agreed upon formula as a fungible drug interchangeable with other brands of the same product," and "pharmacists filled prescriptions from whatever brand of the drug happened to be in stock." (*Sindell, supra*, 26 Cal.3d at p. 595.)

The Manufacturing Defendants argue that fungibility exists only when, as in *Sindell*, the products at issue are chemically identical. The Court disagrees that the fungibility standard is so exacting. For comparison, in *Wheeler v. Raybestos-*

Manhattan (1992) 8 Cal.App.4th 1152, the Court of Appeal found the plaintiff had adequately pled fungibility when the brake pads at issue "were all composed solely of chrysotile asbestos fiber" and "all contained between 40 and 60 percent asbestos by weight." (*Id.*, at p. 1156.) "While brake pads are not absolutely interchangeable each for one another 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." (*Ibid.*)

Also relevant to *Wheeler* was the context in which the plaintiffs' injuries arose. All claimed to have been exposed to asbestos "during inspection or replacement of worn pads when dust containing asbestos which had been generated by the friction on the pads during braking was blown out of the brake drums. At the time of such exposure, these worn brake pads could no longer be identified by brand." (*Id.*, at p. 1155.) That is, not only did the brake pads contain comparable quantities of a single type of asbestos, they were also visually fungible when they allegedly caused injury.

Wheeler is contrasted with *Mullen v. Armstrong World Industries, Inc.* (1988) 200 Cal. App. 3d 250 in which the Court of Appeal held, on demurrer, that not all asbestos-containing products were fungible. Noting that "asbestos is a generic designation possessing a rainbow-like diversity and a bewildering array of potential uses" (*Id.*, at p. 256.), the court ruled that the general fungibility allegations were insufficient to withstand demurrer.

Here, as in *Mullen*, the fact that Plaintiffs allege fungibility is not sufficient to withstand demurrer. Indeed, Plaintiffs do not adequately allege fungibility even under the *Wheeler* standard. It appears to be undisputed, as Plaintiffs allege, that the Manufacturing Defendants' ghost gun parts are all identically unserialized by design. But this is not the end of the inquiry. California law categorizes "firearm precursors parts"—what the Manufacturing Defendants have allegedly made—in a number of ways. Among other things, the law recognizes these parts may be polymer or metallic. (*See* Pen. Code § 16531(a)(1).) In *Wheeler*, the brake pads

were allegedly visually fungible because the printed brand names had worn off through use. Here, in contrast, plastic and metal are easily distinguishable, even to laypersons. Perhaps plastic firearms parts are indistinguishable from one another, but they are distinguishable from metal ones.

The Court does not mean to suggest that Plaintiffs cannot plead fungibility. It simply holds that as the pleadings currently stand, they have not done so.

C. Conclusion on Market Share Liability

The Court sustains the Manufacturing Defendants' demurrer with leave to amend to cure the defects identified above. Unlike the Vendor Defendants, the Court does not hold market share liability categorically inapplicable to the Manufacturing Defendants. It simply holds that on this record, market share liability is inadequately pled.

III. Other Grounds for Demurrer

Defendants raise a number of other challenges to Plaintiffs' complaints. (See Global Demurrer at pp. 30-41.) In light of the Court's resolution of the market share liability issues for both sets of Defendants, the Court will not reach these grounds for demurrer at this time. The amendments Plaintiffs make to address the above pleading defects may materially alter the Court's analysis of more traditional demurrer arguments. Defendants are free to raise their remaining arguments in a challenge to the amended complaint.

PROCEEDINGS GOING FORWARD

As discussed above, Plaintiffs are granted leave to amend. To streamline proceedings, Plaintiffs should file a single consolidated amended complaint rather than two separate complaints for *Cardenas* and *McFayden*.

Per the parties' case management statement filed on April 21, 2022 (ROA 457), the parties will jointly inspect the firearms believed to have been used in the shootings on May 24, 2022. The Court believes judicial economy would best be served by allowing the results of that inspection to inform any amendments Plaintiffs wish to make. To that end, the deadline for filing an amended complaint will be June 24, 2022.

