IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.: 81034

United States District Court Case No.: 2:19-CV-01189-APG-EJY

JAMES PARSONS, Individually and as Special Administrator of the Estate of CAROLYN LEE PARSON; ANN-MARIE PARSONS,

Appellants,

v.

COLT'S MANUFACTURING COMPANY LLC, COLT'S DEFENSE LLC; DANIEL DEFENSE, INC.; PATRIOT ORDNANCE FACTORY, INC.; FN AMERICA, LLC; NOVESKE RIFLEWORKS LLC; CHRISTENSEN ARMS; LEWIS MACHINE & TOOL COMPANY; LWRC INTERNATIONAL LLC; DISCOUNT FIREARMS AND AMMO LLC; DF&A HOLDINGS LLC; MAVERICK INVESTMENTS LP; SPORTSMAN'S WAREHOUSE, INC.; GUNS AND GUITARS, INC.

Respondents.

Certified Questions from the United States District Court for the District of Nevada

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JOINT APPENDIX

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CASE NO: A-19-797891-C
Department 22

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons, and ANN-MARIE PARSONS, Plaintiffs, vs. COLT'S MANUFACTURING COMPANY LLC; COLT DEFENSE LLC; DANIEL DEFENSE INC.; PATRIOT ORDNANCE FACTORY; FN AMERICA; FN HERSTAL; HERSTAL GROUP; NOVESKE RIFLEWORKS LLC; CHRISTENSEN ARMS; LEWIS MACHINE & TOOL COMPANY; LWRC INTERNATIONAL LLC; DISCOUNT FIREARMS AND AMMO LLC; DF&A HOLDINGS LLC; MAVERICK INVESTMENTS LP; SPORTSMAN'S WAREHOUSE; and GUNS AND GUITARS INC., Defendants.	CASE NO.: DEPT. NO.: **COMPLAINT AND JURY DEMAND** **Exemption Requested: Damages Exceed $50,000 Per Plaintiff**

INTRODUCTION

1. On February 14, 1929, men associated with notorious gangster Al Capone fired 70 rounds from Thompson submachine guns into a Chicago garage, killing seven rival gang members.

2. It was a death toll that would barely register today. But 1929 was a different time. The Saint Valentine's Day Massacre, perpetrated with a weapon capable of spraying hundreds of rounds per minute, shocked the nation and galvanized Congress to address the scourge of automatic weapons.

3. The National Firearms Act (NFA) was enacted in 1934 to halt the proliferation of weapons like the so-called "Tommy Gun," which were universally thought to pose an egregious threat to public safety and law enforcement.

4. At congressional hearings, Attorney General Homer Cummings articulated the sentiment shared by Congress, the public, the firearms industry, and the National Rifle Association: "A machine gun, of course, ought never to be in the hands of any private individual. There is not the slightest excuse for it, not the least in the world."

5. The president of the NRA, Karl Frederick, helped Congress draft a definition of "machine gun" that was premised on its essential characteristic – the capacity to produce a ferocious rate of fire unlimited by the shooter's ability to pull the trigger.

6. Colt, at the time the only manufacturer of machine guns, fully cooperated with the government. The Attorney General reported that Colt had "entered into a gentleman's agreement with the Department of Justice . . . because they have realized what a dreadful thing it has been for those deadly and dangerous weapons to be in the hands of those criminals."

7. That gentleman's agreement was eventually obliterated, along with the firearms industry's concern for public safety. In the post-Vietnam era, Colt and other firearm manufacturers took the AR-15, the U.S. military's superlative combat rifle, and sold it to civilians with minor changes that preserve the weapon's core design: a machine gun engineered for automatic fire.

8. Congress, together with the Bureau of Alcohol, Tobacco and Firearms (ATF), spent decades adapting the law in order to keep up with the industry and protect the public from automatic weapons. That effort led to an explicit prohibition on the manufacture and sale of weapons with *design features* that allow for automatic fire through *simple modification*.

9. Several manufacturers of the AR-15 rifle, including Defendants in this case, were undeterred. Choosing profits over public safety, Defendants continued to design, manufacture, and market AR-15 rifles that will shoot automatically with modifications that require no technical expertise and can be completed within minutes, if not seconds.

10. The fact that the AR-15 can be so easily modified is not just known to Defendants; it is intended by them and advertised to potential buyers.

11. In the last several years alone, scores of Americans have been gunned down indiscriminately with AR-15 rifles in schools, places of worship, night clubs, office parties, movie theaters, and dozens of other places.

12. America's mass shooters seek fame by death tally. It has been apparent for years, and reported repeatedly, that even in semi-automatic mode AR-15s are the weapon of choice for shooters looking to inflict maximum casualties.

13. It was not just possible – or even probable – that a gunman would take advantage of the ease of modifying AR-15s to fire automatically in order to substantially increase the body count during a mass shooting. It was inevitable.

14. The inevitable occurred on October 1, 2017.

15. On that day, eighty-eight years after the St. Valentine's Day Massacre, a man unleashed 1,049 rounds into a crowd of concertgoers in Las Vegas in less than ten minutes, killing 58 and injuring more than 400.

16. The scale of that crime was made possible by the shooter's arsenal: twelve AR-15 machine guns. Each weapon had been modified with a "bump stock" – an easily installable plastic device that the manufacturers knew would facilitate the weapon's ability to spray automatic fire.

17. Carrie Parsons, aged 31, was killed in Las Vegas while fleeing for her life from a hailstorm of automatic fire.

18. Defendants' willful conduct in designing, manufacturing and marketing these weapons was craven, unconscionable, and flatly illegal under federal and Nevada law.

PARTIES AND JURISDICTION

19. Plaintiff James Parsons is a resident of Washington. He is the Special Administrator of the Estate of Carolyn Lee Parsons. He is the surviving father of Carolyn Lee Parsons, who was known to her family and friends as Carrie. Pursuant to NRS 41.085, Mr. Parsons has standing to pursue this claim as the Special Administrator and as an heir to Carrie.

20. Plaintiff Ann-Marie Parsons is a resident of Washington. She is the surviving mother of Carrie Parsons. Pursuant to NRS 41.085, she has standing to pursue this claim as an heir to Carrie.

21. Defendant Colt's Manufacturing Company LLC is the manufacturer of the Colt M4 Carbine, an AR-15 style assault rifle that is sold in the United States for personal use. Defendant Colt Defense LLC is the corporate parent of Defendant Colt's Manufacturing Company LLC.

22. Defendant Daniel Defense Inc. is the manufacturer of the Daniel Defense DDM4V11 and the Daniel Defense M4A1, which are both AR-15 style assault rifles that are sold in the United States for personal use.

23. Defendant Patriot Ordnance Factory (POF) is the manufacturer of the POF USA P-15, an AR-15 style assault rifle that is sold in the United States for personal use.

24. Defendant FN Herstal is the manufacturer of the FNH FN15, an AR-15 style assault rifle that is sold in the United States for personal use. Defendant FN America is the American subsidiary of Defendant FN Herstal. Defendant Herstal Group is the corporate parent of Defendants FN Herstal and FN America.

25. Defendant Noveske Rifleworks LLC is the manufacturer of the Noveske N4, an AR-15 style assault rifle that is sold in the United States for personal use.

26. Defendant Christensen Arms is the manufacturer of the Christensen Arms CA-15, an AR-15 style assault rifle that is sold in the United States for personal use.

27. Defendant Lewis Machine & Tool Company (LMT) is the manufacturer of the LMT Defender 2000, an AR-15 style assault rifle that is sold in the United States for personal use.

28. Defendant LWRC International LLC is the manufacturer of the LWRC M6IC, an AR-15 style assault rifle that is sold in the United States for personal use.

29. Defendants Colt's Manufacturing Company LLC, Colt Defense LLC, Daniel Defense Inc., Patriot Ordnance Factory, FN Herstal, FN America, Herstal Group, Noveske Rifleworks LLC, Christensen Arms, Lewis Machine & Tool Company, and LWRC International LLC, are hereinafter collectively referred to as "Defendant Manufacturers."

30. Defendant Discount Firearms & Ammo LLC is a Nevada limited liability company with its principal place of business in Las Vegas, Nevada. Defendant DF&A Holdings LLC is a Nevada limited liability company with its principal place of business in Las Vegas, Nevada. Defendant DF&A Holdings LLC is the manager of Defendant Discount Firearms & Ammo LLC. Defendant Maverick Investments LP is a Nevada limited partnership with its principal place of business in Las Vegas, Nevada. Defendant Maverick Investments, LP is the manager of Defendant DF&A Holdings, LLC.

31. Defendant Guns and Guitars Inc. is a Nevada corporation with its principal place of business in Mesquite, Nevada.

32. Defendant Sportsman's Warehouse is a Utah corporation with its principal place of business in Midvale, Utah.

33. Discount Firearms and Ammo LLC, Sportsman's Warehouse, and Guns and Guitars Inc., are hereinafter collectively referred to as "Defendant Dealers."

34. As alleged herein, the Defendants engaged in illegal and wrongful conduct causing harm in Clark County, Nevada.

BACKGROUND

PART I
The Tommy Gun, Al Capone, and a National Consensus on Machine Guns

35. The Thompson machine gun, known as the "Tommy gun," was a weapon of war that missed its moment. It was developed as a military arm during World War I, but the war ended just a few days before the first prototypes were scheduled to be shipped to Europe. Its manufacturer, now in dire financial straits, tried to sell the weapon to the public.

36. Most Americans had no use for a machine gun. But the Tommy gun's lethality and light frame made it ideal for a very specific market: Prohibition-era organized crime.

37. The Tommy gun enabled many of the era's most notorious crimes. In addition to the Valentines' Day Massacre, it was tied to the 1926 murder of a Chicago prosecutor, William McSwiggin, and the killing of four law enforcement officers in what became known as the "Kansas City Massacre" of 1933.

38. By 1934, the country had witnessed enough carnage. Congress stepped in to address what was universally understood to be a serious threat to public safety.

39. A bill was introduced in the House that sought to impose a 100% tax on the sale of machine guns, putting the total cost at upwards of $7,000 in today's dollars.

40. During debate, a Republican Representative from Minnesota asked why Congress was not simply banning the sale of machine guns to civilians: "Why should we permit the manufacture, that is, permit the sale of the machine guns to anyone outside of the several branches of the Government – for instance, the Federal Government, the sheriff's officers, and State constabularies?"

41. The answer was not a lack of political will or public support. Rather, at the time it was thought that the Constitution's Commerce Clause did not give Congress the authority to pass such a law, forcing Congress to proceed under its taxing power. The goal was a de facto ban by virtue of making machine guns prohibitively expensive.

42. In order to draft the law, Congress had to come up with a statutory definition of "machine gun" that identified and captured the weapon's uniquely dangerous character.

43. In an early iteration of the bill, Congress planned to define a machinegun as "any weapon designed to shoot automatically, or semi-automatically, 12 or more shots without reloading."

44. Representative Sumners from Texas expressed concern that tying the definition to a particular number of rounds made the law too tempting to evade: "Would you anticipate the possibility, if this bill should be passed, of some unscrupulous manufacturer of these machine guns cutting it down to 11?"

45. The Attorney General dispelled those concerns, vouching for the industry's – and in particular, Colt's – trustworthiness. "The Colt people have been very cooperative of late and I would not believe for a moment that they would try to evade the law by any such device."

46. The issue was eventually rendered moot when the president of the NRA, Karl Frederick, proposed a different definition of "machine gun," one that Congress eventually adopted and that endures today: the ability to fire "more than one shot, without manual reloading, by a single function of the trigger."

47. Tying the definition of automatic fire to the phrase "a single function of the trigger" was intended to clarify that the "essence of a machinegun" (to use Mr. Frederick's words) is the ability to produce a rate of fire that is not limited by how quickly the shooter can pull the trigger.

48. As Mr. Frederick explained in his testimony:

> Other guns require a separate pull of the trigger for every shot fired, and such guns are not properly designated as machine guns. . . . You must release the trigger and pull it again for the second shot to be fired. You can keep firing that as fast as you can pull the trigger. But that is not properly a machine gun and in point of effectiveness any gun so operated will be very much less effective.

49. Echoing Representative Sumners, Mr. Frederick also urged Congress to avoid enacting a law with a gaping loophole: "I should not like, if there is to be legislation with respect to machine guns, to have machine guns capable of firing up to 12 shots exempted from the operations of this bill."

50. Persuaded by this testimony, Congress adopted Mr. Frederick's proposal and defined automatic fire accordingly. The NFA was passed, becoming effective in July of 1934.

51. In the decades that followed, Representative Sumners' comments proved strikingly prescient.

52. Beginning in the 1960s, the firearms industry underwent a dramatic shift, shedding the sense of responsibility to the public that had guided its prior cooperation with Congress and choosing instead to embark on a course driven solely by greed.

PART II
The AR-15, Vietnam, and the Firearms Industry's Gambit to Profit From "Civilian" Machine Guns

53. If the Tommy gun was a weapon of war that just missed its moment, the AR-15 was a weapon of war that arrived just in time.

54. After World War II, the U.S. Army's Operations Research Office (ORO) analyzed over three million casualty reports from World War I, World War II, and the ongoing Korean War. In its final 1952 report, ORO determined that, in the context of short range, highly mobile combat, the best predictor of casualties was the number of shots fired. The report also concluded, however, that "current models of fully automatic hand weapons . . . are valueless from the perspective of increasing the number of targets hit."

55. These findings led the U.S. Army to develop specifications for a new combat weapon: a lightweight firearm that would hold a large detachable magazine, expel ammunition with enough velocity to penetrate body armor and steel helmets, and deliver greater accuracy and lethality in automatic mode than current weaponry.

56. A company called Armalite designed the AR-15 in response. Lightweight, air-cooled, gas-operated, and magazine-fed, the AR-15 delivered. Its core design features enabled fully automatic fire that could be aimed and controlled, while also allowing for semi-automatic and three-round burst firing. This "selective fire" feature afforded soldiers flexibility to adapt to the exigencies of battle.

57. Prototypes were completed in time to arm soldiers headed to Vietnam. Reports of the AR-15's performance as an automatic weapon were glowing. According to the 1962

Field Test Report delivered to the Pentagon, an AR-15 in automatic mode was "superior in virtually all respects" to the Thompson or Browning machine guns.

58. The military adopted the AR-15 as its standard-issue rifle, renaming it the M16.

59. One reported example, among many, of the weapon's combat prowess is as follows: "At a distance of approximately 15 meters, one Ranger fired an AR-15 full automatic, hitting one VC [Viet Cong] with three rounds. One round in the head took it completely off. Another in the right arm took it completely off too. One round hit him in the right side, causing a hole about five inches in diameter. It cannot be determined which round killed the VC but it can be assumed that any one of the three would have caused death."

60. The AR-15 was designed and built for this purpose, and this purpose only. It was made for those with the awesome power, and responsibility, to inflict mass casualties in combat. The weapon's superior capacity for lethality, above and beyond other firearms, is why it has endured as the U.S. military's weapon of choice for more than half a century.

61. When the Vietnam War wound down and then ended, military demand naturally declined. Manufacturers responded to this not by manufacturing fewer military weapons, but by seeking to expand the market for military weapons to U.S. civilians.

62. The problem with this plan was that every aspect of the AR-15's design reflected the weapon's raison d'être: to serve as an effective combat weapon capable of fully automatic fire. Transforming it into a truly civilian rifle would have required a different design.

63. But AR-15 manufacturers were not interested in redesign, preferring instead to make the fewest changes possible. This choice was not only cost-effective, it meant manufacturers could use the weapon's close approximation to military weaponry as a selling point.

64. So manufacturers removed the selector switch that allowed the weapon to toggle between automatic, three-round burst, and semi-automatic fire – but otherwise kept the essential design of most internal parts so that they were interchangeable with M16 parts.

65. Exterior components like the stock, barrel and rail system were preserved as easily removeable and interchangeable.

66. The industry refers to these design features as "modularity" – a synonym for "easily modifiable."

67. Congress tried valiantly to keep up, returning repeatedly to the legislative drafting table to effectuate the purpose of the NFA: to protect the public from automatic weapons.

68. In 1968, Congress amended and re-codified the NFA as part of the Gun Control Act of 1968. In doing do, it expanded the definition of "machinegun" in two ways.

69. First, Congress expanded the definition of a "machinegun" to include machinegun frames and receivers, "conversion kits" that could transform semi-automatic weapons into machineguns, and combinations of machinegun parts when in the possession of a single person.

70. Congress further expanded the definition of a "machinegun" to include weapons that presently fire semi-automatically but that "can be readily restored to shoot" automatically.

71. Firearm manufacturers did not heed this clear statement of legislative concern. Selling semi-automatic weapons that could be easily converted into machine guns was too good for business.

72. Sellers of conversion kits proliferated, and also found ways to skirt the law.

73. In 1981, the U.S. Attorney General convened a Task Force on Violent Crime, which addressed the ongoing problem of easily convertible semi-automatic weapons.

74. In its report, the Task Force noted:

> Another problem we wish to address is the ease of conversion of semi-automatic guns into more lethal and more strictly regulated fully automatic guns…. Some manufacturers are producing readily available semi-automatic weapons which can easily be converted to fully automatic weapons by simple tool work or the addition of *readily available parts*. Over an 18-month period, 20 percent of machine guns seized or purchased by the ATF had been converted in this way. [emphasis supplied.]

75. In 1982, ATF addressed the problem directly. It held that the phrase "designed to shoot" automatically in the NFA means "those weapons which have not previously functioned as machineguns but possess design features which facilitate full automatic fire by simple modification or elimination of existing component parts."

76. In other words, a weapon that is manufactured to fire in semi-automatic mode is nevertheless a machinegun if it can be converted to fire automatically through "simple modification."

77. This was a clear directive that responsibility for the scourge of automatic weapons did not lie solely with those selling gadgets or parts that did the work of conversion. By honing-in on the *design features* of semi-automatic weapons, ATF was explicitly calling ut manufacturers for selling easily convertible weapons.

78. In 1986, Congress enacted the Firearms Owners' Protection Act (FOPA) and once again tinkered with the definition of machinegun.

79. Notably, Congress did not eliminate the "designed to shoot" language or otherwise indicate any disagreement with ATF's determination that a weapon with "design features which facilitate full automatic fire by simple modification" is a machinegun.

80. Rather, FOPA once again expanded the definition of the term "machinegun" to address the persistent problem of conversion. This time, Congress clarified that "any part designed and intended to be used solely and exclusively for converting any weapon into a machinegun" is itself a machinegun under the NFA.

81. Again, Defendant Manufacturers chose to ignore these repeated legislative efforts to address the catastrophic danger posed by easily modifiable weapons.

PART III
Modifications, Bump Stocks, and the "Full Auto Experience"

82. Since 1986, the AR-15 has found an enthusiastic audience among those interested in owning a thinly disguised machine gun.

83. Hundreds of videos available online show the AR-15 being shot automatically in back yards and at shooting ranges with a shoe string, a rubber band, or with no tools at all.

84. One YouTube video, viewed more than a million times, shows a man "bump firing" an AR-15 automatically by using only his shoulder to reset the stock and achieve constant trigger activation.

85. These simple hacks make clear that the AR-15 has never strayed from its roots. It has always been, and remains, a machine gun.

86. Over the last decade, devices have been developed that capitalize on the AR-15's powerful recoil and removeable stock to make it even easier to generate reliable and continuous automatic fire.

87. These devices, known generically as "bump stocks," replace the stock of the AR-15 and use the weapon's recoil mechanism to continually fire.

88. An AR-15 modified with a bump stock will continually fire rounds after a single trigger pull, replicating the automatic fire it was designed for.

89. Indeed, an AR-15 modified with a bump stock will not continually fire rounds *unless* the shooter's trigger finger is immobilized.

90. The Akins Accelerator – an early iteration of the bump stock that came on the market in 2006 – stated in its patent application: "The method of the present invention operates by depressing the trigger with a shooter's trigger finger in order to discharge the firearm. The shooter's finger is then immobilized in the position it has assumed to discharge the firearm."

91. The Akins Accelerator was recalled after ATF found it was a machinegun. This did not deter Mr. Akins, who made one (non-functional) modification and put the device back on the market. The company with whom Mr. Akins partnered sold it online with the following description:

> Ever wonder what it would feel like to own a Machine Gun? Heck Yeah, who doesn't. . . . Well FosTech Outdoors has you covered. The Bumpski is the civilian legal way to convert your semi-auto rifle to bump firing, lead throwing, brass spitting rifle that you have always dreamed of owning. Simply replace your existing stock with the FosTech kit that matches your rifle and away you go.

92. Despite the fact that bump stocks like the Akins Accelerator unequivocally converted AR-15s into fully automatic machine guns, the Defendant Manufacturers did

nothing to change the design features of the weapon that rendered it susceptible to simple modification.

93. In 2010, a bump stock from a company called Slide Fire came on the market.

94. Like the Akins Accelerator, the Slide Fire bump stock replaced the AR-15's stock and allowed the shooter to cycle fire with a single trigger pull. As the Slide Fire website advised customers having trouble with the device: "Make sure your finger is tightly seated on the finger rest and that it does not move while you are shooting your firearm. After years of shooting by moving your finger, it can be a hard habit to break."

95. But Slide Fire also "improved" upon the Akins Accelerator. It could be installed in much less time with nothing more than a screwdriver and was compatible with a greater number of AR-15 brands.

96. The inventor of Slide Fire, Jeremiah Cottle, stated in an interview that he developed the bump stock because he "love[s] full auto."

97. Mr. Cottle said of his invention: "Slide Fire brings shooters the same full auto experience" as a fully automatic firearm.

98. For several years prior to 2017, this "full auto experience" could be had by any AR-15 with access to the internet and a few minutes to spare.

99. The simple steps necessary to remove the stocks of Defendant Manufacturers' AR-15s and replace them with a bump stock or similar device can be learned from dozens of videos readily accessible on the internet.

100. Defendant Manufacturers, with full knowledge of the market for automatic weapons and the availability of bump stocks and similar devices, continued to manufacture their respective AR-15 rifles so that the stock could be easily removed and replaced with a bump stock.

101. Moreover, with a reckless lack of regard for public safety, Defendant Manufacturers courted buyers by advertising their AR-15s as military weapons and signaling the weapon's ability to be simply modified.

102. Defendants made these choices despite a decade's worth of evidence – including the *more than one hundred* deaths at Sandy Hook, Aurora, San Bernardino, and Orlando alone – proving that AR-15s were the weapon of choice for mass shooters looking to inflict maximum casualties.

103. It was only a question of when – not if – a gunman would take advantage of the ease of modifying AR-15s to fire automatically in order to substantially increase the body count during a mass shooting.

104. Having created the conditions that made a mass shooting with a modified AR-15 inevitable, Defendant Manufacturers continued conducting business as usual.

PART IV
The Road to Las Vegas

105. On November 23, 2016, Steven Paddock ("the shooter") purchased a Daniel Defense M4V11 AR-15, serial number DDM4078072.

106. The Daniel Defense DDM4V11 is advertised as "Mil-Spec" [shorthand for military specifications], comes equipped with a "Daniel Defense Flash Suppressor," and is touted as allowing the shooter "to drive the gun more precisely and prevent over travel when transitioning between multiple targets," as well as allowing for "quick but precise rapid fire."

107. Daniel Defense allows customers to order an AR-15 that is completely customized to their specifications. Its website has a section entitled "Build a Complete Rifle," which walks the customer through each part and the various options, emphasizing repeatedly the weapon's military bona fides. When selecting for gas system length, for example, the "Carbine Length" option reads: "Built for combat reliability in all conditions, the carbine length is the military standard for the M4 Carbine."

108. On January 25, 2017, the shooter purchased a POF USA P15 AR-15, serial number PE-1600179.

109. POF USA, a company for "Fire-Breathing Patriots," calls its "modular" AR-15s "the Ultimate Fighting Machines that just won't quit," engineered "to withstand the most rugged environments."

110. On February 2, 2017, the shooter purchased a FNH FN15 AR-15, serial number FNB024293.

111. FNH was originally known as Fabrique Nationale d'Armes de Guerre – French for National Factory of Weapons of War. A Belgium company, it is famous for collaborating with John Browning on early automatic weapons, manufacturing one of the firearms confiscated from Archduke Ferdinand's assassins, and more recently, selling arms and ammunition to Gaddafi's regime in Libya. The FN 15, available to civilians in the U.S., is "built to withstand the varied and unrelentingly harsh conditions of battlefields around the world."

112. On February 15, 2017, the shooter purchased another Daniel Defense AR-15, the M4A1, serial number DDM4123629.

113. The Daniel Defense M4A1, also "Mil-Spec," is advertised as having a Rail Interface System "which has been in use by US Special Operations Command."

114. On February 18, 2017, the shooter purchased a Noveske N4 AR-15, serial number B15993.

115. Noveske touts its AR-15s as "built to mil-specs" and notes that its parts "should interchange with other mil-spec components."

116. On March 2, 2017, the shooter purchased three weapons in the same day: a Colt M4 AR-15, serial number LE564124; a LMT Defender 2000, serial number LMT81745; and a Christensen Arms CA-15 AR-15, serial number CA04625.

117. Colt advertises its M4 Carbine as having the "reliability, performance, and accuracy" that "provide[s] our Armed Forces the confidence required to accomplish any mission." The M4 Carbine "shares many features of its combat-proven brother, the Colt M4."

118. Colt has a "Custom Shop" where customers can build the rifle of their choosing "from many custom options."

119. The bump stock manufacturer, Slide Fire, specifically advertised the bump stock's compatibility with the Colt AR-15 platform using the Colt trademark.

120. In August of 2016, as a result of an agreement between Slide Fire and Colt, a Colt Competition AR-15 was sold with a Slide Fire bump stock already "integrated."[1]

121. LMT was founded "to provide the US Military, law enforcement and government agencies with precision engineered, high quality weapons, components and modular weapon systems." The Defender 2000, available to civilians, was "the progenitor of the many customization options" LMT now offers.

122. In 2014, LMT announced a new stock that was "designed to be able to replace current adjustable stocks in less than twenty seconds with no special tools."

123. Christensen Arms not only touts its AR-15's "mil-spec" platform, it explicitly acknowledges the weapon's capability for automatic fire. Its AR-15 user manual notes that "any damage or malfunction due to fully automatic operation and any other modification to this firearm" voids the company's warranties.

124. On May 25, 2017, the shooter purchased another Colt M4 AR-15, serial number LE451984.

125. On June 30, 2017, the shooter purchased two weapons: a second POF USA P15 AR-15, serial number 03E-1603178; and a second FNH FN15 AR-15, serial number FNCR000383.

126. On either May 5, 2017 or July 5, 2017, the shooter purchased a LWRC M6IC AR-15, serial number 5P03902.

127. LWRC developed the "IC" rifle series to compete in the U.S. Army's Individual Carbine Program, a competition to select the Army's next standard-issue combat weapon. The competition was cancelled, but LWRC wasted no time making the weapon available to the public. Advertising boasts that the M6IC is "directly descended from the rifles developed by LWRCI to meet the requirements of the U.S. Army Individual Carbine Program" and are "available in a wide variety of configurations to meet any need or requirement."

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[1] The shooter purchased a Colt Competition AR-15 on May 25, 2017 and brought it to his suite at Mandalay Bay, but did not fire it on October 1.

128. At some time prior to October 1, 2017, the shooter purchased more than a dozen bump stocks.

129. Every AR-15 in the shooter's arsenal was compatible with the bump stocks.

130. At some time prior to October 1, 2017, the shooter purchased dozens of high-capacity magazines, including 100-round magazines.

131. In the days leading up to October 1, 2017, more than 20,000 people converged on Las Vegas for the annual Route 91 Harvest Musical Festival, held at the Las Vegas Village.

132. One of those people was Carrie Parsons, aged 31.

133. Carrie was in Las Vegas to spend a girls' weekend with friends on her way home to Seattle after a business trip. Carrie loved country music, almost as much as she loved her hometown sports teams, the Seahawks and the Mariners.

134. A graduate of Arizona State University, Carrie was working at a staffing agency in downtown Seattle – a job that had sent her to New York the week before the music festival.

135. Carrie had recently become engaged and by October 1 was in full wedding-planning mode. She had already selected her bridal bouquet. After the stopover in Vegas, Carrie had plans to spend the weekend with her sister visiting venues and discussing wedding plans.

136. On October 1, Carrie and her friend, Kelly, arrived at Las Vegas Village well before the concert was set to begin in order to secure spots close to the stage.

137. Meanwhile, at some point prior to 10:00 PM on October 1, the shooter removed the stocks of the Christensen Arms CA-15, the two Colt M4 carbines, the Daniel Defense M4A1 and M4V11, the two FNH FN15s, the LMT Defender 2000, the LWRC M6IC, the Noveske N4, and the two POF USA P15s, and installed bump stocks in their place.

138. Replacing the stocks of all twelve AR-15s with bump stocks would likely have taken the shooter no more than 15 minutes.

139. The shooter attached 100-round magazines to the Christensen Arms CA-15, the two Colt M4 Carbines, the Daniel Defense M4A1 and M4V11, the two FNH FN15s, the LMT Defender 2000, the LWRC M6IC, and the two POF USA P15s.

140. The shooter attached a 40-round magazine to the Noveske N4.

141. The shooter's arsenal in his Mandalay Bay hotel suites also included several AR-10s and a revolver.

142. The shooter used one or more of the AR-10s for the sole purpose of firing eight rounds at a fuel tank bordering the Las Vegas Village.

143. The shooter used the revolver to kill himself.

144. The shooter used Defendant Manufacturers' AR-15 machine guns, and *only* Defendant Manufacturers' AR-15 machine guns, to fire at, kill, maim, wound, and terrorize the thousands of innocent civilians gathered below for the concert.

145. At approximately 10:05 PM, the shooter began using Defendant Manufacturers' AR-15 machine guns to fire from 32 stories above ground, through a hole in the window of his hotel suite, at the crowd some 300 yards away.

146. At such a distance, and without sophisticated scopes, precise aim would have been nearly impossible. The ferocious firepower enabled by Defendant Manufacturers' AR-15 machine guns made aim unnecessary.

147. When the first shots were fired, most people assumed they were fireworks. Carrie's friend, Kelly, who happened to be reading a book where a character initially thinks gunfire is fireworks, was alarmed. She grabbed Carrie and told her they needed to leave.

148. Carrie and Kelly, holding hands to avoid being separated, wove through the crowd toward the bleachers along the side of the Village. They exited the venue and ran through a large parking lot to an adjacent street.

149. Carrie and Kelly encountered two fences as they tried to escape. One was knocked down by the force of the crowd. They were able to climb over the other.

150. As Kelly and Carrie ran, the shooter moved through his arsenal, unleashing automatic fire from each of Defendant Manufacturers' AR-15 machine guns.

151. 21 rounds were fired automatically from the Christensen Arms CA-15, serial number CA04625.

152. 100 rounds were fired automatically from the Colt M4 Carbine, serial number LE451984.

153. 96 rounds were fired automatically from the Colt M4 Carbine, serial number LE564124.

154. 95 rounds were fired automatically from the Daniel Defense M4A1, serial number DDM4123629.

155. 100 rounds were fired automatically from the Daniel Defense M4V11, serial number DDM4078072.

156. 144 rounds were fired automatically from the FNH FN15, serial number FNCR000383.

157. 153 rounds were fired automatically from the FNH FN15, serial number FNB024293.

158. 100 rounds were fired automatically from the LMT Defender 2000, serial number LMT81745.

159. 12 rounds were fired automatically from the LWRC M6IC, serial number 5P03902.

160. 33 rounds were fired automatically from the Noveske N4, serial number B15993.

161. 95 rounds were fired automatically from the POF USA P15, serial number PE-1600179.

162. 100 rounds were fired automatically from the POF USA P15, serial number 03E-1603178.

163. In total, 1049 rounds were fired from Defendant Manufacturers' AR-15 machine guns in less than ten minutes.

164. Though they didn't know the source of the gun fire, Carrie and Kelly ran away from Mandalay Bay, further from the shooter.

165. As they approached the street, where an ambulance was already parked, Carrie was shot from behind in the shoulder.

166. Carrie was able to keep running until they reached the ambulance. The ambulance rushed her to a nearby hospital, but it was too late.

167. Carrie did not survive her wound.

168. From hundreds of yards away and 32 stories above ground, Defendant Manufacturers' AR-15 machine guns proved as lethal as they were in Vietnam.

169. Due to the high number of casualties, it was several days before Carrie's body could be identified. Later that week, Jim and Ann-Marie brought their daughter home.

170. On the day Carrie was supposed to visit wedding venues, she was buried with the bouquet she had chosen to carry down the aisle.

COUNT ONE

NRS 41.085 Action for Death by Wrongful Act

1-170. Plaintiffs incorporate the allegations of paragraphs 1 through 170 as if fully set forth herein.

171. Defendants knew, or should have known, of the facts alleged at paragraphs 1 through 170.

172. Pursuant to 18 U.S.C. § 922(b)(4), it is illegal for any licensed importer, licensed manufacturer, or licensed dealer to sell or deliver a machine gun to any individual, corporation or company.

173. Pursuant to NRS 202.350(1)(b), it is illegal for any person to manufacture or cause to be manufactured, or import into the State of Nevada, or keep, offer or expose for sale, or give, lend, possess or use a machine gun.

174. A weapon that shoots more than one round with a single pull of the trigger is a machine gun.

175. A weapon that possesses design features which facilitate full automatic fire by simple modification or elimination of component parts is a machine gun.

176. The AR-15s identified in this Complaint possessed design features that allowed them to be shot automatically without any modifications.

177. The AR-15s identified in this Complaint possessed design features that allowed internal parts to be easily swapped out for M16 and/or M4 parts.

178. The AR-15s identified in this Complaint possessed design features that allowed them to be shot automatically with simple modifications involving common household items.

179. The AR-15s identified in this Complaint possessed design features, including an easily removable stock, that allowed modification with a bump stock without any special tools and in less than five minutes.

180. The AR-15s identified in this Complaint, after modification with a bump stock, allow a shooter to initiate a continuous firing cycle with a single pull of the trigger; in other words, to fire automatically.

181. Defendants have known for years that their AR-15s could be easily modified to fire automatically.

182. Defendants have known of the existence and availability of bump stock devices since at least 2006, when the Akins Accelerator came on the market.

183. Defendants have known of the existence and availability of the Slide Fire bump stock since 2010.

184. Christensen Arms knowingly designed the CA-15 with an easily removable stock and chose design features that made the CA-15 capable of automatic fire through simple modification.

185. Colt knowingly designed the M4 Carbine with an easily removable stock and chose design features that made the M4 Carbine capable of automatic fire through simple modification.

186. Daniel Defense knowingly designed the M4A1 and the M4V11 with an easily removable stock and chose design features that made the M4A1 and the M4V11 capable of automatic fire through simple modification.

187. FNH knowingly designed the FN15 with an easily removable stock and chose design features that made the FN15 capable of automatic fire through simple modification.

188. LMT knowingly designed the Defender 2000 with an easily removable stock and chose design features that made the Defender 2000 capable of automatic fire through simple modification.

189. LWRC knowingly designed the M6IC with an easily removable stock and chose design features that made the M6IC capable of automatic fire through simple modification.

190. Noveske knowingly designed the N4 with an easily removable stock and chose design features that made the N4 capable of automatic fire through simple modification.

191. POF USA knowingly designed the P15 with an easily removable stock and chose design features that made the P15 capable of automatic fire through simple modification.

192. Defendant Manufacturers' conduct as alleged above was wrongful and in knowing violation of 18 U.S.C. § 922(b)(4) and NRS 202.350(1)(b).

193. Discount Firearms and Ammo knowingly made one of Defendant Manufacturers' AR-15 machine guns available for sale and sold it to the shooter despite knowledge that it possessed design features which facilitate full automatic fire by simple modification.

194. Sportsman's Warehouse knowingly made four of Defendant Manufacturers' AR-15 machine guns available for sale and sold them to the shooter despite knowledge that they possessed design features which facilitate full automatic fire by simple modification.

195. Guns and Guitars made one of Defendant Manufacturers' AR-15 machine guns available for sale and sold it to the shooter despite knowledge that it possessed design features which facilitate full automatic fire by simple modification.

196. Defendant Dealers' conduct as alleged above was wrongful and in knowing violation of 18 U.S.C. § 922(b)(4) and NRS 202.350(1)(b).

197. The sequential use of all twelve AR-15 machine guns modified with bumps stocks created a torrent of continuous automatic fire that amplified the lethality and rapidity of the assault and increased the risk that Carrie Parsons would be shot and seriously injured or killed and was thus a substantial factor in causing her death.

198. The Defendants' conduct in violation of 18 U.S.C. § 922(b)(4) and NRS 202.350(1)(b) exposed Carrie Parsons to an unreasonable risk of harm.

199. One of Defendants' AR-15 machine guns fired the shot that killed Carrie Parsons.

200. It is not known at this time which of Defendants' AR-15 machine guns fired the shot that killed Carrie Parsons.

201. To the extent that information cannot be proved by plaintiffs, the burden should shift to Defendant Manufacturers to prove, if they can, which weapon fired the shot that killed Carrie Parsons, because all Defendants engaged in illegal conduct that contributed to the harm on October 1, 2017.

202. The events of October 1 would not have occurred but for the Defendants' illegal and wrongful conduct.

203. Each of the Defendants' conduct in violation of 18 U.S.C. § 922(b)(4) and NRS 202.350(1)(b) was a proximate cause of the injuries and death of Carrie Parsons.

204. Plaintiff James Parsons, as the Special Administrator of the Estate, has and is incurring damages as specified in NRS 41.085(5) and the damages Carrie Parsons would have recovered had she lived pursuant to NRS 41.100(3) in an amount to be determined at trial and in excess of $15,000.

205. As heirs of Carrie Parsons, Plaintiffs James Parsons and Ann-Marie Parsons have and are incurring damages for their own grief, sorrow, loss of probable support, companionship, society, and comfort in an amount to be determined at trial and in excess of $15,000.

206. In engaging in the conduct described herein, Defendants have acted with fraud, malice and oppression, entitling plaintiffs to punitive damages in an amount determined by the jury, but in any event, in excess of $15,000.

207. Plaintiff James Parsons, as the Special Administrator of the Estate, may recover punitive damages pursuant to NRS 41.085(5) and NRS 41.100(3).

COUNT TWO

(Negligence Per Se)

1-170. Plaintiffs incorporate the allegations of paragraphs 1 through 170 as if fully set forth herein.

171-203. Plaintiffs incorporate the allegations of paragraphs 171 through 203 of Count One as if fully set forth herein.

204. 18 U.S.C. § 922(b)(4) and NRS 202.350(1)(b) are intended to protect members of the public from physical injury and death caused by machine guns.

205. Carrie Parsons is a member of the class of persons that 18 U.S.C. § 922(b)(4) and NRS 202.350(1)(b) were intended to protect.

206. Carrie Parsons suffered the type of injury that 18 U.S.C. § 922 and NRS 202.350(1)(b) were intended to prevent.

207. The Defendants are liable to plaintiffs in negligence per se for selling weapons that were designed to shoot automatically, which proximately caused the injures and death of Carrie Parsons.

208. Plaintiff James Parsons, as the Special Administrator of the Estate, has and is incurring damages as specified in NRS 41.085(5) and the damages Carrie Parsons would have recovered had she lived pursuant to NRS 41.100(3) in an amount to be determined at trial and in excess of $15,000.

209. As heirs of Carrie Parsons, Plaintiffs James Parsons and Ann-Marie Parsons have and are incurring damages for their own grief, sorrow, loss of probable support, companionship, society, and comfort in an amount to be determined at trial and in excess of $15,000.

210. In engaging in the conduct described herein, Defendants have acted with fraud, malice and oppression, entitling plaintiffs to punitive damages in an amount determined by the jury, but in any event, in excess of $15,000.

211. Plaintiff James Parsons, as the Special Administrator of the Estate, may recover punitive damages pursuant to NRS 41.085(5) and NRS 41.100(3).

COUNT THREE

(Negligent Entrustment)

1-170. Plaintiffs incorporate the allegations of paragraphs 1 through 170 as if fully set forth herein.

171-203. Plaintiffs incorporate the allegations of paragraphs 171 through 203 of Count One as if fully set forth herein.

204. The Defendants knew, or should have known, of all the foregoing information alleged. Based on this and similar information, the Defendants knew, or should have known, that the sale of their easily modifiable AR-15s posed an unreasonable and egregious risk of physical injury to others.

205. A mass casualty event, such as the shooting at Las Vegas Village on October 1, 2017, was within the scope of the risk created by the Defendant Manufacturers' design, marketing and sale of their AR-15 rifles.

206. A mass casualty event, such as the shooting at Las Vegas Village on October 1, 2017, was within the scope of the risk created by the Defendant Dealers' sale of the Defendant Manufacturers' AR-15 rifles.

207. The Defendants, as those who deal in firearms, are required to exercise the closest attention and the most careful precautions in the conduct of their business.

208. The Defendant Manufacturers' sale of the Christensen Arms CA-15, serial number CA04625; the Colt M4 Carbine, serial number LE451984; the Colt M4 Carbine, serial number LE564124; the Daniel Defense M4A1, serial number DDM4123629; the Daniel Defense M4V11, serial number DDM4078072; the FNH FN15, serial number FNCR000383; the FNH FN15, serial number FNB024293; the LMT Defender 2000, serial number LMT81745; the LWRC M6IC, serial number 5P03902; the Noveske N4, serial number B15993; the POF USA P15, serial number PE-1600179; and the POF USA P15, serial number 03E-1603178 constituted entrustments that posed an unreasonable risk of physical harm to others, including the victims of a foreseeable mass shooting event perpetrated with simply modified AR-15s capable of automatic fire.

209. Discount Firearms and Ammo's sale of one of Defendant Manufacturers' AR-15s to the shooter constituted an entrustment that posed an unreasonable risk of physical harm to others, including the victims of a foreseeable mass shooting event perpetrated with simply modified AR-15s capable of automatic fire.

210. Sportsman's Warehouse's sale of four of Defendant Manufacturers' AR-15s to the shooter – including three on a single day – constituted an entrustment that posed an unreasonable risk of physical harm to others, including the victims of a foreseeable mass shooting event perpetrated with simply modified AR-15s capable of automatic fire.

211. Guns and Guitars' sale of one of Defendant Manufacturers' AR-15s constituted an entrustment that posed an unreasonable risk of physical harm to others, including the victims of a foreseeable mass shooting event perpetrated with simply modified AR-15s capable of automatic fire.

212. Plaintiff James Parsons, as the Special Administrator of the Estate, has and is incurring damages as specified in NRS 41.085(5) and the damages Carrie Parsons would have recovered had she lived pursuant to NRS 41.100(3) in an amount to be determined at trial and in excess of $15,000.

213. As heirs of Carrie Parsons, Plaintiffs James Parsons and Ann-Marie Parsons have and are incurring damages for their own grief, sorrow, loss of probable support, companionship, society, and comfort in an amount to be determined at trial and in excess of $15,000.

214. In engaging in the conduct described herein, Defendants have acted with fraud, malice and oppression, entitling plaintiffs to punitive damages in an amount determined by the jury, but in any event, in excess of $15,000.

215. Plaintiff James Parsons, as the Special Administrator of the Estate, may recover punitive damages pursuant to NRS 41.085(5) and NRS 41.100(3).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

1. Special, general and punitive damages, according to proof but in excess of Fifteen Thousand Dollars ($15,000.00);

2. Pre- and post-judgment interest as provided by law;

3. An award of attorney's fees and costs of suit incurred; and

4. For such other and further relief as the Court deems just and proper.

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the Social Security number of any person.

DATED this 2nd day of July 2019.

MATTHEW L. SHARP, LTD.