Certain Defendants have filed a separate demurrer arguing Plaintiffs' claims are barred by the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 et seq. (ROA 294, with joinder at ROA 315.) This demurrer is set for hearing on May 27, 2022 with supplemental briefing due on May 16. Because this demurrer challenges pleadings that are no longer operative, the Court takes it off calendar. Defendants are free to raise any PLCAA arguments they wish in a challenge to the amended complaint.

Finally, the Parties are encouraged to stipulate to a briefing schedule for any challenges to the amended complaint, as they did for these demurrers.

In light of the above, the Court sets a further status conference for September 8, 2022 at 9:00 a.m. A joint status conference statement shall be filed on or before September 1, 2022.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
Civil Complex Center
751 W. Santa Ana Blvd
Santa Ana, CA 92701

SHORT TITLE: Ghost Gunner Firearms Cases

CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: **JCCP 5167**

I certify that I am not a party to this cause. I certify that the following document(s), dated , have been transmitted electronically by Orange County Superior Court at Santa Ana, CA. The transmission originated from Orange County Superior Court email address on May 6, 2022, at 2:27:12 PM PDT. The electronically transmitted document(s) is in accordance with rule 2.251 of the California Rules of Court, addressed as shown above. The list of electronically served recipients are listed below:

BEN ROSENFELD
BEN.ROSENFELD@COMCAST.NET

GREENSPOON MARDER LLP
GERMAIN@GMLAW.COM

GREENSPOON MARDER LLP
GUINEVERE.MALLEY@GMLAW.COM

LIVINGSTON LAW FIRM
CLIVINGSTON@LIVINGSTONLAWYERS.COM

LIVINGSTON LAW FIRM
CVANDERPUTTEN@LIVINGSTONLAWYERS.COM

LIVINGSTON LAW FIRM
JJENKINS@LIVINGSTONLAWYERS.COM

LIVINGSTON LAW FIRM
RLIVINGSTON@LIVINGSTONLAWYERS.COM

MICHEL & ASSOCIATES, P.C.
SBRADY@MICHELLAWYERS.COM

ORRICK HERRINGTON & SUTCLIFFE LLP
ASCHWARTZ@ORRICK.COM

ORRICK HERRINGTON & SUTCLIFFE LLP
AVANZANT@ORRICK.COM

ORRICK HERRINGTON & SUTCLIFFE LLP
KRYSTAL.ANDERSON@ORRICK.COM

ORRICK HERRINGTON & SUTCLIFFE LLP
SSAID@ORRICK.COM

PORTER SCOTT, APC
DMELTON@PORTERSCOTT.COM

PORTER SCOTT, APC
DPHUNG@PORTERSCOTT.COM

SINGLETON LAW FIRM
GERALD@SLFFIRM.COM

Clerk of the Court, by: _____, Deputy

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The Vendor Defendants argue that regardless of whether market share liability might apply in this case generally (as discussed in the Global Demurrer), market share liability doesn't apply to vendors at all, only manufacturers. The Court agrees.

The seminal case on market share liability is *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588. In *Sindell*, a number of pharmaceutical companies manufactured a drug known as DES according to an identical formula. Because the formula was identical across all manufacturers, the plaintiff could not discover which drug manufacturer had actually injured her, i.e., which manufacturer had made the drugs the plaintiff's mother took during pregnancy that caused the plaintiff's injuries later in life. The California Supreme Court concluded that if a substantial share of DES manufacturers were joined as defendants, liability could be apportioned according to their market share, unless a manufacturer could prove its DES wasn't the cause of the plaintiff's injuries.

The Vendor Defendants note that *Sindell* speaks of liability in manufacturing terms, not vending terms. *Sindell* notes that "all defendants *produced* a drug from an identical forumla and the *manufacturer* of the DES which caused plaintiff's injuries cannot be identified." (*Id.*, at p. 611 (emphasis added).) It goes on to explain that each defendant in the case can will be held liable "unless it demonstrates that it could not have *made* the product." (*Id.*, at p. 612 (emphasis added).) Post-*Sindell* cases are to similar effect. (See, e.g., *Wheeler v. Raybestos-Manhattan* (1992) 8 Cal.App.4th 1152, 1155 ("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*'") (emphasis added); *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 812 (under market share liability, "a plaintiff injured by such a fungible product could sue various *makers* of the product") (emphasis added); *Ferris v. Gatke Corp.* (2003) 107 Cal.App.3d 1211, 125, fn. 1 ("Under this doctrine, the traditional prerequisite of identifying the *manufacturer* of the injury-causing product is eliminated when the product is a

generic item *produced* by several *manufacturers*.") (emphasis added).)