/s/ *Matthew L. Sharp*
Matthew L. Sharp
Nevada State Bar No. 4746
432 Ridge Street
Reno, NV 89501
(775) 324-1500

JURY TRIAL DEMAND

Plaintiffs hereby demand trial by jury of all issues so triable.

MATTHEW L. SHARP, LTD.

/s/ *Matthew L. Sharp*
Matthew L. Sharp
Nevada State Bar No. 4746
432 Ridge Street
Reno, NV 89501
(775) 324-1500

Richard H. Friedman
Nevada State Bar No. 12743
Friedman Rubin PLLP
1126 Highland Avenue
Bremerton, WA 98337
(360) 782-4300

Joshua D. Koskoff,
Pro Hac Vice to be filed
Katherine L. Mesner-Hage,
Pro Hac Vice to be filed
Koskoff, Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
(203) 336-4421

Attorneys for Plaintiffs

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Nevada

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; and ANN-MARIE PARSONS,

Plaintiff(s)

v.

COLT 'S MANUFACTURING COMPANY LLC, et al.

Defendant(s)

Civil Action No. 2:19-CV-01189-APG-GWF

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* DF&A Holdings, LLC
c/o Jana K. Wyson., Resident Agent
5920 W. Cougar Lane
Las Vegas, NV 89139

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew L. Sharp, Matthew L. Sharp, Ltd., 432 Ridge St., Reno, NV 89501

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DEBRA K. KEMPI
CLERK

7/18/2019
DATE

(By) DEPUTY CLERK

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AOS

UNITED STATES DISTRICT COURT, CLARK COUNTY, NEVADA

JAMES PARSONS; ET AL	Plaintiff	CASE NO: 2:19-CV-01189
vs		HEARING DATE/TIME:
COLT'S MANUFACTURING COMPANY LLC; ET AL	Defendant	DEPT NO:

AFFIDAVIT OF SERVICE

ESTEFANY MOLINA RIVERA being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to or interested in the proceedings in which this affidavit is made. That affiant received 1 copy(ies) of the SUMMONS, COMPLAINT, on the 22nd day of July, 2019 and served the same on the 23rd day of July, 2019, at 09:45 by:

serving the servee DF&A HOLDINGS- LLC C/O JANA K. WYSON by personally delivering and leaving a copy at (address) 5920 W COUGAR LANE, LAS VEGAS NV 89139 with JANA K. WYSON as REGISTERED AGENT, an agent lawfully designated by statute to accept service of process;

Pursuant to NRS 53.045

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED this 23 day of Jul, 2019.

ESTEFANY MOLINA RIVERA
R-098289

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Nevada

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; and ANN-MARIE PARSONS,

Plaintiff(s)

v.

COLT 'S MANUFACTURING COMPANY LLC, et al.

Defendant(s)

Civil Action No. 2:19-CV-01189-APG-GWF

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Discount Firearms & Ammo, LLC
c/o Jana K. Wyson., Resident Agent
5920 W. Cougar Lane
Las Vegas, NV 89139

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew L. Sharp, Matthew L. Sharp, Ltd., 432 Ridge St., Reno, NV 89501

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DEBRA K. KEMPI
CLERK

(By) DEPUTY CLERK

7/18/2019
DATE

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____ , a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AOS

UNITED STATES DISTRICT COURT, CLARK COUNTY, NEVADA

JAMES PARSONS; ET AL	Plaintiff	CASE NO: 2:19-CV-01189
vs		HEARING DATE/TIME:
COLT'S MANUFACTURING COMPANY LLC; ET AL	Defendant	DEPT NO:

AFFIDAVIT OF SERVICE

ESTEFANY MOLINA RIVERA being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to or interested in the proceedings in which this affidavit is made. That affiant received 1 copy(ies) of the SUMMONS, COMPLAINT, on the 22nd day of July, 2019 and served the same on the 23rd day of July, 2019, at 09:45 by:

serving the servee DISCOUNT FIREARMS & AMMO- LLC C/O JANA K. WYSON by personally delivering and leaving a copy at (address) 5920 W COUGAR LANE, LAS VEGAS NV 89139 with JANA K. WYSON as REGISTERED AGENT, an agent lawfully designated by statute to accept service of process;

Pursuant to NRS 53.045

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED this 23 day of Jul, 2019.

ESTEFANY MOLINA RIVERA
R-098289

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Nevada

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; and ANN-MARIE PARSONS,

Plaintiff(s)

v.

COLT 'S MANUFACTURING COMPANY LLC, et al.

Defendant(s)

Civil Action No. 2:19-CV-01189-APG-GWF

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Maverick Investments LP
c/o Joseph A. Wyson., Resident Agent
5920 W. Cougar Lane
Las Vegas, NV 89139

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew L. Sharp, Matthew L. Sharp, Ltd., 432 Ridge St., Reno, NV 89501

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DEBRA K. KEMPI
CLERK

7/18/2019
DATE

(By) DEPUTY CLERK

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____ , a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AOS

UNITED STATES DISTRICT COURT, CLARK COUNTY, NEVADA

JAMES PARSONS; ET AL	Plaintiff	CASE NO: 2:19-CV-01189
vs		HEARING DATE/TIME:
COLT'S MANUFACTURING COMPANY LLC; ET AL	Defendant	DEPT NO:

AFFIDAVIT OF SERVICE

ESTEFANY MOLINA RIVERA being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to or interested in the proceedings in which this affidavit is made. That affiant received 1 copy(ies) of the SUMMONS, COMPLAINT, on the 22nd day of July, 2019 and served the same on the 23rd day of July, 2019, at 09:45 by:

serving the servee MAVERICK INVESTMENTS LLP C/O JOSEPH A. WYSON by personally delivering and leaving a copy at (address) 5920 W COUGAR LANE, LAS VEGAS NV 89139 with JANA WYSON as WIFE, an agent lawfully designated by statute to accept service of process;

Pursuant to NRS 53.045

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED this 23 day of Jul, 2019.

ESTEFANY MOLINA RIVERA
R-098289

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Nevada

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; and ANN-MARIE PARSONS,

Plaintiff(s)

v.

COLT 'S MANUFACTURING COMPANY LLC, et al.

Defendant(s)

Civil Action No. 2:19-CV-01189-APG-GWF

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Noveske Rifleworks LLC
c/o Lorina Noveske, Resident Agent
594 NE E Street
Grants Pass, OR 97526

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew L. Sharp, Matthew L. Sharp, Ltd., 432 Ridge St., Reno, NV 89501

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DEBRA K. KEMPI
CLERK

7/18/2019
DATE

(By) DEPUTY CLERK

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* NOVESKE RIFLEWORKS LLC C/O LORINA NOVESKE, REGISTERED AGENT

was received by me on *(date)* 18 JULY 2019.

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

☑ I served the summons on *(name of individual)* MEGAN FISHER, who is designated by law to accept service of process on behalf of *(name of organization)* NOVESKE RIFLEWORKS LLC on *(date)* 19 JULY 2019 ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00.

I declare under penalty of perjury that this information is true.

Date: 22 JULY 2019

Server's signature

PATRICK SCULLEY

Printed name and title

ACTION PROCESS SVC, INC.
560 NE F ST #623 GRANTS PASS, OR 97526

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Nevada

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; and ANN-MARIE PARSONS,

Plaintiff(s)

v.

COLT 'S MANUFACTURING COMPANY LLC, et al.

Defendant(s)

Civil Action No. 2:19-CV-01189-APG-GWF

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Lewis Machine and Tool Co.
c/o James Jestel, Resident Agent
1600 East Leonard Ct.
Eldridge, Iowa 52748

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew L. Sharp, Matthew L. Sharp, Ltd., 432 Ridge St., Reno, NV 89501

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DEBRA K. KEMPI
CLERK

(By) DEPUTY CLERK

7/18/2019
DATE

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____ , a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* James Jestel, Registed Agent
was received by me on *(date)* 7-24-19.

☒ I personally served the summons on the individual at *(place)* 1600 EAST Leonard CT Eldridge Ia on *(date)* 7-24-19 ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____, a person of suitable age and discretion who resides there, on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ 0 for travel and $ 75 for services, for a total of $ 75.00.

I declare under penalty of perjury that this information is true.

Date: 7-25-19

Harlan Perry
Server's signature

Harlan Perry Notary
Printed name and title

2685 Kimberly Road Bettendorf Ia
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Nevada

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; and ANN-MARIE PARSONS,

Plaintiff(s)

v.

COLT 'S MANUFACTURING COMPANY LLC, et al.

Defendant(s)

Civil Action No. 2:19-CV-01189-APG-GWF

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Colt Defense LLC
c/o Corporation Service Company, Resident Agent
251 Little Falls Dr.
Wilmington, DE 19808

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew L. Sharp, Matthew L. Sharp, Ltd., 432 Ridge St., Reno, NV 89501

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DEBRA K. KEMPI
CLERK

(By) DEPUTY CLERK

7/18/2019
DATE

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

❒ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 01/09) Summons in a Civil Action (Page 2)

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This summons for *(name of individual and title, if any)* COLT DEFENSE LLC
was received by me on *(date)* 7/24/19

☐ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ , or _____

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____ , a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

☒ I served the summons on *(name of individual)* LYNANNE GARES (authorized person at the registered agent) , who is designated by law to accept service of process on behalf of *(name of organization)* COLT DEFENSE LLC
C/O CORPORATION SERVICE CO. 251 LITTLE FALLS DRIVE WILMINGTON, DE 19808 on *(date)* 7/24/19 4:15 PM

☐ I returned the summons unexecuted because _____ , or

☐ Other *(specify):*

_____

My fees are $ _____ for travel and $ _____ for services, for a total of $ _____

I declare under penalty of perjury that this information is true.

Date: 7/24/19

_____
Server's signature

KEVIN S. DUNN PROCESS SERVER
Printed name and title

BRANDYWINE PROCESS SERVERS, LTD
PO BOX 1360
WILMINGTON, DE 19899
302-475-2600
Server's address

Additional information regarding attempted service, etc:

SERVED: SUMMONS, COMPLAINT WITH JURY DEMAND

SWORN TO ON 7/24/19

_____

DENORRIS ANGELO BRITT
NOTARY PUBLIC
STATE OF DELAWARE
My Commission Expires May 1, 2022

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Nevada

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; and ANN-MARIE PARSONS,

Plaintiff(s)

v.

COLT 'S MANUFACTURING COMPANY LLC, et al.

Defendant(s)

Civil Action No. 2:19-CV-01189-APG-GWF

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Christensen Arms
c/o Protection Services, Inc., Resident Agent
200 E. South Temple, Suite 190
Salt Lake City, UT 84111

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew L. Sharp, Matthew L. Sharp, Ltd., 432 Ridge St., Reno, NV 89501

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DEBRA K. KEMPI
CLERK

7/18/2019
DATE

(By) DEPUTY CLERK

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* Christensen Arms
was received by me on *(date)* July 24, 2019

☐ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____ ; a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

☒ I served the summons on *(name of individual)* Bill Darden , who is
designated by law to accept service of process on behalf of *(name of organization)* Protection Services, Inc.
200 E. South Temple, Suite 190, Salt Lake City, UT 84111 on *(date)* July 25, 2019 ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ _____ .

I declare under penalty of perjury that this information is true.

Date: July 29, 2019

Server's signature

James Schmidt
Printed name and title

ICU Investigations, LLC
250 N Red Cliffs Drive, #4B-275
St. George, UT 84790
435-986-1200
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Nevada

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; and ANN-MARIE PARSONS,

Plaintiff(s)

v.

COLT 'S MANUFACTURING COMPANY LLC, et al.

Defendant(s)

Civil Action No. 2:19-CV-01189-APG-GWF

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Sportsman's Warehouse, Inc.
c/o CT Corporation System, Resident Agent
701 S. Carson St., Suite 200
Carson City, NV 89701

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew L. Sharp, Matthew L. Sharp, Ltd., 432 Ridge St., Reno, NV 89501

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DEBRA K. KEMPI
CLERK

7/18/2019
DATE

(By) DEPUTY CLERK

AFFIDAVIT OF SERVICE

STATE OF NEVADA

CASE # A-19-797891-C

I SUSAN PAPKA being duly sworn deposes and says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age and not a party to or interested in the proceeding in which this affidavit is made. The affiant received 1 copy (ies) of the

SUMMONS AND COMPLAINT

on the 24TH day of JULY ,2019 and served the same on the 25TH day of JULY , 2019 at 11:30AM by:

1 delivering and leaving a copy with the defendant, _____

DESCRIPTION:

at: NEUTRAL SITE:

2 serving the defendant, _____ by personally delivering a copy with:

_____

a person of suitable age and discretion located at:

_____

3 serving, SPORTSMAN'S WAREHOUSE INC

by personally delivering and leaving a copy at: R/A: CT CORPORATION SYSTEMS

701 S. CARSON ST #200, CARSON CITY, NV

a. with DANIELLE as _____ an agent lawfully designated by statute to accept service of process.

b. with _____, pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the resident agent as shown on the current certificate of designation filed with the Secretary of State.

c. with _____, pursuant to Chapter 14 of NRS, a guard posted at the gate of Defendant's residence to which the undersigned has been denied access.

STATE OF NEVADA,
COUNTY OF WASHOE
SIGNED AND SWORN before me on this
25TH day of JULY 2019,

BY: SUSAN PAPKA

SPapka
Affiant-SUSAN PAPKA-R-031336
LICENSE #918

WEST COAST PROCESS SERVICE
401 COURT STREET
RENO, NV 89501

EMILY DEBARD
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 19-1519-2 - Expires February 04, 2023

Notary Public

ed

MATTHEW L. SHARP, ESQ.
Nevada State Bar No. 4746
Matthew L. Sharp, Ltd.
432 Ridge Street
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com

RICHARD H. FRIEDMAN, ESQ.
Nevada State Bar No. 12743
Friedman Rubin PLLP
1126 Highland Avenue
Bremerton, WA 98337
(360) 782-4300
rfriedman@friedmanrubin.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons, and ANN-MARIE PARSONS, Plaintiffs, vs. COLT'S MANUFACTURING COMPANY LLC; COLT DEFENSE LLC; DANIEL DEFENSE INC.; PATRIOT ORDNANCE FACTORY; FN AMERICA; FN HERSTAL; HERSTAL GROUP; NOVESKE RIFLEWORKS LLC; CHRISTENSEN ARMS; LEWIS MACHINE & TOOL COMPANY; LWRC INTERNATIONAL LLC; DISCOUNT FIREARMS AND AMMO LLC; DF&A HOLDINGS LLC; MAVERICK INVESTMENTS LP; SPORTSMAN'S WAREHOUSE; and GUNS AND GUITARS INC., Defendants.	CASE NO.: 2-19-cv-01189-APG-GWF **ACCEPTANCE OF SERVICE OF SUMMONS AND COMPLAINT**

V.R. Bohman, counsel for Defendant Daniel Defense, Inc., hereby accepts service on behalf of Defendant Daniel Defense, Inc. of the Complaint filed in the Eighth Judicial District

Court as Case No. A-19-797891-C and removed to the United States District Court – District of Nevada as Case No. 2:19-cv-01189-APG-GWF.

Daniel Defense does not waive and expressly retains all defenses and objections to the lawsuit, jurisdiction, and the venue of the action, but waives any objections to the service of process.

DATED this 30th day of July, 2019.

SNELL & WILMER

V.R. Bohman
3883 Howard Hughes Pkwy.
Las Vegas, NV 89169
Telephone (702) 784-5282
vbohman@swlaw.com

Attorneys for Defendant Daniel Defense, Inc.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Nevada

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; and ANN-MARIE PARSONS,

Plaintiff(s)

v.

COLT'S MANUFACTURING COMPANY LLC, et al.

Defendant(s)

Civil Action No. 2:19-CV-01189-APG-GWF

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Colt's Manufacturing Company LLC
c/o Corporation Service Company, Resident Agent
50 Weston St.
Hartford, CT 06120-1537

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew L. Sharp, Matthew L. Sharp, Ltd., 432 Ridge St., Reno, NV 89501

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DEBRA K. KEMPI
CLERK

7/18/2019
DATE

(By) DEPUTY CLERK

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____ , a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

JAMES PARSONS, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CAROLYN LEE PARSONS, et al
Plaintiff

vs

COLT'S MANUFACTURING COMPANY LLC, et al
Defendant

Case Number: 2:19-CV-01189-APG-GWF

AFFIDAVIT OF SERVICE

Now comes, Thomas J. Bradtke the undersigned and does hereby swear and affirm, affiant is a Private Process Server and disinterested Person over the age of eighteen. Affiant is not a party in the above styled cause and has a legal domicile of Washington, DC.

I, Thomas J. Bradtke certify that on, **07/29/2019**, at **1:40 PM**, I served a copy of the within ***Summons and Complaint and Jury Demand*** upon the within named **LWRC International, LLC c/o Capital Corporate Services, Inc., RA**, in the following manner,

(xx) **Corporate/Partnership Service:** Through Personal Service of each document, a true copy to **Diane Becker, Administrative Assistant,** whom based on information and belief affiant knew said individual to be Authorized Agent, a person authorized to accept service on behalf of **LWRC International, LLC c/o Capital Corporate Services, Inc., RA.**

Said service was effected at the following location: **Capitol Corporate Services, Inc., 3206 Tower Oaks Boulevard, Fourth Floor, Rockville, MD 20852.**

I, Thomas J. Bradtke describe the individual accepting service **Diane Becker** as follows: **Diane Becker** is a White Female, approximately 45 yrs. old, with Brown hair, approximately 5'5" and weighing 160 lbs.

I, Thomas J. Bradtke certify that my statements, contained within the foregoing affidavit are true, correct and my free act and deed. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Sworn to and subscribed before me on
07/29/2019

E. Torri Schaffer

E. Torri Schaffer, Notary Public
Commission Expires 11/29/2020

E. TORRI SCHAFFER
Notary Public
State of Maryland
Montgomery County
My commission exp. November 29, 2020

45440

Thomas Bradtke

Thomas J. Bradtke
P.O. Box 18647
Washington, DC 20036
202-296-0222

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Nevada

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; and ANN-MARIE PARSONS,

Plaintiff(s)

v.

COLT 'S MANUFACTURING COMPANY LLC, et al.

Defendant(s)

Civil Action No. 2:19-CV-01189-APG-GWF

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Patriot Ordnance Factory, Inc.
c/o Frank Lynn Desomma, Resident Agent
1492 W. Victory Lane
Phoenix, AZ 85027

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew L. Sharp, Matthew L. Sharp, Ltd., 432 Ridge St., Reno, NV 89501

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DEBRA K. KEMPI
CLERK

7/18/2019
DATE

(By) DEPUTY CLERK

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* Patriot Ordnance Factory, Inc. c/o Frank Lynn Desomma was received by me on *(date)* 7/24/2019.

☐ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____, a person of suitable age and discretion who resides there, on *(date)* _____, and mailed a copy to the individual's last known address; or

☒ I served the summons on *(name of individual)* Frank Lynn Desomma, who is designated by law to accept service of process on behalf of *(name of organization)* Patriot Ordnance Factory, Inc. on *(date)* 7/31/2019 ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ Ø for travel and $ 65.00 for services, for a total of $ ~~0.00~~ $65.00

I declare under penalty of perjury that this information is true.

Date: 7/31/2019

Server's signature

Jaron Perkins - Private Process Server

Printed name and title

PO Box 942 Glendale, AZ 85311

Server's address

Additional information regarding attempted service, etc:

DECLARATION OF SERVICE

Case: 2:19-CV-01189-APG-GWF	Court: United States District Court of Nevada	County: District of Nevada, NV	Job: 3595807
Plaintiff / Petitioner: JAMES PARSONS AND ANN-MARIE PARSONS		Defendant / Respondent: COLT'S MANUFACTURING COMPANY LLC, ET AL.	
Received by: J & L Process Service, LLC		For: MATTHEW L. SHARP, LTD.	
To be served upon: PATRIOT ORDNANCE FACTORY, INC. c/o FRANK LYNN DESOMMA			

I, Jaron Perkins, being duly sworn, depose and say: I am over the age of 21 years and not a party to this action, and that within the boundaries of the state where service was effected, I was authorized by law to make service of the documents and informed said person of the contents herein

Recipient Name / Address: FRANK LYNN DESOMMA, PATRIOT ORDNANCE FACTORY, INC.: 1492 W VICTORY LN, PHOENIX, AZ 85027

Manner of Service: Business, Jul 31, 2019, 4:10 pm MST

Documents: Summons In A Civil Action & Complaint and Jury Demand. (Received Jul 24, 2019 at 11:26am MST)

Additional Comments:
1) Successful Attempt: Jul 31, 2019, 4:10 pm MST at PATRIOT ORDNANCE FACTORY, INC.: 1492 W VICTORY LN, PHOENIX, AZ 85027 received by FRANK LYNN DESOMMA. Age: 50+; Ethnicity: Caucasian; Gender: Male; Weight: 230+; Height: 5'6"; Hair: Gray; Relationship: REGISTERED AGENT;

Hand Delivered

Fees: $65.00

I declare under penalty of perjury under the laws of the State of Arizona that the foregoing is true and correct:

7/31/2019

Jaron Perkins
MC-8562
Certified in Maricopa County

Date

J & L Process Service, LLC
PO Box 942
Glendale, AZ 85311
602-344-9655

Subscribed and sworn to before me by the affiant who is personally known to me.

Notary Public

7/31/2019

Date Commission Expires

LETICIA ESTRADA
Notary Public, State of Arizona
Maricopa County
Commission # 553425
My Commission Expires
November 02, 2022

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Nevada

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; and ANN-MARIE PARSONS,

Plaintiff(s)

v.

COLT 'S MANUFACTURING COMPANY LLC, et al.

Defendant(s)

Civil Action No. 2:19-CV-01189-APG-GWF

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* LWRC International, LLC
c/o Capitol Corporate Services, Inc., Resident Agent
3206 Tower Oaks Blvd., 4th Floor
Rockville, MD 20852

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew L. Sharp, Matthew L. Sharp, Ltd., 432 Ridge St., Reno, NV 89501

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DEBRA K. KEMPI
CLERK

7/18/2019
DATE

(By) DEPUTY CLERK

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____ , a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

JAMES PARSONS, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CAROLYN LEE PARSONS, et al
Plaintiff

vs

COLT'S MANUFACTURING COMPANY LLC, et al
Defendant

Case Number: 2:19-CV-01189-APG-GWF

AFFIDAVIT OF SERVICE

Now comes, Thomas J. Bradtke the undersigned and does hereby swear and affirm, affiant is a Private Process Server and disinterested Person over the age of eighteen. Affiant is not a party in the above styled cause and has a legal domicile of Washington, DC.

I, Thomas J. Bradtke certify that on, **07/29/2019**, at **1:40 PM**, I served a copy of the within ***Summons and Complaint and Jury Demand*** upon the within named **LWRC International, LLC c/o Capital Corporate Services, Inc., RA**, in the following manner,

(xx) **Corporate/Partnership Service:** Through Personal Service of each document, a true copy to **Diane Becker, Administrative Assistant,** whom based on information and belief affiant knew said individual to be Authorized Agent, a person authorized to accept service on behalf of **LWRC International, LLC c/o Capital Corporate Services, Inc., RA**.

Said service was effected at the following location: **Capitol Corporate Services, Inc., 3206 Tower Oaks Boulevard, Fourth Floor, Rockville, MD 20852.**

I, Thomas J. Bradtke describe the individual accepting service **Diane Becker** as follows: **Diane Becker** is a White Female, approximately 45 yrs. old, with Brown hair, approximately 5'5" and weighing 160 lbs.

I, Thomas J. Bradtke certify that my statements, contained within the foregoing affidavit are true, correct and my free act and deed. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Sworn to and subscribed before me on
07/29/2019

E. Torri Schaffer

E. Torri Schaffer, Notary Public
Commission Expires 11/29/2020

E. TORRI SCHAFFER
Notary Public
State of Maryland
Montgomery County
My commission exp. November 29, 2020

45440

Thomas Bradtke

Thomas J. Bradtke
P.O. Box 18647
Washington, DC 20036
202-296-0222

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Nevada

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; and ANN-MARIE PARSONS,

Plaintiff(s)

v.

COLT 'S MANUFACTURING COMPANY LLC, et al.

Defendant(s)

Civil Action No. 2:19-CV-01189-APG-GWF

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Guns & Guitars, Inc.
c/o Michael T. Sullivan, Resident Agent
430 Bannock St.
Mesquite, NV 89027

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Matthew L. Sharp, Matthew L. Sharp, Ltd., 432 Ridge St., Reno, NV 89501

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DEBRA K. KEMPI
CLERK

7/18/2019
DATE

(By) DEPUTY CLERK

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 2:19-CV-01189-APG-GWF

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AOS

UNITED STATES DISTRICT COURT, CLARK COUNTY, NEVADA

JAMES PARSONS; ET AL	Plaintiff	CASE NO: 2:19-CV-01189
vs		HEARING DATE/TIME:
COLT'S MANUFACTURING COMPANY LLC; ET AL	Defendant	DEPT NO:

AFFIDAVIT OF SERVICE

RYAN TAYLOR being duly sworn says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, not a party to or interested in the proceedings in which this affidavit is made. That affiant received 1 copy(ies) of the SUMMONS, COMPLAINT, on the 22nd day of July, 2019 and served the same on the 5th day of August, 2019, at 18:28 by:

delivering and leaving a copy with the servee GUNS & GUITARS- INC. C/O PRESIDENT MICHAEL T. SULLIVAN at (address) 430 BANNOCK ST, MESQUITE NV 89027

SUBEJECT ANSWERED DOOR AND ACCEPTED HIS DOCS 5FT7IN - 5FT11IN 180-220LBS WHITE MALE 60+ YEARS OLD BALD(ING)

Pursuant to NRS 53.045

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED this 05 day of Aug, 2019.

Ryan Taylor

RYAN TAYLOR
R-099360

John F. Renzulli (*Pro Hac Vice*)
jrenzulli@renzullilaw.com
Christopher Renzulli (*Pro Hac Vice*)
crenzulli@renzullilaw.com
Scott C. Allan (*Pro Hac Vice*)
sallan@renzullilaw.com
Renzulli Law Firm, LLP
One North Broadway, Suite 1005
White Plains, NY
Telephone: (914) 285-0700
Facsimile: (914) 285-1213

Counsel for Defendants Colt's Manufacturing Company, LLC, Colt Defense, LLC, Lewis Machine & Tool Company, and LWRC International, LLC

[Counsel for additional defendants identified on the signature pages]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons, and ANN-MARIE PARSONS,

Plaintiffs,

v.

COLT'S MANUFACTURING COMPANY LLC, LLC; COLT DEFENSE LLC; DANIEL DEFENSE INC.; PATRIOT ORDNANCE FACTORY; FN AMERICA; FN HERSTAL; HERSTAL GROUP; NOVESKE RIFLEWORKS LLC; CHRISTENSEN ARMS; LEWIS MACHINE & TOOL COMPANY; LWRC INTERNATIONAL LLC; DISCOUNT FIREARMS AND AMMO LLC; DF&A HOLDINGS LLC; MAVERICK INVESTMENTS LP; SPORTSMAN'S WAREHOUSE; and GUNS AND GUITARS INC.

Defendants.

Case No. 2:19-CV-01189-APG-EJY

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Defendants Colt's Manufacturing Company LLC, Colt's Defense LLC, Daniel Defense, Inc., Patriot Ordnance Factory, Inc., FN America, LLC, Noveske Rifle Works LLC, Christensen Arms, Lewis Machine & Tool Company, and LWRC International LLC (collectively "Defendant Manufacturers"), and Discount Guns & Ammo, DF&A Holdings LLC, Maverick Investments LP, Guns & Guitars, Inc., and Sportsman's Warehouse, Inc. (collectively "Defendant Sellers") respectfully move to dismiss Plaintiffs' Complaint with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-03 ("PLCAA" or the "Act"), Nevada Revised Statute § 41.131, and principles of causation.

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF THE ARGUMENT

The October 1, 2017 shooting at the Route 91 Harvest Music Festival was a tragedy, but Defendants – manufacturers and retailers of rifles allegedly used by the shooter ("Subject Rifles") – are not responsible for the deaths and injuries the shooter caused. In fact, Plaintiffs' lawsuit, which seeks to hold Defendants liable for damages caused by the intentional crimes of the shooter, is expressly barred by the PLCAA. The PLCAA prohibits claims against firearm manufacturers or sellers for damages resulting from a third party's criminal or unlawful misuse of a firearm, subject to six limited exceptions. Plaintiffs' Complaint is precisely the type of lawsuit that Congress sought to preempt when enacting the PLCAA.

Implicitly recognizing the applicability of the PLCAA, Plaintiffs attempt to plead around the statute by endeavoring to fit their purported causes of action into two of the exceptions to the Act: (1) actions brought against firearm "sellers" (as defined by the PLCAA) for negligent entrustment or negligence per se; and (2) actions brought against firearm "manufacturers" or "sellers" who knowingly violate a state or federal statute applicable to the sale or marketing a firearm, the violation of which was a proximate cause of the harm for which relief is sought.

However, neither exception is applicable. Plaintiffs' lawsuit should be dismissed pursuant to the PLCAA because: (1) Plaintiffs fail to plead sufficient facts to establish a negligent entrustment action under Nevada law; (2) an alleged violation of a penal statute cannot serve as the basis for a negligence per se action; (3) negligent entrustment and negligence per se actions against firearms manufacturers are preempted by the Act; and (4) Defendants did not knowingly violate any federal or state firearm statute because the Subject Rifles at issue are not "machineguns" under the law.

Plaintiffs' claims should also be dismissed pursuant to the immunity provisions of Nevada Revised Statute § 41.131, which provides that, except for a product liability action, "[n]o person has a cause of action against the manufacturer or distributor of a firearm … merely because the firearm … was capable of causing serious injury, damage or death." Finally, separate and apart from any immunity statute, Plaintiffs' lawsuit should be dismissed pursuant to Nevada common law because their claims do not satisfy the requirements for negligent entrustment and negligence per se. Plaintiffs have not, and cannot, sufficiently plead causation under Nevada law because the injuries and deaths at the music festival were caused by the criminal acts of the shooter. The Court should dismiss the Complaint with prejudice because no set of facts consistent with Plaintiffs' Complaint would remedy these defects.[1]

PLAINTIFFS' ALLEGATIONS

On October 1, 2017, a criminal ("Shooter") intentionally fired into a crowd of people attending the Harvest Music Festival in Las Vegas. Plaintiffs' daughter, Carolyn Lee Parsons ("Parsons"), was shot and killed, allegedly by a bullet the Shooter fired from one of the Subject Rifles. Compl. ¶¶ 131-32, 136, 144-45, 165, 167, 199-200. Plaintiffs allege that the Defendant Manufacturers manufactured the Subject Rifles that were used in the shooting, and the Defendant Sellers each sold one or more of the Subject Rifles to the Shooter. Compl. ¶¶ 193-95. The Shooter

[1] *Ventress v. Japan Airlines*, 603 F.3d 676, 680 (9th Cir. 2010).

also allegedly purchased more than a dozen bump stocks from a non-party, and had replaced the Subject Rifles' stocks with the bump stocks before he fired into the crowd.[2] Compl. ¶¶ 93- 97, 119, 128, 137. Plaintiffs bring an action for wrongful death based on claims of negligence per se and negligent entrustment. Both of these purported causes of action are based on the claim that Defendants violated 18 U.S.C. § 922(b)(4) and Nev. Rev. Stat. § 202.350(1)(b) because the semi-automatic rifles they manufactured or sold should be considered "machineguns" under federal and state law because the shooter was able to modify them to fire more rapidly by installing bump stocks on them.

LEGAL STANDARD

To survive a motion to dismiss for failure to state a claim, a plaintiff must plead "facts" that are sufficient to "nudge the[] claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Doing so "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*. at 555. A "two-pronged" approach is employed in evaluating the sufficiency of allegations under Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). First, a court considering a motion to dismiss "can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id*. Under this standard, a "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555). "[M]ere conclusory statements . . . do not suffice." *Id.* Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity

[2] Bump stocks are "designed to be affixed to a semiautomatic long gun (most commonly an AR-type rifle or an AK-type rifle) in place of a standard, stationary rifle stock, for the express purpose of allowing 'rapid fire' operation of the semiautomatic firearm to which they are affixed … [W]hen a bump-stock-type device is affixed to a semiautomatic firearm, the device harnesses and directs the firearm's recoil energy to slide the firearm back and forth so that the trigger automatically re-engages by 'bumping' the shooter's stationary finger without additional physical manipulation of the trigger by the shooter." Bump-Stock Type Devices, 83 Fed. Reg. 66,516.

and then determine whether they plausibly give rise to an entitlement to relief." *Id*. at 679. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id*. at 678 (quoting *Twombly*, 550 U.S. at 557).

ARGUMENT

I. PLAINTIFFS' LAWSUIT IS PREEMPTED BY THE PLCAA

Congress enacted the PLCAA in 2005 to prohibit the filing of lawsuits seeking to hold firearm manufacturers and sellers legally responsible for harm caused by the criminal or unlawful misuse of firearms. Beginning in the late 1990s, victims of criminal firearms violence and state and local governments began filing lawsuits against members of the firearm industry seeking to hold them liable for damages resulting from the criminal and unlawful misuse of firearms. The liberal rules of modern pleading in some jurisdictions made it easy for even meritless lawsuits to survive motions to dismiss. Aware of these efforts, Congress found that if lawsuits of this sort were allowed to proceed, they would impose ruinous financial costs on the firearm industry, even if the plaintiffs could not succeed at trial. *See* 15 U.S.C. § 7901(a). The strength of the PLCAA's immunity for firearm manufacturers and sellers is exemplified by the Act's clear directive that any such "action that is pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought or is currently pending." *Id*. § 7902(b).

The explicit purpose of the PLCAA is to "prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms . . . for the harm solely caused by the criminal or unlawful misuse of firearm[s] . . . by others when the product functioned as designed and intended," and to "prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce." 15 U.S.C. § 7901(b). Congress made several findings supporting the PLCAA's enactment, most pertinently, as follows:

- The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

- Lawsuits have been commenced against manufacturers, distributors, dealers and importers of firearms that operate as designed and intended which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

- Businesses . . . that are engaged in … the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products . . . 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.

Id. §§ 7901(a)(3)-(5). Based upon these findings, Congress prohibited lawsuits meeting the definition of a "qualified civil liability action," from being "brought in any Federal or State court." *Id.* § 7902(a).

A. This Case is a Qualified Civil Liability Action

As defined in relevant part by the PLCAA, a "qualified civil liability action" is a "civil action or proceeding . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages, punitive damages, injunctive or declaratory relief, or penalties or other relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . ." 15 U.S.C. § 7903(5)(A). This case fits the definition precisely. It is a civil proceeding brought by persons (James and Anne-Marie Parsons) against manufacturers (the Manufacturer Defendants) and sellers (the Seller Defendants) of qualified products (the Subject Rifles) for damages and other relief based on the criminal use (the shooting of Parsons) of one of the qualified products (the Subject Rifles) by a third party (the Shooter). Compl. ¶¶ 19-33, 105, 108, 110, 112, 114, 116, 124-26, 128-29, 131-32, 136-37, 144-45, 150-63, 164-65, 167.

While there are six categories of claims that the PLCAA excludes from the definition of a qualified civil liability action, Plaintiffs have attempted to plead only two: (1) "an action brought against a seller for negligent entrustment or negligence per se"; and (2) "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . . ." 15 U.S.C. § 7903(5)(A)(ii)-(iii). Importantly, the PLCAA—by its express terms—does not create causes of action or remedies. *See id.* § 7903(5)(C) ("no provision of this chapter shall be construed to create a public or private cause of action or remedy"). The availability of a negligent entrustment or a negligence per se action depends on whether the cause of action is recognized under an applicable state's law. Here, Plaintiffs have not, and cannot, plead causes of action falling within these exceptions under Nevada law.

B. Nevada Law Does Not Recognize a Negligent Entrustment Action Against a Product Seller or Manufacturer

Although one of the exceptions to the PLCAA's definition of a qualified civil liability action is an action against a seller for negligent entrustment, such an action is not available to Plaintiffs in this case. Because "no provision of this chapter shall be construed to create a public or private cause of action or remedy," 15 U.S.C. § 7903(5)(C), Plaintiffs' negligent entrustment claim rises or falls under Nevada law.

Nevada appellate courts have not recognized a cause of action for negligent entrustment outside the context of an entrustment of a "vehicle to an inexperienced or incompetent person." *Zugel by Zugel v. Miller*, 688 P.2d 310, 312 (Nev. 1984). The Nevada Supreme Court has never extended the cause of action for negligent entrustment to cover actions against product sellers and manufacturers because, to be liable for negligent entrustment, the entrustor must have had a right

to control the instrumentality when it was used to cause harm.[3] Owners and lessors of vehicles (or other instrumentalities) continue to have rights to control the use their vehicles, even when driven by others. In contrast, product sellers and manufacturers relinquish ownership and control of the products they sell to buyers, and have no right or ability to control their subsequent use.

Nevada is not unique in requiring that a right to control an entrusted instrumentality at the time of injury be alleged and proven. For example, in Maryland, negligent entrustment liability theory is also recognized only in the context of entrustments by those who had a right to control the instrumentality when an injury occurred.[4] Plaintiffs have not alleged, and cannot plead, that any of the Defendants had the right to control the use of any of the Subject Rifles after they were sold to the Shooter. In the absence of such a well-pled allegation, Plaintiffs' negligent entrustment claim against the Defendants fails.

C. Plaintiffs Do Not Sufficiently Plead a Negligent Entrustment Action

Even if a negligent entrustment action against a product seller or manufacturer were recognized under Nevada law, Plaintiffs' claim should still be dismissed. The focus of the negligent

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[3] *Mills v. Continental Parking Corp.*, 475 P.2d 673, 674 (Nev. 1970) ("negligent entrustment theory may apply where one who has a right to control the car permits another to use it in circumstances where he knows or should know that such use may create an unreasonable risk of harm."); *accord Connell v. Carl's Air Conditioning,* 634 P. 2d 673, 675 (Nev. 1981); *Roddick by and through Roddick v. Plank*, 608 F. Supp. 229, 231 (D. Nev. 1985).

[4] *See, e.g., Broadwater v. Dorsey*, 688 A.2d 436, 440-41 (Md. Ct. App. 1997) (holding that a person without the right to prohibit use of chattel at the time of an accident is not liable for negligent entrustment); *accord Allen v. Wal-Mart Stores, LLC*, 907 F.3d 170, 179 (5th Cir. 2018) (surveying Texas law and noting that Texas has not adopted negligent entrustment with respect to the sale of chattel); *DeWester v. Watkins*, 745 N.W. 2d 330, 334 (Neb. 2008) (extending negligent entrustment of motor vehicle liability to a non-owner who nevertheless had a right to control use of the vehicle at the time of the accident); *Neary v. McDonald*, 956 P. 2d 1205, 1209 (Alaska 1998) (the right to control means that the defendant must have a greater right of possession or control than the entrustee); *Zedella v. Gibson*, 650 N.E.2d 1000, 1003–04 (1995) (stating that "if the [defendant] does not have an exclusive or superior right of control, no entrustment of the property can occur"); *Mills v. Crone*, 973 S.W. 2d 828, 831 (Ark. 1998) (one is not liable for negligent entrustment of a thing if he has no right to control its use).

entrustment tort is on the competency, maturity, or qualifications of the person to whom a potentially dangerous instrumentality is entrusted, not on the instrumentality itself.[5] The only allegation Plaintiffs make in support of their negligent entrustment claim is that attributes of the Subject Rifles themselves created a risk of harm, regardless of who was entrusted with their use. The Complaint does not allege that any Defendant either knew, or reasonably should have known, that the Shooter was not competent to use the Subject Rifles safely, or that he had an intent to use them criminally. For that reason, it fails to satisfy the PLCAA's requirement for a negligent entrustment action. 15 U.S.C. § 7903(5)(5) (negligent entrustment means "the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.").

In *Soto v. Bushmaster Firearms Int'l, LLC*, the Connecticut Supreme Court rejected an identical attempt to impose negligent entrustment liability on a rifle manufacturer in a mass shooting case, based on an allegation that selling AR-type rifles to civilians constitutes negligent entrustment. 202 A.3d 262, 281-83 (Conn. 2019) (recognizing that a "cause of action for negligent entrustment will lie only when the entrustor knows or has reason to know that the direct entrustee is likely to use a dangerous instrumentality in an unsafe manner"). The plaintiffs in *Soto* made no allegation that the person who acquired the rifle was not competent to use it safely, and the court summarily rejected the plaintiffs' argument that the "commercial sale of assault weapons to civilian users constitutes negligent entrustment because the social costs of such sales outweigh the perceived benefits," stating that "[o]ther courts have rejected such a theory, as do we." *Id.*[6]

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[5] *See Zugel*, 688 P.2d at 312-13 (knowing entrustment of a vehicle to an "inexperienced or incompetent person" may result in liability).

[6] The fundamental defect in Plaintiffs' negligent entrustment allegations was also recognized in *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997). In *McCarthy*, victims of a mass shooting

Plaintiffs in this case make the same allegation and this Court should likewise reject it because knowledge of an entrustee's incompetence to handle a product safely is a vitally important element of a negligent entrustment claim that Plaintiffs ignore entirely. Defendants anticipate that Plaintiffs will argue that their negligent entrustment action is sufficiently supported by the allegations that: (1) the Subject Rifles were dangerous; and (2) they were sold to the Shooter. Plaintiffs' argument would require a dramatic change in tort law. Such a finding would eliminate the need to plead and prove that the person entrusted with a potentially dangerous instrumentality was the type of person who could not be trusted to use it safely. The consequence of such a drastic change in the law would be that any person who entrusts a dangerous instrumentality to another is *ipso facto* negligent, and the only issue to be decided is whether the use of the instrumentality was the proximate cause of harm.

D. An Alleged Violation of a Penal Statute Cannot Serve as the Basis for a Negligence Per Se Action Under Nevada Law

Unlike negligent entrustment, the PLCAA does not define the requirements for an action pleaded under the negligence per se exception. Thus, applicable state law determines whether alleged statutory violations support a negligence per se action, and whether such an action has been sufficiently pleaded. Under Nevada law, violation of a statute "may constitute negligence *per se* only if the injured party belongs to the class of persons that the statute was intended to protect, and

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filed suit against the manufacturer of the ammunition used by the shooter alleging, similar to what the plaintiffs allege here, that the ammunition had "severe wounding power." *Id.* at 156. The plaintiffs argued before the district court that the sale of the ammunition to the general public constituted negligent entrustment. *McCarthy v. Sturm, Ruger* & Co., 916 F. Supp. 366, 370 (S.D.N.Y. 1996). The court rejected the plaintiffs' argument, noting that negligent entrustments are made to persons who lack ordinary prudence. *Id*. The court reasoned that "[t]o extend this theory to the general public would be a dramatic change" in tort law. *Id*. The court held that recognizing a "negligent entrustment rule for the protection of the general public" would "imply that the general public lacks ordinary prudence and thus undermine the reasonable person concept so central to tort law." *Id.*

the injury is of the type that the statute was intended to prevent." *Sagebrush Ltd. v. Carson City*, 660 P.2d 1013, 1015 (Nev. 1983). The typical statutes that can serve as the basis for a negligence per se claim are traffic statutes, designed to protect travelers from motor vehicle accidents.[7]

The statutes upon which Plaintiffs rely for their negligence per se claim are both penal statutes, 18 U.S.C. § 922(b)(4) and Nev. Rev. Stat. § 202.350(1)(b), that do not support a negligence per se claim under Nevada law. "[I]n the absence of evidence of legislative intent to impose civil liability, a violation of a penal statute is not negligence per se."[8] There is no expression of legislative intent in either 18 U.S.C. § 922(b)(4) or Nev. Rev. Stat. § 202.350(1)(b) to impose civil liability for their violation, and Plaintiffs' negligence per se claim should be dismissed.