In opposition, Plaintiffs argue the Vendor Defendants misrepresent *Sindell*. Specifically, they point to language where the Supreme Court explained that "the likelihood that any of the defendants *supplied* the product which allegedly injured plaintiff" can be measured by "the percentage [of] the DES *sold* by each of them." (*Sindell*, *supra*, 26 Cal.3d at pp. 611-12 (emphasis added).) They similarly argue the Vendor Defendants omit important context from *Wheeler*: that the plaintiff there sued *only* manufacturers, not vendors, on a market share theory. And, Plaintiffs argue, Vendor Defendants' other authority never actually holds that vendors *cannot* be sued on a market share basis. Those cases reject market share liability for other reasons. (See, e.g., *Ferris*, *supra*, 107 Cal.App.4th at p. 1221-24 (noting, among other things, that defendants' products were not fungible).)

The Court is persuaded by the Vendor Defendants' argument in reply. As the Vendor Defendants point out, *Sindell* recognized that doctors, hospitals and pharmacies sold DES. (*Sindell*, *supra*, 26 Cal.3d at p. 601) If doctors, hospitals, and pharmacies also sold DES, and if *Sindell* permits the application of market share liability to mere vendors, then doctors, hospitals, and pharmacies must have been part of the "market" for purposes of determining whether the plaintiff had named a sufficient portion of the market as defendants. But *no* doctors, hospitals, or pharmacies were named as defendants, only manufacturers. If vendors were part of the market, but no vendors were named defendants, how was a substantial share of the market joined as defendants? The only way *Sindell* makes sense on its own terms is if mere vendors are excluded. To be sure, *Sindell* mentions the supply, sale, and marketing of DES, but this was in the context of the named defendants in the case: *manufacturers* who supplied, sold, and marketed DES.

Courts "employ . . . group liability concepts" such as market share liability "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.) Absent authority expressly extending the manufacturer-based reasoning of *Sindell* to mere vendors, the Court will follow this cautious approach

and sustain the Unique Demurrer.

Because the Court concludes market share liability is inapplicable to the Vendor Defendants, Plaintiffs are granted leave to amend to attempt to plead a non-market share case against the Vendor Defendants.

DEFENDANTS' GLOBAL DEMURRER

I. Requests for Judicial Notice

The Manufacturing Defendants have filed two requests for judicial notice. Their first request (ROA 272) seeks notice of (1) a proposed Bureau of Alcohol, Tobacco and Firearms rule regarding the definition of "frame or receiver" (a rule adopted as final after the demurrer was filed), (2) an online guide from the ATF's website regarding definitions in the federal Gun Control Act, and (3) an online Q&A from the ATF's website regarding the legality of so-called "80% receivers." Because these documents are immaterial to the Court's ruling on this demurrer, the first request for judicial notice is DENIED without prejudice. (See *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748 fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"].)

The second request (ROA 406) seeks notice of a ruling of the San Diego County Superior Court that the Manufacturing Defendants rely upon for its persuasive value. "Even assuming for the sake of argument that [this case] involves the same issue as the case before [the Court] . . . a written trial court ruling has no precedential value." (*Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 831.) Furthermore, this document is immaterial to the Court's ruling. The second request for judicial notice is therefore DENIED.

II. Market Share Liability

In light of the foregoing ruling on the Unique Demurrer, the market share liability arguments in the Global Demurrer are moot as to the Vendor Defendants. The Court therefore considers these arguments only in relation to the Manufacturing Defendants.

A. Product Defect

Sindell's adoption of market share liability was based on policy concerns unique to the defective product context:

> From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product. As was said by Justice Traynor in *Escola*, "(t)he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." (Citation.) The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety. (Citations.) These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometimes permanent, sometimes fatal, injuries caused by deleterious drugs. (*Sindell, supra*, 26 Cal.3d at p. 611.)