E. The Negligent Entrustment and Negligence Per Se Exceptions to the PLCAA Do Not Apply to Actions Against Manufacturers

The exception for negligent entrustment and negligence per se actions applies only to firearm sellers, not to manufacturers. *Id*. § 7903(5)(A)(ii) ("[A]n action brought against a *seller* for negligent entrustment or negligence per se.") (emphasis added). The PLCAA defines "manufacturer" and "seller" separately; a "seller" is one who is (1) "engaged in the business" as a firearms dealer and (2) licensed to "engage in business" as a firearms "dealer." *Id.* at § 7903(6). A firearms "dealer" is defined in relevant part as "any person engaged in the business of selling firearms at wholesale or retail . . . ." 15 U.S.C. § 921(a)(11)(A). A person is "engaged in the business" of dealing firearms when he "devotes time, attention and labor to dealing in firearms in

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[7] *See, e.g., Brannan v. Nevada Rock & Sand Co.*, 823 P.2d 291, 293 (Nev. 1992) (requirement to maintain brakes in good working order); *Barnes v. Delta Lines, Inc.*, 669 P.2d 709, 710-11 (Nev. 1983) (violation of law to "fail to yield the right of way to moving traffic while backing a vehicle on a roadway, or when entering a highway from a private way").

[8] *Hinegardner v. Marcor Resorts, L.P.V.*, 844 P.2d 800, 803 (Nev. 1993); *see also Bell v. Alpha Tau Omega Fraternity, Eta Epsilon Chapter*, 642 P.2d 161, 162-63 (Nev. 1982) ("absent evidence of legislative intent to impose civil liability we shall not conclude that the violation of a [criminal] statute is negligence per se").

the regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms." *Id.* § 921(a)(21).

In contrast, a "manufacturer" is defined by the PLCAA as "a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code." 15 U.S.C. § 7903(2).[9] Plaintiffs' negligent entrustment and negligence per se actions against the Manufacturer Defendants therefore fail for the additional and independent reason that the exception applies only to claims against sellers, not manufacturers. *Id.* § 7903(5)(A)(ii).

F. Defendants Did Not Violate a Statute by Manufacturing and Selling The Subject Rifles Because They are Not "Machineguns" Under Federal or State Law

The last PLCAA exception on which Plaintiffs rely is an action in which a "manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or marketing of [firearms], and the violation was a proximate cause of the harm for which relief is sought. . . ." 15 U.S.C. § 7903(5)(A)(iii). This exception has come to be known as the "predicate exception," because a plaintiff not only must present a cognizable claim, but must also allege a knowing violation of a "predicate statute." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132 (9th Cir. 2009). Defendants, however, did not violate either of the statutes upon which Plaintiffs rely, 18 U.S.C. § 922(b)(4) or Nev. Rev. Stat. § 202.350(1)(b), because the Subject Rifles are not "machineguns" as a matter of law.[10]

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[9] Chapter 44 of title 18 of the United States Code, in turn, defines a manufacturer as "any person engaged in the business of manufacturing firearms . . . for purposes of sale or distribution; and the term 'licensed manufacturer' means any such person licensed under the provisions of this chapter." 18 U.S.C. § 921(a)(10).

[10] It should be noted that Plaintiffs' negligence per se action also fails for this additional and independent reason. In other words, even if Nevada recognized a negligence per se cause of action under the facts alleged, no such cause of action can exist if the statues at issue were not violated.

(1) Definition of a Machinegun Under Federal and Nevada Law

Section 922(b)(4) of the Gun Control Act ("GCA"), states in relevant part that "it shall be unlawful for any . . . licensed manufacturer [or] licensed dealer . . . to sell or deliver … to any person any … machinegun (as defined in section 5845 of the Internal Revenue Code of 1986) … except as specifically authorized by the Attorney General consistent with public safety and necessity." 18 U.S.C. § 922(b)(4).[11] A "machinegun" is defined in Section 5845 of the National Firearms Act ("NFA") as:

> [A]ny weapon which [1] shoots, [2] is designed to shoot, or [3] can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include [4] the frame or receiver of any such weapon, [5] any part designed and intended solely and exclusively, or [6] combination of parts designed and intended, for use in converting a weapon into a machinegun, and [7] any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b) (bracketed numbers added).

By contrast, a "semi-automatic rifle" is defined as "any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which *requires a separate pull of the trigger to fire each cartridge*." 18 U.S.C. § 921(a)(28) (emphasis added). By alleging that the Subject Rifles would "fire automatically" only "after modification with a bump stock," the Complaint concedes that the Subject Rifles were semiautomatic when manufactured and sold. Compl. ¶ 180. Based on the allegations in the

[11] Nevada law also restricts the manufacture, sale and possession of machineguns. Nev. Rev. Stat. § 202.350(1)(b) states that a person in Nevada shall not "[m]anufacture or cause to be manufactured, or import into the State, or keep, offer or expose for sale, or give, lend, possess or use a machine gun . . . unless authorized by federal law." The definition of a "machinegun" under Nevada law is similar to the federal law definition: "any weapon which shoots, is designed to shoot or can be readily restored to shoot more than one shot, without manual reloading, by a single function of the trigger." *Id.* § 202.350(8)(c). Importantly, Section 202.350(1)(b) applies only to activities within the state of Nevada, and does not apply to the out-of-state Defendant Manufacturers based on the allegations in the Complaint.

Complaint, the key phrase in the definition of "machinegun" is "designed to shoot."[12] That definition was applied to an M-16 machinegun from which the auto sear was removed, thereby "disabling the weapon's automatic firing function," but "simply replacing the auto sear would reenable the gun's automatic fire capabilities." *United States v. Gravel*, 645 F.3d 549, 552 (2d Cir. 2011). Similarly, ATF explained in Ruling 82-2[13] that the "designed to shoot" definition refers to features that would allow conversion of a firearm into a machinegun "by simple modification or elimination of *existing component parts*" (emphasis added), *i.e.*, parts already assembled into the firearm. (https://www.atf.gov/firearms/docs/ruling/1982-2-kg-9-pistol-nfa-weapon/download).

The Complaint mentions the "can be readily restored to shoot" definition, Compl. ¶ 70, but does not allege that it is relevant here.[14] Case law explains the differences between the "designed" and the "readily restorable" definitions. In *U.S. v. Hester*, 855 F.2d 863, at *1 (9th Cir. 1988), the Court of Appeals for the Ninth Circuit held a firearm that is originally "designed to fire in an

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[12] The Complaint alleges that the Subject Rifles are machineguns because they had "*design features* that allow for automatic fire through *simple modification*." Compl. ¶ 8 (emphasis added). It alleges that they "possessed design features, including an easily removable stock, that allowed modification with a bump stock." *Id.* ¶ 179. Plaintiffs contend that the Subject Rifles were designed "with an easily removable stock," which is the only "design feature[]" they specifically claim make them "capable of automatic fire through simple modification." *Id.* ¶¶ 184-91.

[13] The ATF is a federal law enforcement agency within the Department of Justice that is authorized to promulgate and publish "orders, delegations, determinations, rules, personnel actions, permits, agreements, grants, contracts, certificates, licenses, registrations, and privileges." *See* 27 C.F.R. § 70.701 (2011), *extended by* 28 C.F.R. § 0.133 (2019). As such, the Court may take judicial notice of the ATF's rules, open letters, guidebooks, and classification decisions. *See, e.g., Prescott v. Slide Fire Sols., LP*, 341 F. Supp. 3d 1175, 1188 (D. Nev. 2018) (taking judicial notice of the ATF Guidebook as well as ATF open letters).

[14] The Ninth Circuit Court of Appeals held that the "can be readily restored to shoot" definition refers to a firearm that in its original state was a machinegun, because the "plain and unambiguous ordinary meaning of 'restored' as used in the context of § 5845(b) is 'to bring back to or put back into a former or original state.'" *U.S. v. TRW Rifle 7.62X51 Caliber, One Model 14 Serial 593006*, 447 F.3d 686, 687-91 (9th Cir. 2006) (citing Webster's Third New Int'l Dictionary (1961) and holding that a semi-auto rifle made from a fully-automatic M-14 was "readily restorable" to again fire automatically, and therefore a machinegun).

automatic mode," but will not do so in its present condition because of a "faulty extractor switch," "could have been 'readily restored' to shoot automatically." In contrast, an item that "was never in the first place designed to shoot" cannot be considered a machinegun on the basis that it can be modified to fire fully automatic.[15]

(2) The Supreme Court has Recognized that Rifles Like the Subject Rifles are Not Machineguns

In *Staples v. United States*, 511 U.S. 600 (1994), the Supreme Court recognized the distinction between semi-automatic AR-type rifles and statutorily-defined machineguns. In *Staples*, the defendant had been convicted of possession of an unregistered machinegun in violation of 26 U.S.C. § 5861(d). The issue before the Court was whether the government was required to prove beyond a reasonable doubt that the defendant knew the rifle he possessed had characteristics that made it a machinegun, as defined by 26 U.S.C. § 5845(b). The firearm at issue in *Staples* was a semi-automatic AR-type rifle that had been modified to fire automatically by filing away a metal stop that prevented the functioning of parts that, if installed, would allow for full automatic firing. *Id*. at 603. The defendant professed ignorance that his rifle had been modified and that it could fire automatically, and asked the district court to instruct the jury that the government had the burden to prove that he knew the firearm was a fully automatic firearm. The instruction was refused, and the defendant was convicted. *Id*. at 603-04.

The Court in *Staples* recognized the differences between semi-automatic AR-type rifles and fully automatic firearms:

> The AR-15 is the civilian version of the military's M-16 rifle, and is, unless modified, a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire. Many M-16 parts are interchangeable with those in the AR-15 and can be used to convert the AR-15 into an automatic weapon.

[15] *United States v. Seven Miscellaneous Firearms*, 503 F. Supp. 565, 574 (D.D.C. 1980) (holding that non-firing museum-pieces that were never designed to shoot were not machineguns on the basis that they could be "readily restored" to fire fully automatic).

511 U.S. at 603. The Court specifically held that Section 5861(d) "does not suggest that any significance should attach to readily convertible semiautomatics, for that class bears no relation to the definitions in the Act. . . . The parties assume that virtually all semiautomatics may be converted into automatics . . . ." *Id.* at 612 n.6.

Thus, the Supreme Court explicitly held that a semi-automatic firearm is not a machinegun on the basis that it is "readily convertible" to a machinegun. *Id.* Indeed, the phrase "readily convertible" (as opposed to "readily restored") is not found in the definition of a machinegun set forth in 26 U.S.C. § 5845(b).

(3) A Firearm is Not "Designed" as a Machinegun Simply Because One Can Make It Fire Automatically by Adding New Parts, Such as a Bump Stock

In Ruling 82-2, the ATF explained that: (1) the "shoots automatically" part of the Section 5845(b) "machinegun" definition covers firearms that will shoot automatically; (2) the "readily restored to shoot automatically" part of the definition applies to firearms that could previously shoot automatically, but will not in their present condition; and (3) the "designed to shoot automatically" part of the definition covers firearms that have not previously functioned as "machineguns," but have design features that facilitate fully automatic fire "by a simple modification or elimination of existing parts." (https://www.atf.gov/firearms/docs/ruling/1982-2-kg-9-pistol-nfa-weapon/download). The firearm in that case was considered to be "designed" as a machinegun because "a simple modification to it, such as cutting, filing, or grinding, allow[ed it] to operate automatically." *Id.*

By contrast, a semiautomatic rifle is not "designed" as a machinegun based on the mere existence and possession by a third-party of parts that could convert it into one. That clear statutory distinction as applied to AR-15 rifles was the basis of ATF Ruling 81-4, which concerned a conversion kit known as the "AR15 auto sear." (https://www.atf.gov/resource-center/docs/atf-

ruling-81-4pdf/download). The ATF found "that the single addition of this auto sear to certain AR15 type semiautomatic rifles, manufactured with M16 internal components already installed, will convert such rifles into machineguns." *Id*.

The auto sear was thus found to be a "combination of parts designed and intended for use in converting a weapon to shoot automatically more than one shot, without manual reloading, by a single function of the trigger." ATF Ruling 81-4. It was the "addition" of this conversion kit to AR-15 rifles with "M16 internal components already installed" that transformed the rifles into machineguns. *Id*. Importantly, however, the mere existence of this conversion kit did not transform such rifles into machineguns under the "designed" definition, as ATF characterized them as "AR15 type *semiautomatic rifles*." *Id*. (emphasis added).

Similarly, in Ruling 2006-2 (https://www.atf.gov/firearms/docs/ruling/2006-2-classification-devices-exclusively-designed-increase-rate-fire/download), the ATF considered various bump stock devices (Akins Accelerator) designed for use with Ruger 10/22 semiautomatic rifles that used energy from a coiled spring and, "once activated by a single pull of the trigger, initiate an automatic firing cycle which continues until either the finger is released or the ammunition supply is exhausted." The ATF concluded that such devices were machineguns on the basis that they are a "part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun" for purposes of 28 U.S.C. § 5845(b). *See Akins v. U.S.*, 312 Fed. App'x 197, 198 (11th Cir. 2009). Notably, the ATF did not find that Ruger 10/22 semiautomatic rifles were machineguns simply because such a conversion device was available.

(4) The Bump Stocks Installed on the Subject Rifles Were Legal at All Times Relevant to this Lawsuit

This Court previously addressed a case arising from the October 1, 2017 shooting brought against the manufacturer of the bump stocks the Shooter used. *Prescott v. Slide Fire Solutions, LP*,

341 F. Supp. 3d 1175 (D. Nev. 2018) (Navarro, J.). The court in *Prescott* dismissed plaintiffs' claims against the bump stock manufacturer pursuant to the PLCAA (with leave to replead). In its decision, this Court discussed a letter that the ATF had issued to the manufacturer of the bump stocks before the shooting occurred, in which the ATF concluded that "the bump-stock is a firearm part and is not regulated as a firearm under [the] Gun Control Act or the National Firearms Act." *Id.* at 1189.

It was not until well-after the shooting, in December 2018, that the ATF reclassified bump stocks as machineguns. Bump-Stock Type Devices, 83 Fed. Reg. 66,514-54. The ATF did so by amending the definition of a machinegun in the regulations enacted pursuant to the GCA and the NFA as follows:

> [T]he term "automatically" as it modifies "shoots, is designed to shoot, or can be readily restored to shoot," means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and "single function of the trigger" means a single pull of the trigger and analogous motions. The term "machine gun" includes a bump-stock-type device, *i.e.*, a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.

27 C.F.R. §§ 478.11 & 479.11.

The ATF noted that since issuing Ruling 2006-2, in which it concluded that the Akins Accelerator was a machinegun, it had "issued classification decisions concluding that other bump-stock-type devices were not machineguns, primarily because the devices did not rely on internal springs or similar mechanical parts to channel recoil energy." 83 Fed. Reg. at 66,514. The ATF concluded that those decisions "did not include extensive legal analysis relating to the definition of 'machinegun,'" and decided to "promulgate a rule that would bring clarity to the definition of 'machinegun'—specifically with respect to the terms 'automatically' and 'single function of the trigger,' as those terms are used to define 'machinegun.'" *Id.*

The ATF further noted that based on its earlier definition of "machinegun" in the GCA and the NFA, "semiautomatic firearms modified with these bump-stock-type devices did not fire 'automatically,' … [and] were not machineguns' . . . ." 83 Fed. Reg. at 66,516 (noting that the ATF has not regulated the bump stocks as "machineguns under the NFA or GCA" and individuals could purchase them "without undergoing background checks or complying with any other Federal regulations applicable to firearms.").

The ATF's amendment of 27 C.F.R. §§ 478.11 & 479.11 to reclassify bump stocks as machineguns did not go into effect until March 26, 2019, and the rule only attached criminal liability to the manufacture, sale, or possession of bump stocks after that date.[16] Therefore, *when* Defendants manufactured and sold the Subject Rifles, *when* the bump stocks were installed on them, and *when* the Subject Rifles with the bump stocks installed were used by the Shooter, bump stocks (and semiautomatic rifles with bump stocks installed on them) were not machineguns, according to ATF and under *Guedes.* Significantly, the new definition of a machinegun in 27 C.F.R. §§ 478.11 & 479.11 does not transform "unmodified semiautomatic rifles" into machineguns. 83 Fed Reg. at 66,532-34; *Guedes*, 920 F.3d at 32.

(5) Congress has Recognized that Rifles Like the Subject Rifles are Not Machineguns

Plaintiffs suggest that the semi-automatic AR-15 rifles like the Subject Rifles have always been machineguns, and that "[t]ransforming [them] into a truly civilian rifle would have required a different design."[17] Congress necessarily rejected Plaintiffs' argument that the Subject Rifles are

[16] 83 Fed. Reg. at 66,525 ("This rule . . . makes clear that individuals are subject to criminal liability only for possessing bump-stock-type devices after the effective date of regulation, not for possession before that date. No action taken before the effective date of the regulation is affected under the rule."); *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 8-9 (D.C. Cir. 2019).

[17] Compl. ¶ 62. *See also id.* ¶¶ 76 (contending that a rifle "manufactured to fire in a semi-automatic mode is nevertheless a machinegun if it can be converted to fire automatically through 'simple

machineguns. The 1994 assault weapons ban, 18 U.S.C. § 922(v), which expired in 2004 pursuant to a sunset provision, banned "semi-automatic assault weapons," which it defined in relevant part as the Colt AR-15, including copies or duplicates, or a "semiautomatic rifle with the ability to accept a detachable magazine and at least two of five specified features, *id.* §§ 921(a)(30)(A)(iv) & (B). If Plaintiffs' position were correct, there would have been no need for Congress to have temporarily banned the Subject Rifles as semi-automatic assault weapons, because they would already be banned as machineguns.

(6) Defendants Could Not Have Knowingly Violated 18 U.S.C. § 922(b)(4) or Nev. Rev. Stat. § 202.350(1)(b) When the Subject Rifles were Manufactured and Sold

Finally, the predicate exception can only be satisfied by a knowing violation of a statute, which is an impossibility in this case. Allegations that Defendants knowingly violated either 18 U.S.C. § 922(b)(4) or Nev. Rev. Stat. § 202.350(1)(b), require pleading facts indicating that Defendants had either actual knowledge that the Subject Rifles were machineguns, or were willfully blind that they were machineguns.[18] For example, in *Staples*, the U.S. Supreme Court held that the Government must prove that the defendant had knowledge of the features of a firearm that made it a machinegun. 511 U.S. at 613. As explained above, at the time Defendants manufactured and sold the Subject Rifles, Congress and the Supreme Court did not consider semi-automatic AR-15 type rifles to be machineguns, and the ATF officially considered semi-automatic AR-15 type rifles to not be machineguns, even if they had bump stocks installed on them. Therefore, although Defendants deny that the Subject Rifles are machineguns under the statutes, it is undisputed that

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modification'"); 92 ("Despite the fact that bump stocks . . . unequivocally converted [semi-automatic] AR-15s into fully automatic machineguns, the Defendant Manufacturers did nothing to change the design features of the weapon that rendered it susceptible to simple modification.").

[18] *See Global–Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769-70 (2011) (explaining the willful blindness standard).

Defendants could not have knowingly violated either 18 U.S.C. § 922(b)(4) or Nev. Rev. Stat. § 202.350(1)(b) by manufacturing and selling the Subject Rifles.

II. PLAINTIFFS' CLAIMS ARE BARRED BY NEV. REV. STAT. § 41.131

The Nevada Legislature passed Nev. Rev. Stat. § 41.131 to make clear that, at least in Nevada, "if someone shoots a firearm and hurts somebody, you can't sue the firearms manufacturer because it shoots."[19] This is because "a gun in itself is not to be determined as at fault in the case of a death or injury . . . . [Rather] the liability would be on the handler of the gun."[20] In fact, the Senate Committee Chairman "clarified that it was [the bill sponsor's] intent to ***not*** have a firearms manufacturer sued by his heirs if he were murdered."[21] Thus, Section 41.131 specifically provides that:

> 1. No person has a cause of action against the manufacturer or distributor of any firearm or ammunition merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death. This subsection is declaratory and not in derogation of the common law.
>
> 2. This section does not affect a cause of action based upon a defect in design or production. The capability of a firearm or ammunition to cause serious injury, damage or death when discharged does not make the product defective in design.

Section 41.131 has a protective purpose, requiring liberal construction. As repeatedly stated by the Nevada Supreme Court, "[s]tatutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained."[22] Here, the statute is indisputably

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[19] Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. Apr. 17, 1985).

[20] Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. Mar. 13, 1985).

[21] Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. Apr. 17, 1985) (emphasis added).

[22] *State Dep't of Bus. & Indus., Fin. Institutions Div. v. Dollar Loan Ctr., LLC*, 412 P.3d 30, 33 (Nev. 2018); *see also, e.g.*, *Colello v. Adm'r of Real Estate Div. of State of Nev.*, 683 P.2d 15, 17

intended to protect firearm manufacturers and distributors (sellers) from civil claims arising from criminal shootings by third parties.

Further, Section 41.131's language is plain and unambiguous: under Nevada law, no cause of action exists against a firearm manufacturer or distributor because the firearm was capable of causing and did cause serious injury, damage, or death, unless caused by a defect in design or production. Plaintiffs' claims are against manufacturers and distributors of the Subject Rifles for the simple reason that they were capable of, and one of them allegedly did, cause serious injury, damage, or death to Parsons.[23] Plaintiffs are not raising a claim based upon a defect in the design or production of the Subject Rifles, so their claims are barred by Section 41.131(1).

Although there is no caselaw directly addressing Section 41.131, *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015), applying Colorado's equivalent statute, Colo. Rev. Stat. § 13-21-504.5(1),[24] is instructive. In *Phillips*, the parents of a woman killed during a mass shooting at a movie theatre in Aurora, Colorado sued several retailers that allegedly sold ammunition used by the shooter. 84 F. Supp. 3d at 1220. Similar to Nevada law, Section 13-21-504.5 limits claims against firearm manufacturers and distributors to those based on product liability. The court ultimately held that the exceptions to Section 13-21-504.5's "broad immunity" did not apply, and therefore dismissed the claims as barred. *Id.* at 1222.

The California Supreme Court's decision in *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001) is also instructive. *Merrill* dealt with claims arising out of a mass shooting at an office

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(Nev. 1984) ("Statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained.").

[23] *See* Complaint at 20:26-23:6, 23:11-14; 24:13-15; 25:7-26:16. References are to page and line numbers because the Complaint duplicates paragraph numbers 204-11, but not their content.

[24] "A person or other public or private entity may not bring an action in tort, other than a product liability action, against a firearms or ammunition manufacturer, importer, or dealer for any remedy arising from physical or emotional injury, physical damage, or death caused by the discharge of a firearm or ammunition." Colo. Rev. Stat. § 13-21-504.5(1).

building in San Francisco. *Id.* at 120. To support their negligence claims, plaintiffs claimed that Navegar knew, or should have known, that its firearms were "likely to be enhanced by the addition of products such as high-capacity magazines" and "would be used to kill or injure innocent persons in violent criminal acts such as the mass killing committed by [the perpetrator]." *Id.* at 121. The court held that the plaintiffs' claims could not proceed "because the Legislature ha[d] declared as a matter of public policy that a gun manufacturer may not be held liable" for a firearm's "potential to cause serious injury, damage, or death when discharged." *Id.* at 119. Nevada's legislature has made that same policy decision. Based on black-letter Nevada law, Plaintiffs' claims are barred and should be dismissed with prejudice.

III. PLAINTIFFS HAVE NOT SUFFICIENTLY PLEADED CAUSATION

Plaintiffs have failed to sufficiently allege that Defendants proximately caused their damages. Proximate cause is defined as "any cause which in natural foreseeable and continuous sequence unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred."[25] Proximate cause can properly be decided as a matter of law in Nevada.[26] "When a third party commits an intentional tort or a crime, the act is a superseding cause, even when the negligent party created a situation affording the third party an opportunity to commit the tort or crime." *Bower v. Harrah's Laughlin, Inc.*, 215 P.3d 709, 725 (Nev. 2009). The only exception is where the unlawful act was foreseeable. *Anderson v. Mandalay Corp.*, 358 P.3d 242, 248 (Nev. 2015). "[C]riminal or tortious third-party conduct typically severs the chain of proximate causation between a plaintiff and a defendant, [although] the chain remains

[25] *Clark County Sch. Dist. v. Payo*, 403 P.3d 1270, 1279 (Nev. 2017).

[26] *Van Cleave v. Kietz-Mill Minit Mart*, 633 P.2d 1220, 1222, (Nev. 1981); *Kusmirek v. MGM Grand Hotel, Inc.*, 7 Fed. App'x 734, 736, 2001 WL 357515, at *1 (9th Cir. 2001) (unpublished decision).

unbroken when the third party's intervening intentional act is reasonably foreseeable." *Price v. Blaine Kern Artista, Inc.*, 893 P.2d 367, 370 (Nev. 1995).

To determine if an intervening cause is foreseeable, Nevada courts consider six factors:

> whether (1) the intervention causes the kind of harm expected to result from the actor's negligence, (2) the intervening event is normal or extraordinary in the circumstances, (3) the intervening source is independent or a normal result of the actor's negligence, (4) the intervening act or omission is that of a third party, (5) the intervening act is a wrongful act of a third party that would subject him to liability, and (6) the culpability of the third person's intervening act.

Bower, 215 P.3d at 725 (emphasis added).

Based on the *Bower* factors, the October 1, 2017 shooting was an extraordinary event and not a normal or foreseeable consequence of Defendants' lawful manufacture and sale of legal firearms. Plaintiffs fail to plead any facts that would have given Defendants—or any other person—reasonable cause to anticipate that the Shooter was intent on committing these crimes.

Firearms, like the Subject Rifles at issue in this case, are lawfully owned by "millions of Americans" for entirely lawful purposes, including hunting, self-defense and target shooting.[27] An allegation that a firearm can be used in a crime is simply insufficient to plead causation under *Iqbal* and *Twombly*. If it were, the potential liability of all firearm manufacturers and sellers will be limitless because every time a firearm (or any other potentially dangerous instrumentality) is used to intentionally cause harm, there will be someone other than the criminal to blame.

Based on Plaintiffs' arguments, there is nothing Defendants could have done differently to avoid being held liable for damages caused by the Shooter's criminal actions. The only manner in which Defendants could have avoided liability – whether for the damages caused by the Shooter

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[27] *Shew v. Malloy*, 994 F. Supp. 2d 234, 245 (D. Conn. 2014), *aff'd in part, rev'd in part, sub nom., New York State Rifle & Pistol Ass'n. v. Cuomo*, 804 F. 3d 242 (2d Cir. 2015); *see also Friedman v. Highland Park*, 784 F. 3d 406, 411 (7th Cir. 2015) (recognizing that semi-automatic rifles are useful for self-defense); *Heller v. District of Columbia*, 670 F.3d 1244, 1288 (D.C. Cir. 2011) (Kavanaugh, J. dissenting) (recognizing that semi-automatic rifles are commonly used for self-defense, hunting and target shooting).

using the Subject Rifles, or future crimes committed by other persons using semi-automatic AR-15 rifles – would be to stop manufacturing and selling such rifles to civilians entirely.

CONCLUSION

For the reasons stated above, Defendants respectfully request that Plaintiffs' Complaint be dismissed with prejudice.

Dated September 24, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' MOTION TO DISMISS THE COMPLAINT** was electronically served on counsel of record this 24th day of September, 2019, using the Court's CM/ECF System and via email to:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES PARSONS, et al., Plaintiffs, vs. COLT'S MANUFACTURING COMPANY LLC; et al., Defendants.	CASE NO.: 2-19-cv-01189-APG-EJY **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

"Short of bombs, missiles, and biochemical agents, we can conceive of few weapons that are more dangerous than machine guns."

United States v. Henry, 688 F.3d 637, 640 (9th Cir. 2012)

Plaintiffs brought this action because Defendants bear legal responsibility for the carnage at the Route 91 Harvest music festival in Las Vegas on October 1, 2017, which claimed 58 lives and injured more than 400. Las Vegas was the most lethal mass shooting in American history – a devastating superlative in a country where the names of towns and schools are immediately associated with a body count. What made Las Vegas exceptional was the shooter's arsenal: twelve AR-15 machine guns[1] manufactured and sold by Defendants with full knowledge of the weapons' military design, modularity, and capacity for automatic fire through simple modification.

Defendants' conduct violated longstanding federal and state law designed to protect the public from the catastrophic danger posed by machine guns. Those statutory violations, in turn, give rise to causes of action expressly preserved by the Protection of Lawful Commerce in Arms Act ("PLCAA"). Defendants attempt to shirk their legal responsibility by proffering an untenable interpretation of federal law and ignoring Plaintiffs' extensive factual allegations. The Court should deny Defendants' motion.

THE ALLEGATIONS OF THE COMPLAINT

The last century has seen precious little consensus when it comes to firearms policy, with one notable exception: machine guns. It started with the Thompson submachine gun, or "Tommy Gun," which was designed and manufactured to arm American soldiers fighting in World War I. Compl. ¶ 35. But the war ended before prototypes could be shipped abroad and

[1] This brief uses the modern spelling of "machine gun" unless quoting from the National Firearms Act or other sources that retain the older version, "machinegun."

the manufacturer set its sights on the civilian market. *Id.* For fifteen years, the country permitted access to weapons capable of spraying hundreds of rounds per minute. *Id.* ¶¶ 2, 35, 38. The experiment was a boon to organized crime and a catastrophe for public safety. *Id.* ¶¶ 1-2, 37. By 1934, the country had witnessed enough carnage. *Id.* ¶ 38. Congress, the Attorney General, the NRA, and the firearms industry united around a common goal, best expressed by AG Cummings: "A machine gun, of course, ought never to be in the hands of any private individual." *Id.* ¶ 4. It was this sentiment that spawned the National Firearms Act ("NFA") and a decades-long effort to protect the public from automatic weapons.[2]

The defining characteristic of a machine gun is the capacity to produce a rate of fire that is unconstrained by the shooter's trigger finger. *Id.* ¶ 47. In 1934, the president of the NRA dissuaded Congress from defining a machine gun based on how many rounds it could fire without reloading. *Id.* ¶¶ 43, 46. The "essence of a machinegun," he explained, was the absence of a human constraint on the rate of fire. *Id.* ¶ 47. Semiautomatic firearms "require a separate pull of the trigger for every shot fired," and although a shooter "can keep firing that as fast as [he] can pull the trigger, . . . that is not properly a machinegun and in point of effectiveness any gun so operated will be very much less effective." *Id.* ¶ 48. Persuaded by Mr. Frederick's testimony, Congress enacted the definition that endures today: the ability to fire "more than one shot, without manual reloading, by a single function of the trigger." *Id.* ¶ 46.

On October 1, 2017, eighty-three years later, American citizens witnessed firsthand the terrifying lethality of machine gun fire. In a hotel room thirty-two stories above ground, a man fired at a massive crowd some 300 yards away. *Id.* ¶ 145. With him in the room were twelve

[2] The NFA did not prohibit the sale of machine guns; instead, it levied a 100% tax with the goal of making the weapons prohibitively expensive. Compl. ¶ 39. Though legislators preferred a ban, they believed the Commerce Clause did not confer the necessary authority. *Id.* ¶¶ 40-41. This thinking had changed by the time Congress passed the Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986), which made it illegal to manufacture and sell machine guns.

weapons built to military specifications. *Id.* ¶¶ 61-63, 106, 113, 115, 123, 127. According to reports from the battlefield, for which these weapons were designed, a single round could decapitate a person. *Id.* ¶¶ 54-59. In less than ten minutes, the shooter used each of the twelve weapons. *Id.* ¶ 163. Each time he picked up a new weapon, the shooter pulled the trigger, then immobilized his trigger finger. *Id.* ¶¶ 94, 137. All told, between the twelve weapons, the shooter likely pulled the trigger no more than fourteen times. *Id.* ¶¶ 151-162.[3] Yet this minimal effort caused one thousand and forty-nine bullets to rain down on the crowd below. *Id.* ¶ 163. Fifty-eight people were killed, including 31-year-old Carrie Parsons, and more than 400 were injured. *Id.* ¶¶ 15, 17. That's approximately 30 people killed or maimed for each trigger pull.

The road to the Las Vegas massacre began in the same fashion as America's failed experiment with the Tommy Gun; that is, firearms manufacturers made the reckless decision to market a military weapon to the public. After World War II, the U.S. Army initiated a comprehensive study of combat casualties, concluding that current automatic weaponry was "valueless from the perspective of increasing the number of targets hit." *Id.* ¶ 54. This discovery led the Army to develop specifications for a new combat weapon: a lightweight firearm that would hold a large detachable magazine, expel ammunition with enough velocity to penetrate steel helmets, and deliver greater accuracy and lethality in automatic mode. *Id.* ¶ 55.

The AR-15 was born in response. Built to deliver controllable automatic fire, the AR-15 also allowed for semi-automatic and three-round burst firing. *Id.* ¶ 56. This "selective fire" feature afforded soldiers flexibility to adapt to the exigencies of battle. *Id.* Reports from Vietnam were glowing; with a single round, the AR-15 could decapitate, dismember, and leave "hole[s] about five inches in diameter." *Id.* ¶ 59. The Pentagon was informed that an AR-15 in

[3] The shooter used most of the weapons until the magazine he had attached ran out of ammunition. On two weapons, however, one of the FNH FN15s and the LMT Defender 2000, the shooter expended a 100-round magazine and attached a second, which he then partially expended. Compl. ¶¶ 157-58.

automatic mode was "superior in virtually all respects" to previous machine guns. *Id.* ¶¶ 57, 59. The military adopted the AR-15 as its standard-issue rifle, renaming it the M16. *Id.* ¶ 58.

When the Vietnam War wound down and military demand declined, manufacturers faced a choice: learn from history, or repeat it. They chose the latter and looked to cultivate a civilian market for the AR-15. *Id.* ¶ 61. They did so despite the fact that every aspect of the AR-15's design advanced the rationale for its existence: to deliver effective, automatic fire in combat. *Id.* ¶¶ 54-62. Rather than decommission the weapon or redesign it, manufacturers made only minimal adjustments so that automatic fire could no longer be "selected" by a shooter. *Id.* ¶¶ 62-64. They preserved the weapon's core design so that the AR-15's internal parts were interchangeable with M16 parts. *Id.* Exterior components like the stock, barrel and rail system were also untouched and therefore interchangeable. *Id.* ¶ 65. A cottage industry sprang up in response: interchangeable military-grade parts sold separately, conversion kits, and various gadgets that harness the weapon's capacity for automatic fire. *Id.* ¶ 72, 86.[4]

It was an ideal arrangement for evading Congress's regulatory goals for machine guns. Firearms manufacturers produced weapons they could claim were semiautomatic (despite the ease of conversion), while purveyors of parts and gadgets provided the means of conversion. The danger of this new, symbiotic relationship was not lost on either Congress or the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), the agency charged with interpreting and enforcing the NFA. *Id.* ¶ 67, 75. Over the course of a decade, the government employed a two-pronged approach in an effort to effectuate the public safety goals of the NFA. *See id.* ¶¶ 67-80.

From 1968-1986, the definition of "machinegun" was expanded to keep up with the modification industry; by 1986, it included machine gun frames and receivers, conversion kits,

[4] Some machine gun enthusiasts have even proven that the AR-15 can produce automatic fire with nothing more than a shoestring or a rubber band. Compl. ¶ 83.

combinations of machine gun parts, and any part "designed and intended" to be used for converting a weapon into a machine gun. *Id.* ¶¶ 69, 80. Congress also amended the statute to cover firearms that "can be readily restored to shoot" automatically. *Id.* ¶ 70.

Beginning in 1981, the Attorney General and ATF turned their attention to the root of the problem: easily-convertible, semiautomatic weapons. That year, a Task Force on Violent Crime was convened, which sounded the alarm and explicitly called out manufacturers' role.

> Another problem we wish to address is the ease of conversion of semi-automatic guns into more lethal and more strictly regulated fully automatic guns…. Some manufacturers are producing readily available semi-automatic weapons which can easily be converted to fully automatic weapons by simple tool work *or the addition of readily available parts*.

Id. ¶ 74 (emphasis added). It was unnecessary for Congress to amend the NFA to address this problem, because the statute already defined a machine gun as "any weapon . . . *designed to shoot* . . . automatically." Thus, in 1982, ATF issued a ruling explaining that "designed to shoot" refers to "those weapons which have not previously functioned as machineguns but possess design features which facilitate full automatic fire by simple modification or elimination of existing component parts." *Id.* ¶ 75. It was a clear signal that firearms manufacturers, who determine weapon design, were also responsible for the scourge of automatic weapons. *Id.* ¶ 77.

Manufacturers ignored this directive, continuing to produce AR-15 as susceptible to modification as ever. *Id.* ¶ 92. As a result, the modification industry flourished. Over the last decade, devices have been developed that capitalize on the AR-15's design features to generate the automatic fire the weapon was built for. *Id.* ¶ 86. One of these devices is known generically as a "bump stock." *Id.* ¶ 87. A bump stock replaces the stock of an AR-15 and modifies the weapon so that a continuous firing sequence is initiated with a single trigger pull. *Id.* ¶¶ 87-89.

The Akins Accelerator was an early iteration of the bump stock that came on the market in 2006. *Id.* ¶ 90. According to its patent application, the Accelerator produced continuous fire

with a single depression of the trigger and the immobilization of the shooter's trigger finger. *Id.* The Akins Accelerator was recalled after ATF found it was a machine gun; but Mr. Akins found an easy workaround, then renamed the device and put it back on the market. *Id.* ¶ 91. The company with whom Mr. Akins partnered sold it online with the following description:

> Ever wonder what it would feel like to own a Machine Gun? Heck Yeah, who doesn't. . . . The Bumpski is the civilian legal way to convert your semi-auto rifle to bump firing, lead throwing, brass spitting rifle that you have always dreamed of owning. Simply replace your existing stock with the FosTech kit that matches your rifle and away you go. *Id.*

In 2010, a bump stock called Slide Fire came on the market. *Id.* ¶ 93. Like the Akins Accelerator, the Slide Fire bump stock replaced the AR-15's stock and modified the weapon so that the shooter could cycle fire with a single trigger pull. *Id.* ¶ 94. The Slide Fire website advised customers to "[m]ake sure your finger is tightly seated on the finger rest and that it does not move while you are shooting your firearm. After years of shooting by moving your finger, it can be a hard habit to break." *Id.* Slide Fire also "improved" the bump stock design, facilitating modification in minutes, with only a screwdriver. *Id.* ¶ 95. The device's inventor has boasted that "Slide Fire brings shooters the same full auto experience" as a fully automatic firearm. *Id.* ¶¶ 96-97.

The Defendants in this case not only knew that their AR-15s were designed for automatic fire and could be easily modified, but also advertised those qualities. Defendants courted buyers by advertising their AR-15s as military weapons. Many used the term "Mil-Spec," shorthand for military specifications, *id.* ¶¶ 106, 113, 115, 123, or described their weapons as "directly descended" from military weaponry. *Id.* ¶ 127. Other Defendants invoked the weapon's military bona fides more descriptively: "the Ultimate Fighting Machines that just won't quit," *id.* ¶ 109; "built to withstand the varied and unrelentingly harsh conditions of battlefields around the world," *id.* ¶ 111; and "built for combat reliability in all conditions." *Id.*

¶ 107. Defendants also clearly signaled the ease of modification. Defendants hailed their AR-15s as "modular," the industry term for modifiable. *E.g., id.* ¶¶ 109, 121. Others promised that their AR-15 model "shares many parts with its combat-proven brother," *id.* ¶ 117, or is built from parts that "should interchange with other mil-spec components." *Id.* ¶ 115. Defendant LMT even emphasized speed of modification, boasting of a new stock "designed to replace current adjustable stocks in less than twenty seconds with no special tools." *Id.* ¶ 121-22.

At least two of the Defendants were even more brazen in their open acknowledgment – or expectation – of conversion. Advertising using Defendant Colt's trademark demonstrated the compatibility between a Slide Fire bump stock and Colt's AR-15s. *Id.* ¶ 119. In 2016, as a result of an agreement between Slide Fire and Colt, a Colt AR-15 was sold with a Slide Fire bump stock already "integrated." *Id.* ¶ 120. And Defendant Christensen Arms included in its AR-15 user manual that "any damage or malfunction due to fully automatic operation and any other modification to this firearm" voids the company's warranties. *Id.* ¶ 123.

Defendants' marketing emphasis on the AR-15's military roots and modifiability sent a clear message. The Las Vegas shooter was listening. From November 2016 to July 2017, he purchased twelve of Defendants' AR-15s and more than a dozen bump stocks. *Id.* ¶¶ 105-26, 130. As advertised, he was able to easily modify each AR-15 with a bump stock. *Id.* ¶¶ 129, 138. They then delivered the ferocious automatic fire associated with mil-spec rifles "built for combat reliability in all conditions." *Id.* ¶ 107.

Carrie Parsons, a 31-year-old enjoying a concert with friends on her way home to Seattle and her new fiancé, was gunned down hundreds of yards from the shooter, having already escaped the venue and reached the street. *Id.* ¶¶ 164-168. The weapon that killed her was sold eight decades after the NFA was enacted to protect Americans from the terror of machine guns, *id.* ¶¶ 3, 38; thirty-five years after ATF made clear that weapons with design features that

facilitate conversion to automatic fire are illegal under federal law, *id.* ¶¶ 73-75; eleven years after ATF held that a bump stock was a machine gun, *id.* ¶ 91; seven years after Slide Fire promised simpler conversion for the "full auto experience," *id.* ¶¶ 93-87; and within five years of Sandy Hook, Aurora, Orlando, and other tragedies demonstrating that the AR-15 was the weapon of choice for mass shooters seeking to inflict maximum casualties. *Id.* ¶ 102.

The Plaintiffs, Carrie's parents, have brought claims for wrongful death and negligence per se based on Defendants' violation of federal and state law prohibiting the manufacture and sale of machine guns. Plaintiffs have also pled negligent entrustment.

LEGAL STANDARD

On a motion to dismiss, "[a]ll well-pleaded allegations of material fact in the complaint are accepted as true and construed in the light most favorable to the non-moving party." *Faulkner v. DAT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013) (internal citations omitted). To survive a motion to dismiss, a plaintiff must only allege facts that are "plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). "[A] complaint need not contain detailed factual allegations; rather, it must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiffs easily meet this standard.

ARGUMENT

I. Defendants Violated Federal Law Because They Sold Weapons That Were Statutorily Machine Guns.

PLCAA provides that a gun manufacturer or seller can be liable for harms caused to third parties when that "manufacturer or seller knowingly … violated a State or Federal statute applicable to the sale or marketing [of firearms], and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii) (the "predicate exception"). In

this case, Plaintiffs have alleged Defendants violated Section 922(b)(4) of the Gun Control Act which prohibits the sale or delivery of machine guns.[5] Defendants suggest that, as a matter of law, Plaintiffs cannot state a claim under the predicate exception because the "Subject Rifles" are not machin eguns. *See* Def. Mot. at 11. This argument ignores the exhaustive factual allegations in Plaintiffs' Complaint. Accepted as true, as they must be, Plaintiffs' allegations more than demonstrate that Defendants knowingly violated the Gun Control Act by selling "machine guns" as defined by federal law.