Subsequent case law clarified that market share liability lies only when an inherent, general product defect is alleged. In *Sheffield v. Eli Lilly & Co.* (1983) 144 Cal.App.3d 583, the plaintiff was paralyzed after inoculation with a live-virus polio

vaccine. Due to a lack of historical records, it was impossible to determine which of the authorized manufacturers of the vaccine had made her dose, which was prepared according to a uniform, government-approved formula. But in *Sheffield*, the plaintiff didn't allege that the live-virus polio vaccine was generally inherently defective. Instead, she alleged that her particular dose was defective. (*Id.*, at p. 594 ("The product that allegedly injured the plaintiff[] was itself not a unit of a total generic pharmaceutical product but a deviant defective vaccine.").) Because the alleged defect was particular to plaintiff's dose, application of market share liability would "unlock a treasure chest of a shared liability indiscriminately imposed on manufacturers of safe and defective products of the same nature." (*Id.*, at p. 596.) The Court of Appeal therefore "decline[d] to extend the theory behind [*Sindell*] to the manufacturers of a product not intrinsically defective for the purpose for which it was used." (*Id.*, at p. 593.)

Here, Plaintiffs do not allege the Manufacturing Defendants' products are generally, inherently defective. Rather, as the Manufacturing Defendants point out, Plaintiffs' complaint is that the guns used in the Tehama County shooting worked exactly as intended—except they were misused for criminal ends. That is, the Manufacturing Defendants' products are "not defective—if anything, the problem is that they work too well." (*Hamilton v. Beretta U.S.A. Corp.* (2021) 96 N.Y.2d 222, 235.)

In opposition, Plaintiffs argue the Manufacturing Defendants are asking the Court to "invent" an "inherently defective" requirement. The Court disagrees. Following *Sheffield*, market share liability is not appropriate unless the product at issue is "intrinsically defective for the purpose for which it was used." Significantly, while Plaintiffs contend the "inherently defective" requirement is an invention, they point to no case allowing a market share liability theory to proceed *without* an inherently defective product.

As to actually alleging an inherent defect, Plaintiffs make two attempts in footnotes in their opposition. First, they argue that they have alleged the Manufacturing Defendants negligently supplied ghost gun parts, and CACI 1220

allows the negligent supplier of products to be held liable on a product defect theory. But the directions for use say CACI 1220 should be used when the plaintiff "allege[s] a manufacturing or design defect under a negligence theory." That is, the product *itself* must allegedly be defective for CACI 1220 to be an accurate statement of the law. Again, there is no allegation that the Manufacturing Defendants' products did anything other than work exactly as intended.

Second, Plaintiffs argue "Defendants appear to allege [in their opening papers] that their products' intended use is lawful use (citation), [so] Defendants' designs of the products are defective as they instead attract and encourage the assembly of illegal assault weapons for unlawful use." (Opp. at p. 12, fn. 5.) It appears Plaintiffs are attempting to recast the Manufacturing Defendants' demurrer arguments as allegations in the very complaints the Manufacturing Defendants demur to. The Court is not aware of any authority allowing this practice, and Plaintiffs point to none.

Because Plaintiffs have not adequately alleged an inherent product defect, they have not adequately pled market share liability.

B. Fungibility

Market share liability also hinges on the product at issue being fungible across manufacturers. In *Sindell*, "DES was produced from a common and mutually agreed upon formula as a fungible drug interchangeable with other brands of the same product," and "pharmacists filled prescriptions from whatever brand of the drug happened to be in stock." (*Sindell, supra*, 26 Cal.3d at p. 595.)