A. A "Machinegun" is Any Weapon "Designed to Shoot" Automatically.

The Gun Control Act of 1968, 18 U.S.C. §921 *et seq.*, ("GCA"), as amended by the Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) ("FOPA"), imposes both a regulatory licensing scheme and criminal prohibitions on specified firearms transactions. As relevant to this case, the GCA makes it unlawful for a "licensed manufacturer [or] licensed dealer" to "sell or deliver…to any person any…machinegun," unless specifically authorized by the Attorney General. 18 U.S.C. § 922(b)(4). The GCA incorporates by reference the definition of "machinegun" in the National Firearms Act, 26 U.S.C. § 5845(b) ("NFA"). The NFA defines a "machinegun" as "any weapon which shoots, *is designed to shoot*, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b) (emphasis added).

Pursuant to Congress's express delegation, ATF has promulgated regulations clarifying the meaning of Section 5845(b)'s phrase "designed to shoot," explicitly distinguishing it from the other two categories of weapons covered by the statute's text. *See* 26 U.S.C. § 7805; *see id.* § 7801(a)(2)(A) (providing that the Attorney General "shall prescribe all needful rules and

[5] Plaintiffs also allege that Defendants violated Nevada Law prohibiting the manufacture and sale of machine guns, NRS 202.350(1)(b). Compl. ¶¶ 173, 192. Because this statute is modeled after the federal statute and uses the same definition of machine gun, it is not discussed separately.

regulations for the enforcement" of the NFA). ATF regulations instruct that the phrase "designed to shoot" includes "those weapons which have not previously functioned as machineguns but possess design features which facilitate full automatic fire by simple modification or elimination of existing component parts." ATF Ruling 82-2. That common-sense definition has been widely adopted by federal courts throughout the country. *See, e.g.*, *United States v. TRW Rifle 7.62X51mm Caliber, Model 14,* 447 F.3d 686, 688 n.2 (9th Cir. 2006) (citing ATF Rule 82-2); *United States v. TRW Model M14, 7.62 Caliber Rifle,* 441 F.3d 416, 4210 n.4 (6th Cir. 2006) (same); *S.W. Daniel, Inc. v. United States*, 831 F.2d 253, 254 (11th Cir. 1987) (approving a jury charge repeating Rule 82-2).

This statutory scheme delineates three distinct categories of weapons that constitute "machineguns." The first category – weapons that "shoot…automatically" – is the most straightforward and refers to those weapons that fire automatically when sold. The second category – weapons that can be "readily restored to shoot… automatically" – refers to those weapons that fire automatically in their "original" manufactured state but have been modified in some way so as to temporarily block the weapon's automatic capabilities. *U.S. v. TRW Rifle 7.62X51mm Caliber, One Model 14 Serial 593006*, 447 F.3d 686, 691 (9th Cir. 2006) (M-14 machine gun that was cut in half, welded back together, and modified to remove automatic function fell within the category of "readily restored to shoot"). The third category – weapons that are "designed to shoot… automatically" – refers to weapons that were not manufactured to have automatic firing capabilities when sold but have design features that facilitate easy modification to fully automatic capabilities.

Throughout their brief, Defendants fail to grapple with how "designed to shoot" functions within Section 5845(b) as a whole. Defendants argue repeatedly that the Complaint's

allegation that Defendants' weapons fire automatically only after modification[6] is a concession that Defendants' rifles are not machine guns. *E.g.*, Def. Mot. at 12. This reveals a fundamental misunderstanding of Section 5845(b). Weapons that fire automatically *without* modification are covered by the first clause. *See* 26 U.S.C. 5845(b) (a machine gun is "any weapon which shoots . . . automatically. . ."). Defendants' proffered interpretation would collapse the distinction between weapons "designed to shoot" automatically and weapons that "shoot[] automatically," rendering the former superfluous. Basic canons of statutory construction dictate this cannot be so. It is a "cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 364 (2000).

B. Plaintiffs Have Adequately Pled That Defendants Sold Weapons "Designed to Shoot" Automatically and Did So Knowingly.

Plaintiffs' Complaint is replete with factual allegations demonstrating that Defendants' weapons "possess[ed] design features which facilitate full automatic fire by simple modification or elimination of existing component parts." ATF Rule 82-2. The Complaint also details how Defendants, with knowledge of that fact, continued peddling the weapons that armed the Las Vegas shooter, enabled the length and lethality of his attack, and caused Carrie's death.

Indeed, the AR-15 was designed for the *sole* purpose of providing the military with a superior combat weapon that would "increas[e] the numbers of targets hit" in automatic mode. Compl. ¶ 54; *see id.* ¶¶ 55-56, 60. It delivered on that promise, proving "superior in all respects" to other automatic weaponry. *Id.* ¶¶ 57-59. When manufacturers started selling a "civilian version" of the AR-15, they preserved the core design of the weapon. *Id.* ¶¶ 62-65. That is why AR-15s can be shot automatically with a shoestring, a rubber band, or just the shooter's shoulder. *Id.* ¶¶ 83-84. That is why M16 parts are interchangeable with AR-15 parts.

[6] This is not actually true, since Plaintiffs allege the AR-15 can produce automatic fire using only the shooter's shoulder. Compl. ¶ 84.

Id. ¶ 64. That is why bump stocks are made to modify AR-15s, not handguns. *Id.* ¶¶ 86-87. And that is why Defendants advertise that the AR-15 has not strayed from its original, machine gun roots: these are "modular," "mil-spec" weapons that are "directly descended" from the M16; constructed from parts that "should interchange with other mil-spec components" (sometimes in "less than twenty seconds with no special tools"); and "built for combat reliability in all conditions." *Id.* ¶¶ 106-27.

Defendants continued manufacturing, selling, and aggressively advertising their weapons with full knowledge of the AR-15's origin and corresponding design features; the demand for illicit automatic weaponry among a subset of civilians; the ease of modification to automatic firing capabilities through simple hacks; and the availability of bump stocks and similar devices through which their weapons could be easily modified to become fully automatic. *Id.* ¶¶ 63, 100, 171. Defendants also acted with full knowledge of the 1982 ATF ruling defining the contours of the NFA's "designed to shoot" language, *id.* ¶ 171, as well as the "repeated legislative efforts to address the catastrophic danger posed by easily modifiable weapons." *Id.* ¶ 81. Yet, Defendants "did nothing to change the design features of the weapon that rendered it susceptible" to this "simple modification." *Id.* ¶ 92. Indeed, their marketing indicates they both *expected* such modification, *e.g.*, *id.* ¶ 123 (Christensen Arms user manual warned that "any damage or malfunction due to fully automatic operation and any other modification to this firearm" would void the company's warranties), and *welcomed* it. *E.g.*, *id.* ¶ 120 (Colt partnered with Slide Fire to sell Colt AR-15 already modified with a bump stock).

These facts are beyond "plausibly suggestive" of Plaintiffs' claim that Defendants knowingly violated the GCA by selling weapons that fall squarely under the NFA's definition of machine gun. *Moss*, 572 F.3d at 969. No more is required at this juncture. It will fall to a jury to resolve, with the assistance of expert testimony, the fact-intensive (and mechanically

technical) issues embedded in the question of whether the weapons sold by Defendants and used by the shooter were statutorily machine guns. *See United States v. Fleischli*, 119 F. Supp. 2d 819, 821 (C.D. Ill. 2000) ("Since the gun's classification [as a machine gun] is an element of a § 922(*o*) offense, it is obviously a jury question."); *cf. United States v. Guard*, 2 F.3d 1158 (9th Cir. 1993) (affirming conviction for possession of a machine gun; jury had enough evidence to convict based on expert testimony explaining the significance of the addition of parts and the drilling of two holes, indicating "the frame of a semi-automatic rifle . . . had been modified to support a weapon that could fire automatically").

C. Defendants' Arguments Ignore the Facts as Pleaded in the Complaint and the Procedural Posture of Their Motion.

Defendants' brief offers a litany of reasons why Plaintiffs fail to state a claim, each of which should be rejected.

First, Defendants appear to argue that their weapons cannot have been "designed to shoot" automatically, as ATF has defined that term, because the bump stock modification does not involve "existing component parts." *See* Def. Mot. at 13. This fact-based argument is at odds with both the allegations of the Complaint and a common sense understanding of how a bump stock works.

The first step in modifying an AR-15 with a bump stock is to remove – or eliminate – the existing stock. Compl. ¶ 95. This alone satisfies the ATF definition because "a 'stock' is a component part of a rifle," and an "integral" one at that, because "it permits the firearm to be fired from the shoulder." *Prescott v. Slide Fire Sols., LP*, 341 F. Supp. 3d 1175, 1189 (D. Nev. 2018); *id.* at 1188 (citing to ATF Guidebook, which identifies the stock as a component part). Next, a separate stock is attached in place of the prior stock and secured. Compl. ¶ 87. Once the bump stock is attached, depressing the trigger initiates a self-acting firing mechanism that causes the trigger to "automatically reengage" until all ammunition is exhausted. 83 Fed. Reg.

66,514-55; *see also* Compl. ¶¶ 94, 87, 88. In other words, without the bump stock, the trigger resets after each trigger pull but does not continue firing; with the bump stock, it resets and fires continuously. It is hard to imagine how this fundamentally different firing mechanism is not a "modification" of "existing component parts."[7] *Cf. United States v. Camp*, 343 F.3d 743, 744 (5th Cir. 2003) (upholding conviction for possession of a machine gun where defendant "modified [a] semiautomatic rifle" by using a fishing rod and external motor to continuously activate the trigger). And to the extent there is disagreement on the technical meaning of "existing component part" in the context of a bump stock modification to one of Defendants' rifles, it cannot be settled at the pleadings stage.

Second, Defendants pin their hopes on ATF Rule 81-4, which designated the AR-15 "auto sear" a machine gun because it was designed to convert a weapon into a machine gun. Defendants suggest the ruling vindicates their position because ATF used the phrase "semiautomatic rifles" to refer to AR-15s and did not declare AR-15s to be machine guns. Def. Mot. at 16 ("[T]he mere existence of this conversion kit did not transform [the subject weapons] into machineguns under the 'designed' definition, as ATF characterized them as 'AR15 type *semiautomatic rifles*.") (emphasis added by Defendants). This argument fails.

Rule 81-4 predated Rule 82-2, meaning ATF had not yet promulgated the definition of "designed to shoot" that is relevant here. Moreover, Defendants cannot be correct that use of the term "semiautomatic" to describe the AR-15s at issue in Rule 81-4 is somehow proof of the non-machine gun status of Defendants' weapons in this case. We know this because ATF uses the same term when explicitly describing machine guns. In Rule 82-2, for example, ATF

[7] Defendants also seem to find it significant that modification through a bump stock does not involve "cutting, filing, or grinding" the weapon. *See* Def. Mot. at 15. However, they fail to offer any reason why that distinction would be salient, let alone dispositive, here. Rule 82-2 is clear that the relevant inquiry is *whether* the weapon is being modified – not *how* it is modified.

describes the KG-9 as a "9-millimeter caliber, *semiautomatic* firearm." ATF Rule 82-2 (emphasis added). In the next paragraph, however, it notes that the KG-9's design facilitates automatic fire through simple modification and that the weapon is thus a "machinegun" for the purposes of the NFA. Defendants' attempt to capitalize on the term "semiautomatic" in Rule 81-4 is yet another example of their deliberate distortion of what "designed to shoot" means. Acknowledging that certain AR-15s are sold as "semiautomatic rifles" has no relevance to whether a weapon is "designed to shoot" automatically for the purposes of the statute.

Finally, Defendants lean on the fact that the bump stocks used by the shooter were not classified as machine guns until March of 2019, well after Defendants manufactured and sold the weapons at issue in this case. *See* Def. Mot. at 16-18. Defendants, citing to *Prescott*, mention a letter ATF issued to Slide Fire in which ATF concluded that "the bump-stock is a firearm part and is not regulated as a firearm under [the] Gun Control Act of the National Firearms Act." Def. Mot. at 17 (citing *Prescott*, 341 F. Supp. 3d at 1189).

This is a good argument for Slide Fire, but it does not exonerate the Defendants. This case is about weapons manufacturers, and Defendants' argument improperly conflates the legality of bump stocks and other conversion devices with the legality of the weapons themselves.[8] Plaintiffs' claim in this case is that Defendants manufactured weapons that were "designed to shoot... automatically" in violation of federal law. *See* 26 U.S.C. § 5845(b). The regulatory classification of bump stocks at the time of manufacture does not answer that question.

[8] It is also not clear why Defendants believe that reliance on a one paragraph letter from ATF to a bump stock manufacture is dispositive – particularly when ATF subsequently acknowledged that such "rulings concerning bump-stock-type devices did not provide substantial or consistent legal analysis regarding the meaning of the term 'automatically,' as it is used in the NFA and GCA." 83 Fed. Reg. 66,514-55.

Instead, the answer requires analyzing whether Defendants' weapons "have design features which facilitate full automatic fire" by simple modification. ATF Rule 82-2. One route to "simple modification" is through the use of bump stocks; or, in the prescient words of the 1981 Task Force, "the addition of readily available parts." *See* Compl. ¶¶ 86-87, 74. As the Complaint makes clear, "bump stock" is merely a *type* of device, *id.* ¶ 87, and different iterations have been treated differently by ATF – something the agency readily acknowledges. *Id*. ¶¶ 90-91; *see supra* fn. 8. Defendants cannot rest their case on one letter to one bump stock manufacturer, Def. Mot. at 17, while ignoring Plaintiffs' allegations that other bump stocks, deemed legal, "unequivocally converted AR-15s into fully automatic machine guns." Compl. ¶ 92. That reliance is particularly unpersuasive when "[t]he *plain language* of [Section 5845(b)] defines a machinegun as any part or device that allows a gunman to pull the trigger once and thereby discharge the firearm repeatedly," *Akins v. United States*, 312 F. App'x. 197, 201 (11th Cir. 2009) (emphasis added) – which is precisely what a bump stock does.

Moreover, due to the AR-15's specific design, "simple modification" is not confined to bump stocks. *See* Compl. ¶ 83 (noting videos showing "the AR-15 being shot automatically in back yards and at shooting ranges with a shoe string, a rubber band, or with no tools at all"); *id.* ¶ 84 (pointing to a particular video in which a man produces automatic fire with an AR-15 "using only his shoulder"). What is pertinent is Defendants' knowledge of the design features of their own weapons that facilitated "simple modification," by any means, into fully automatic weapons. Plaintiffs' Complaint sufficiently alleges such knowledge.

D. Defendants' Reliance on *Staples* Is Misplaced.

Defendants declare in their brief that "[t]he Supreme Court has recognized that rifles like the subject rifles are not machineguns." Def. Mot. at 14. The basis for this bold assertion is *Staples v. United States*, 511 U.S. 600 (1994), which Defendants claim "held that a semi-

automatic firearm is not a machinegun." Def. Mot. at 15. This is fundamentally incorrect. *Staples* concerned a criminal prosecution under 26 U.S.C. § 5861(d), which criminalizes possession of unregistered "firearms," including machine guns. The issue before the Court was whether, in a criminal prosecution under Section 5861(d), the government was required to prove that the defendant *knew* of the characteristics that made his weapon a "machinegun" under the statute. *Staples*, 511 U.S. at 602. The Court held that such a *mens rea* requirement existed under Section 5861(d). *Id.* at 619. At no point did the Court hold, as Defendants suggest, that weapons such as the ones at issue in this case can never be "machineguns" for purposes of Section 5845. That question was simply not addressed.[9]

Defendants point out that the Court in *Staples* "recognized the difference," *see* Def. Mot. at 14, between an AR-15 (the "civilian version of the military's M-16 rifle" that is "unless modified, a semi-automatic weapon"), and an M-16 (a "selective fire rifle" that allows for either "semiautomatic or automatic fire"). *Staples*, 511 U.S. at 603. This is true, but unhelpful. As explained above, there is no dispute as to those differences at the time of manufacture of those respective weapons. Plaintiffs do not argue that Defendants' weapons are "category one" weapons under the statute – i.e., weapons that "shoot" automatically. *See* 26 U.S.C. 5845(b). Instead, the relevant question in this case is whether Defendants' weapons were "designed to shoot" automatically, an issue upon which *Staples* does not speak.

[9] Defendants who have endeavored to use *Staples* as controlling authority on the contours of Section 5845 have been consistently rebuffed because "[t]he narrow holding from *Staples* is that *mens rea* was an element of the crime in question." *United States v. Olofson*, 563 F.3d 652, 657 (7th Cir. 2009) (rejecting argument that Court's definition of "automatically" in *Staples* was controlling because the Court was not interpreting § 5845(b)); *see also Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 29 (D.C. Cir. 2019) (explaining that the Supreme Court's decision in *Staples* did not "compel a particular interpretation" of the meaning of "single function of the trigger," because that question was "not at issue" before the Court).

In a last-ditch attempt to use *Staples* as a shield, Defendants cherry-pick language from a footnote in the majority opinion, which addresses the dissenters' view that the dangerous nature of defendant's weapon – a "semiautomatic weapon that [is] readily convertible into a machinegun" – should lessen the *mens rea* requirement. In response, the majority notes that Section 5861(d) penalizes the possession of any NFA "firearm" that is unregistered and "does not suggest that any significance should attach to readily convertible semiautomatics." *Staples*, 511 U.S. at 612 n.6. Critically, the Court goes on to say that "it is not at all clear what the contours of this category would be," and that the concept of ready conversion "provides no real guidance concerning the required *mens rea*." *Id.* (emphasis added). Defendants' quotation from this footnote omits that language entirely. That is no accident – a full account of the footnote makes clear that the Court is not speaking to the "contours" of what constitutes a machine gun, and, moreover, is looking only for "guidance" on *mens rea*. The Court's refusal to use "readily convertible semiautomatic weapons" as a "benchmark for defining the knowledge requirement for 5861(d)," *see id.*, simply does not touch on whether Defendants' weapons *in this case* were machine guns for the purposes of Section 5845(b). [10]

II. Plaintiffs have Stated a Claim for Negligence Per Se.

The Nevada Supreme Court has "consistently held that the violation of a statute constitutes negligence per se if the injured party belongs to the class of persons that the statute was intended to protect, and the injury suffered is of the type the statute was intended to

[10] Defendants' brief also suggests that Congress, by passing the 1994 assault weapon ban, "recognized" that the Subject Rifles are not machine guns. *See* Def. Mot. at 18-19. But this is hardly dispositive. First, Congress' decision to pass FOPA in 1986 and implicitly endorse ATF Rule 82-2 is much more relevant to Congress' intended meaning of "machinegun" in the NFA than the assault weapons ban. Second, the definition of "machinegun" was not at issue when Congress passed the assault weapons ban. And third, Defendants' argument yet again suffers from the misapprehension that the use of the term "semiautomatic" somehow ends the discussion – a view that is contradicted by the plain text of the NFA.

prevent." *Vega v. E. Courtyard Associates*, 24 P.3d 219, 221 (Nev. 2001). Consistent with this, Plaintiffs allege that Defendants[11] violated federal and state law when they sold weapons that facilitated automatic fire. The purpose of the prohibition on the manufacture and sale of machine guns is to "protect members of the public from physical injury and death caused by machine guns." Compl. Count II ¶ 204; *see also* ¶¶ 35-40. Carrie Parsons, who was fatally shot with automatic fire, is exactly who these statutes were designed to protect. *Id.* ¶¶ 165-68, Count II ¶ 206.

Having adequately pled those elements, "[t]he questions of whether a violation of a statute occurred and whether the violation was a proximate cause of the plaintiff's injuries are questions of fact for the jury." *Barnes v. Delta Lines, Inc.*, 669 P.2d 709, 711 (Nev. 1983); *see also Zugel by Zugel v. Miller*, 688 P.2d 310, 312 (Nev. 1984). The Defendants nevertheless argue that the Parsons' claim should be dismissed because penal statutes cannot form the basis for a negligence per se claim unless the statute explicitly provides for a private right of action. Def. Mot. at 9-10. In fact, in Nevada, "[t]he use of a violation of a criminal statute as the basis for common-law negligence has been upheld in this state, as well as many others." *Southern Pacific Co. v. Watkins*, 83 Nev. 471, 435 P.2d 498 (1967); *see also Hamm v. Carson City Nugget*, 85 Nev. 99, 450 P.2d 358 (1969) ("[W]e have recognized that a violation of a penal statute is negligence per se."); *cf.* Prosser & Keeton on Torts, § 36 p. 220 (5th Ed. 1984) ("The standard of conduct required of a reasonable man may be prescribed by legislative enactment. . .

[11] PLCAA allows claims based on negligent entrustment and negligent entrustment to proceed against a "seller." 15 U.S.C. § 7905(5)(A)(ii). "Seller" is defined to mean a federally licensed importer, dealer, or seller of ammunition – all of which are further defined by federal law. *Id.* § 7903(6). The Defendant Dealers must be federally licensed dealers (or else they are in clear violation of an additional federal law). As such, plaintiffs' negligence claims are permitted as to those three Defendants. At this procedural posture, however, plaintiffs cannot know whether one or more of the Defendant Manufacturers is also a statutory "seller" under PLCAA. Plaintiffs are entitled to conduct discovery on that issue.

. The fact that such legislation is usually penal in character … will not prevent its use in imposing civil liability[.]").

And Defendants are incorrect that "in the absence of evidence of legislative intent to impose civil liability, a violation of a penal statute is not negligence per se." Def. Mot. at 10. Defendants support this proposition by quoting from and citing to *Hindegardner v. Marcor Resorts*, L.P.V., 108 Nev. 1091, 844 P.2d 800 (1993), and *Bell v Alpha Tau Omega Fraternity, Eta Epsilon Chapter*, 98 Nev. 109, 642 P.2d 161 (1982). Both cases are completely inapt. They arise from claims related to the negligent provision of alcohol – a cause of action that Nevada courts do not recognize unless specifically provided for by the legislature. *See generally Hamm*, 85 Nev. at 100-02 (reviewing common law rule, affirming it, and noting that "civil liability in this situation should be created by legislative act, if at all"). The language Defendants rely on merely reiterates that rule. *See Hinegardner*, 844 P.2d at 803 (Court will "continue to follow the *Hamm* rule—only legislative mandate should create civil liability for vendors who serve alcohol to minors.").[12]

Hindegardner and *Bell* have no relevance here, where the provision of alcohol is not involved. Indeed, *Hamm* makes clear that alcohol-related claims are an *exception* to the general rule that penal statutes may form the basis for a negligence per se claim in Nevada, even without evidence of clear legislative intent. *Hamm*, 85 Nev. at 102. The Parsons have pled such a claim. The remaining issues belong to the trier of fact.