The Manufacturing Defendants argue that fungibility exists only when, as in *Sindell*, the products at issue are chemically identical. The Court disagrees that the fungibility standard is so exacting. For comparison, in *Wheeler v. Raybestos-*

Manhattan (1992) 8 Cal.App.4th 1152, the Court of Appeal found the plaintiff had adequately pled fungibility when the brake pads at issue "were all composed solely of chrysotile asbestos fiber" and "all contained between 40 and 60 percent asbestos by weight." (*Id.*, at p. 1156.) "While brake pads are not absolutely interchangeable each for one another 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." (*Ibid.*)

Also relevant to *Wheeler* was the context in which the plaintiffs' injuries arose. All claimed to have been exposed to asbestos "during inspection or replacement of worn pads when dust containing asbestos which had been generated by the friction on the pads during braking was blown out of the brake drums. At the time of such exposure, these worn brake pads could no longer be identified by brand." (*Id.*, at p. 1155.) That is, not only did the brake pads contain comparable quantities of a single type of asbestos, they were also visually fungible when they allegedly caused injury.

Wheeler is contrasted with *Mullen v. Armstrong World Industries, Inc.* (1988) 200 Cal. App. 3d 250 in which the Court of Appeal held, on demurrer, that not all asbestos-containing products were fungible. Noting that "asbestos is a generic designation possessing a rainbow-like diversity and a bewildering array of potential uses" (*Id.*, at p. 256.), the court ruled that the general fungibility allegations were insufficient to withstand demurrer.

Here, as in *Mullen*, the fact that Plaintiffs allege fungibility is not sufficient to withstand demurrer. Indeed, Plaintiffs do not adequately allege fungibility even under the *Wheeler* standard. It appears to be undisputed, as Plaintiffs allege, that the Manufacturing Defendants' ghost gun parts are all identically unserialized by design. But this is not the end of the inquiry. California law categorizes "firearm precursors parts"—what the Manufacturing Defendants have allegedly made—in a number of ways. Among other things, the law recognizes these parts may be polymer or metallic. (*See* Pen. Code § 16531(a)(1).) In *Wheeler*, the brake pads

were allegedly visually fungible because the printed brand names had worn off through use. Here, in contrast, plastic and metal are easily distinguishable, even to laypersons. Perhaps plastic firearms parts are indistinguishable from one another, but they are distinguishable from metal ones.

The Court does not mean to suggest that Plaintiffs cannot plead fungibility. It simply holds that as the pleadings currently stand, they have not done so.

C. Conclusion on Market Share Liability

The Court sustains the Manufacturing Defendants' demurrer with leave to amend to cure the defects identified above. Unlike the Vendor Defendants, the Court does not hold market share liability categorically inapplicable to the Manufacturing Defendants. It simply holds that on this record, market share liability is inadequately pled.

III. Other Grounds for Demurrer

Defendants raise a number of other challenges to Plaintiffs' complaints. (See Global Demurrer at pp. 30-41.) In light of the Court's resolution of the market share liability issues for both sets of Defendants, the Court will not reach these grounds for demurrer at this time. The amendments Plaintiffs make to address the above pleading defects may materially alter the Court's analysis of more traditional demurrer arguments. Defendants are free to raise their remaining arguments in a challenge to the amended complaint.

PROCEEDINGS GOING FORWARD

As discussed above, Plaintiffs are granted leave to amend. To streamline proceedings, Plaintiffs should file a single consolidated amended complaint rather than two separate complaints for *Cardenas* and *McFayden*.

Per the parties' case management statement filed on April 21, 2022 (ROA 457), the parties will jointly inspect the firearms believed to have been used in the shootings on May 24, 2022. The Court believes judicial economy would best be served by allowing the results of that inspection to inform any amendments Plaintiffs wish to make. To that end, the deadline for filing an amended complaint will be June 24, 2022.

Certain Defendants have filed a separate demurrer arguing Plaintiffs' claims are barred by the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 et seq. (ROA 294, with joinder at ROA 315.) This demurrer is set for hearing on May 27, 2022 with supplemental briefing due on May 16. Because this demurrer challenges pleadings that are no longer operative, the Court takes it off calendar. Defendants are free to raise any PLCAA arguments they wish in a challenge to the amended complaint.

Finally, the Parties are encouraged to stipulate to a briefing schedule for any challenges to the amended complaint, as they did for these demurrers.

In light of the above, the Court sets a further status conference for September 8, 2022 at 9:00 a.m. A joint status conference statement shall be filed on or before September 1, 2022.