[12] Further proof that Defendants are incorrect can be found in *Watkins*, where the statute plaintiffs relied upon for negligence per se made no mention of a private cause of action. *See* 83 Nev. at 491; § 705.430.

III. Plaintiffs have Stated a Claim for Negligent Entrustment.

One of the causes of action preserved under PLCAA is "an action brought against a seller for negligent entrustment." 15 U.S.C. § 7903(5)(A)(ii).[13] In Nevada, negligent entrustment occurs when an instrumentality is entrusted "in circumstances where [the entrustor] knows or should that such use may create an unreasonable risk of harm to others." *Mills v. Continental Parking Corp.*, 86 Nev. 724, 726, 475 P.2d 673, 674 (1970). Plaintiffs allege that Defendants' entrustment of weapons that could easily be modified for automatic fire created just such an unreasonable risk. Compl. ¶¶ 204-11.

Defendants argue that negligent entrustment is only recognized in the context of "entrusting a vehicle to an inexperienced or incompetent person." Def. Mot. at 6 (citing *Zugel*, 688 P.2d at 312). This misstates the law. While Nevada cases generally deal with negligent entrustment in the context of automobiles – and lending a car is likely to be negligent in circumstances where the entrustee is "inexperienced or incompetent" – no Nevada case states that negligent entrustment is so limited as a matter of law.

Indeed, this artificial restriction is at odds with the tort of negligent entrustment spelled out in the Restatement, which recognizes a claim for the entrustment of any "chattel." Rest. (2d) Torts § 390. It is the Restatement that has guided states when considering the application of the tort outside the context of cars. *E.g.*, *West v. E. Tennessee Pioneer Oil Co.*, 172 S.W.3d 545, 555 (Tenn. 2005) ("In line with a majority of other states, this Court has previously cited section 390 with approval in defining negligent entrustment,"). And it is particularly relevant

[13] Although PLCAA does not create negligent entrustment liability and must arise under state law, *see id.* § 7903(5)(C), PLCAA defines negligent entrustment with language that substantially tracks the Restatement of Torts: Negligent entrustment is "the supplying of a qualified product by a seller for use by another person when the sellers knows, or reasonably should know, the person to whom the product is supplied is likely to, and does use, the product in a manner involving unreasonable risk of physical injury to the person or others." *Id.* § 7903(5)(B); *compare with* Rest. (2d) Torts § 390.

here, since the PLCAA definition of negligent entrustment "is substantially the same as the Restatement version." *Estate of Kim v. Coxe*, 295 P.3d 380, 394 & n.89 (Alaska 2013). Moreover, Nevada has a history of relying upon the Restatements Second of Torts on tort issues that Nevada has not specifically addressed. *E.g. Arnesano v. State ex. rel. DOT*, 113 Nev. 815, 822-23, 942 P.2d 139, 144 (1997) (regarding causation); *San Juan v. PSC Indus. Outsourcing,* 126 Nev. 355, 360-361, 240 P.3d 1026, 1029-30 (2010) (regarding vicarious liability).

IV. Plaintiffs Have Adequately Alleged Causation.

Defendants argue that Plaintiffs cannot establish that Defendants proximately caused Carrie's death. Def. Mot. at 22-23. In Nevada "issues of negligence and proximate cause are usually factual issues to be determined by the trier of fact." *Frances v. Plaza Pacific Equities, Inc.*, 109 Nev. 91, 94 (1993). Defendants also ignore Plaintiffs' many allegations that a mass shooting committed with a bump-stock-modified AR-15 was manifestly foreseeable.

Defendants were aware that (1) machine guns had been restricted due to concern for public safety since 1934, Compl. ¶¶ 3, 37-38, 81, 171; (2) for decades there had been an enthusiastic audience of consumers interested in owning a modular weapon capable of automatic fire," *id.* ¶¶ 82-83, 100, 171; (3) the ease of conversion increased with the advent of bump stocks, which, in "a few minutes," could be "installed… with nothing more than a screwdriver," *id.* ¶¶ 95, 98, 171; and (4) these bump stocks were specifically compatible with Defendants' AR-15 models. *Id.* ¶¶ 99-100, 129. Yet Defendants "continued to manufacture their respective AR-15 rifles so that the stock could be easily removed and replaced with a bump stock." *Id.* ¶ 100.

Defendants made these choices despite "a decade's worth of evidence … proving that AR-15s were the weapon of choice for mass shooters looking to inflict maximum casualties." *Id*. ¶ 102; *see also id.* ¶ 11. And because "America's mass shooters seek fame by death tally,"

"[i]t was not just possible – or even probable – that a gunman would take advantage of the ease of modifying AR-15s to fire automatically in order to substantially increase the body count during a mass shooting. It was inevitable." *Id.* ¶ 13.

Defendants' attempt to cast the shooter as a "third party commit[ing] an intentional tort or a crime" that "severs the chain of causation" is a red herring. Def. Mot. at 22. Civilian access to machine guns is so tightly restricted because "[a] modern machine gun can fire more than 1,000 rounds per minute, allowing a shooter to kill dozens of people within a matter of seconds." *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) (citation omitted). The risk created by selling an illegal machine gun is that this "murderously effective firepower," *id.*, will be turned against civilians and law enforcement, as it was on October 1, 2017 in Las Vegas. *Cf. Price v. Blaine Kern Artista, Inc.*, 893 P.2d 367, 370 (Nev. 1995("[W]hile it is true that criminal or tortious third-party conduct typically severs the chain of proximate causation between a plaintiff and a defendant, the chain remains unbroken when the third party's intervening intentional act is reasonably foreseeable.").

V. Nevada's Narrow Immunity Statute Does Not Bar Plaintiffs' Claims.

Finally, Defendants argue that Plaintiffs' claims are barred by NRS § 41.131. *See* Def. Mot. at 20-22. The statute's plain text, however, makes clear this is not the case. *See Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 935 F.3d 858, 869 (9th Cir. 2019) ("[I]t is axiomatic that we resolve questions of statutory interpretation starting with the text"). The statute only prohibits causes of actions against firearm manufacturers or distributors brought "merely because the firearm or ammunition was *capable of causing serious injury, damage or death*." NRS 41.131 (emphasis added). Plaintiffs' Complaint cannot plausibly be reduced to such a claim. Rather, Plaintiffs clearly allege that Defendants knowingly violated federal and state law by selling and distributing machine guns.

Defendants' reliance on *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015) to suggest otherwise is misguided. In *Phillips*, the Colorado statute at issue prohibited any action against a firearms manufacturer or dealer "*for any remedy* arising from physical or emotional injury, physical damage, or death caused by the discharge of a firearm or ammunition." *Phillips*, 84 F. Supp. 3d at 1221 (citing C.R.S. § 13-21-504.5) (emphasis added). By its plain terms, the Colorado statute is far broader than the Nevada statute upon which Defendants rely.[14] Section 41.131 is no bar to plaintiffs' claims.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court deny Defendants' Motion to Dismiss.

DATED this 22nd day of November 2019.

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[14] Defendants also rely on the California case *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001). Yet, the law at issue in *Merrill*, like the Nevada statute at issue here, only prohibits causes of action based on a firearm's "potential to cause serious injury, damage, or death when discharged." *Merrill*, 28 P.3d at 119. Such a cause of action is not present in this case.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Opposition to Defendants' Motion to Dismiss the Complaint was electronically served on counsel of record this 22nd day of November, 2019, using the Court's CM/ECF System and via email to:

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[Counsel for additional defendants identified on the signature pages]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons, and ANN-MARIE PARSONS,

Plaintiffs,

v.

COLT'S MANUFACTURING COMPANY LLC; COLT DEFENSE LLC; DANIEL DEFENSE INC.; PATRIOT ORDNANCE FACTORY; FN AMERICA; FN HERSTAL; HERSTAL GROUP; NOVESKE RIFLEWORKS LLC; CHRISTENSEN ARMS; LEWIS MACHINE & TOOL COMPANY; LWRC INTERNATIONAL LLC; DISCOUNT FIREARMS AND AMMO LLC; DF&A HOLDINGS LLC; MAVERICK INVESTMENTS LP; SPORTSMAN'S WAREHOUSE; and GUNS AND GUITARS INC.

Defendants.

Case No. 2:19-CV-01189-APG-EJY

DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

Defendants[1] respectfully submit this reply in further support of their motion to dismiss Plaintiffs' Complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF THE ARGUMENT

Plaintiffs' response in opposition to Defendants' motion to dismiss demonstrates the futility of their position. According to Plaintiffs, the Subject Rifles, and all similar semiautomatic AR-type rifles are "illegal machineguns" because they are allegedly capable of being converted to fully automatic weapons by the addition of bump stocks. Plaintiffs contend that such rifles have been machineguns for decades, yet no one previously noticed, including Congress, the U.S. Supreme Court, the ATF, state legislatures, prosecuting authorities, and law enforcement agencies across the country. As evidenced by their opposition, Plaintiffs are essentially asking this Court to step into Congress's shoes and rewrite the federal definition of a machinegun in 26 U.S.C. § 5845(b) to support their arguments and, in the process, make hundreds of thousands of United States citizens who lawfully manufactured, sold, purchased, and/or possessed AR-type rifles felons overnight.

No legal support exists for Plaintiffs' argument that Defendants have knowingly violated federal and state law by manufacturing and selling illegal machineguns. This Court should also dismiss Plaintiffs' claims for the following reasons:

- Plaintiffs fail to satisfy the PLCAA's predicate exception, or its negligent entrustment and negligence per se exceptions. Consequently, Defendants are entitled to immunity from Plaintiffs' claims.
- Plaintiffs' negligent entrustment claim is fundamentally flawed because Defendants had no control over the Subject Rifles after their manufacture and sale, which control is necessary to maintain such a claim under Nevada law.
- Plaintiffs' negligence per se claim fails because an alleged violation of the statutes upon which Plaintiffs rely does not support such a claim under Nevada law.
- Nevada Revised Statute § 41.131 provides Defendants with immunity from Plaintiffs' claims.

[1] This reply brief is filed on behalf of all defendants except for Daniel Defense Inc. and Sportsman's Warehouse.

- Plaintiffs' claims are barred by the superseding criminal acts of the shooter, as well as by their failure to plead causation sufficiently.

As set forth below more fully, Defendants respectfully request that the Court dismiss Plaintiffs' claims with prejudice.

ARGUMENT

I. The Subject Rifles are Not "Machineguns" Under Federal or State Law

Plaintiffs claim their allegations satisfy the predicate exception to the PLCAA, 15 U.S.C. § 7903(5)(A)(iii), because Defendants knowingly violated 18 U.S.C. § 922(b)(4) and Nev. Rev. Stat. § 202.350(1)(b),[2] by manufacturing and selling the Subject Rifles because they are machineguns as defined by 26 U.S.C. § 5845(b). This argument is meritless. A machinegun is defined by the National Firearms Act ("NFA") as:

> [A]ny weapon which [1] shoots, [2] is designed to shoot, or [3] can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include [4] the frame or receiver of any such weapon, [5] any part designed and intended solely and exclusively, or [6] combination of parts designed and intended, for use in converting a weapon into a machinegun, and [7] any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b) (bracketed numbers added).

Plaintiffs contend the Subject Rifles are machineguns based on the second bracketed definition in 26 U.S.C. § 5845(b) because they are "designed to shoot" automatically. Pls.' Opp'n (ECF No. 88) at 5, 9-13. In support, Plaintiffs quote from a report by a "Task Force on Violent Crime" stating that:

> Another problem we wish to address is the ease of conversion of semi-automatic guns into more lethal and more strictly regulated fully automatic guns . . . . Some manufacturers are producing readily available semi-automatic weapons which can be easily converted to fully automatic weapons by simple tool work *or the addition of readily available parts*.

[2] Plaintiffs' Opposition solely addresses their argument that the Subject Rifles are machineguns for purposes of 18 U.S.C. § 922(b)(4), as opposed to Nev. Rev. Stat. § 202.350(1)(b), Pls.' Opp'n at 9 n.5, so this reply will solely address the federal statute as well.

Pls.' Opp'n at 5 (emphasis added by plaintiffs). Plaintiffs contend that it was not necessary to "amend the NFA to address this problem, because the statute already defined a machine gun as "'any weapon . . . *designed to shoot* . . . automatically.'" *Id.* (emphasis added by Plaintiffs).

As Plaintiffs acknowledge, Pls.' Opp'n at 10, the ATF has determined that firearms are considered machineguns based on the "designed to shoot" automatically definition if they "have not previously functioned as machineguns but possess design features which facilitate full automatic fire by simple modification or elimination of e*xisting component parts*." ATF Ruling 82-2[3] (emphasis added). Thus, to meet this definition, a firearm must be able to fire automatically when an existing component part is eliminated or simply modified. Yet Plaintiffs argue that the Subject Rifles are machineguns because they can be modified by *replacing* their butt stocks with bump stocks. Plaintiffs concede that to make the Subject Rifles fire fully automatic, one must remove their existing butt stocks and replace them with bump stocks:

- "A bump stock replaces the stock of an AR-15 and modifies the weapon so that a continuous firing sequence is initiated with a single trigger pull."
- "The first step in modifying an AR-15 with a bump stock is to remove – or eliminate – the existing stock."
- "Next, a separate stock is attached in place of the prior stock and secured."
- "In other words, without the bump stock, the trigger resets after each trigger pull but does not continue firing; with the bump stock, it resets and fires continuously."

See Pls.' Opp'n at 5, 13-14 (emphasis added).

While a butt stock is a component part of a rifle, Plaintiffs do not contend that the Subject Rifles will fire fully automatic merely by eliminating, *i.e.*, removing, their existing butt stocks. Nor do Plaintiffs contend that the Subject Rifles will fire fully automatic through a "simple modification" of the buttstocks on the Subject Rifles when they were manufactured and sold. Plaintiffs must satisfy one of these two requirements for a firearm to be considered a machinegun

[3] Contrary to Plaintiffs' claim, ATF Rulings are not the regulations that Congress authorized the Attorney General to prescribe pursuant to 26 U.S.C. §§ 7801(a)(2)(A) & 7805. Pls.' Opp'n at 9 n.5. Such regulations are codified at 27 C.F.R. §§ 479.1-193.

based on the "designed to shoot" automatically definition in 26 U.S.C. § 5845(b) as interpreted in ATF Ruling 82-2.[4] Plaintiffs' theory satisfies neither requirement.

Attempting to bolster their argument, Plaintiffs claim that it is "hard to imagine how this *fundamentally different firing mechanism* is not a 'modification' of 'existing component parts.'" Pls.' Opp'n at 14 (emphasis added). Plaintiffs then attempt to dodge the threshold legal issue – whether adding an after-market bump stock is a modification of an existing component part – by claiming that any "disagreement on the technical meaning of 'existing component part' in the context of a bump stock modification . . . cannot be settled at the pleadings stage." *Id.* "Existing" is defined as something "that exists or is being used at the present time."[5] Accordingly, an "existing component part" is a part that was present and installed on the Subject Rifles when they were manufactured and sold by Defendants. Plaintiffs have acknowledged that existing components are not modified when a bump stock is installed. Rather, an existing component (the butt stock) is removed and replaced with a new component (the bump stock). Thus, Plaintiffs' own allegations establish that the Subject Rifles are *not* statutorily-defined "machineguns."

What Plaintiffs are requesting this Court to do is rewrite the definition of machinegun in 28 U.S.C. § 5845(b) to create an eighth category – *i.e.*, a "weapon that can be modified to fire automatically, more than one shot, without manual reloading based on the replacement of existing parts with readily available parts." *See* Pls.' Opp'n at 5 (quoting the Task Force on Violent Crime). Such a definition results in all AR-type rifles – and likely all semiautomatic firearms – being considered illegal machineguns for purposes of federal law and the law of every state that has adopted the federal definition. It would also render the fifth bracketed definition of a machinegun in Section 5845(b), *i.e.*, a "part designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun," superfluous and unnecessary, which violates the rules of statutory construction. *Williams v. Taylor*, 529 U.S. 362, 364 (2000).

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[4] Plaintiffs wrongly claim that based on ATF Ruling 82-2, the "relevant inquiry is *whether* the weapon is being modified – not *how* it is modified." Pls.' Opp'n at 14 n.7 (emphasis by Plaintiffs). ATF Ruling 82-2 makes it clear that *how* a firearm may be modified is dispositive.

[5] https://dictionary.cambridge.org/us/dictionary/english/existing

Through the fifth bracketed definition of a machinegun in 28 U.S.C. § 5845(b), Congress chose to classify the parts used to modify semiautomatic firearms that allow them to fire fully automatic, rather than the semiautomatic firearms themselves, as machineguns. This fifth bracketed definition formed the basis for the ATF recently reclassifying the Slide Fire bump stock as a machinegun. Bump-Stock Type Devices, 83 Fed. Reg. 66,514-54; 27 C.F.R. §§ 478.11 & 479.11 ("a *device that allows a semi-automatic firearm* to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semiautomatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter") (emphasis added).

ATF Ruling 81-4 confirms that a firearm is not a machinegun simply because it is capable of being modified by exchanging one of its existing parts with a new component part, such as a bump stock or an auto sear. In Ruling 81-4, the ATF held that an auto sear was a machinegun based on the sixth bracketed definition in 26 U.S.C. § 5845(b), *i.e.*, a "combination of parts designed and intended for use in converting a weapon to shoot automatically more than one shot, without manual reloading, by a single function of the trigger." Plaintiffs' argue unpersuasively that this Court should ignore ATF Ruling 81-4 because it was issued before ATF Ruling 82-2, and that the ATF's characterization of AR-type rifles as semiautomatic does not mean that they are not machineguns. Pls.' Opp'n at 14.

The order in which the ATF rulings were issued is irrelevant, and no basis exists for Plaintiffs' claim to the contrary. The language in 26 U.S.C. § 5845(b) that both rulings discuss did not change and the rulings address different issues. The ATF's characterization of the AR-15 rifles in which the auto sears could be installed as semiautomatic is not the important issue. What is important is that the ATF did not consider AR-15 rifles, the same type of rifles as the Subject Rifles at issue in this case, to be machineguns unless an auto sear was installed in them.

Like the ATF, the Supreme Court also does not consider AR-type rifles to be "machineguns." In *Staples v. United States*, 511 U.S. 600 (1994), the Court clearly recognized that:

> *The AR-15 is* the civilian version of the military's M-16 rifle, and *is, unless modified, a semiautomatic weapon*. The M-16, in contrast, is a selective fire rifle that allows

> the operator, by rotating a selector switch, to choose semiautomatic or automatic fire. *Many M-16 parts are interchangeable with those in the AR-15 and can be used to convert the AR-15 into an automatic weapon.*

Id. at 603 (emphasis added). Plaintiffs ask this Court to ignore *Staples* because the Supreme Court did not specifically address the issue of whether AR-type rifles are machineguns based on the "designed to shoot" automatically definition.[6] As the decision makes clear, the Supreme Court implicitly rejected the argument that AR-type rifles are "machineguns." The reason why this issue was not more specifically addressed is because the argument is far-fetched and legally unsupportable.[7] If all AR-type rifles are machineguns on the basis that they were "designed to shoot" automatically (as Plaintiffs argue), there would have been no need in *Staples* for the prosecution to instead focus on the issue of whether defendant's particular AR-type rifle was a machinegun based on the modification of existing component parts. *Id.* at 603. Rather, the defendant could have been charged and convicted for possessing a "machinegun" simply because he possessed an unmodified semiautomatic AR-type rifle, capable of being converted to a machinegun.[8]

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[6] Plaintiffs' argue that *Staples* is not controlling authority because it did not address the meaning of the terms "automatically" or "single function of the trigger." Pls.' Opp'n at 17 n.9 (citing *United States v. Olofson*, 563 F.3d 652, 657 (7th Cir. 2009) and *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 29 (D.C. Cir. 2019)). Defendants' motion to dismiss did not cite to *Staples* with regard to those terms, or even rely on those terms for the arguments it raised, so it is difficult to comprehend the significance of Plaintiffs' argument.

[7] A firearm is a "machinegun" as defined by 26 U.S.C. § 5845(b) under either the first bracketed definition, "shoots automatically," or the second bracketed definition, "designed to shoot" automatically. Therefore, it is not relevant whether the AR-15 rifles at issue in *Staples* would shoot automatically in the condition in which they were manufactured. See Pls.' Opp'n at 17. Based on Plaintiffs' argument, they would have been machineguns based on the "designed to shoot" automatically definition and have been just as illegal.

[8] In the motion to dismiss, Defendants referenced the Supreme Court's holding that the NFA "does not suggest that any significance should attach to readily convertible semiautomatics, for that class bears no relation to the definitions in the Act. . . . The parties assume that virtually all semiautomatics may be converted into automatics . . . ." *Staples*, 511 U.S. at 612 n.6. Plaintiffs incorrectly claim that Defendants have misconstrued this footnote and that it only addresses *mens rea*. Pls.' Opp'n at 18. The footnote in the majority opinion is addressing the fact that while machineguns are illegal, regular firearms are not, and a person cannot be held to have knowledge that he is in possession of a machinegun simply because it is a semiautomatic firearm that is readily convertible into a machinegun because that class of firearms "bears no relation to the definitions in the [NFA]." *Staples*, 511 U.S. at 612 n.6. If this Court accepts Plaintiffs' argument, "every owner

The United States Department of Justice ("DOJ") recently rejected the arguments made by Plaintiffs in a challenge to the federal ban on bump stocks resulting from the very shooting at issue in this case. In *Gun Owners of America, Inc. v. Whitaker*, the DOJ's brief in opposition to the plaintiffs' motion for a preliminary injunction rejected plaintiffs' argument that the ATF's rule change could result in the AR-type rifles on which the bump stocks are designed to be installed being classified as machineguns, and suggested that the Second Amendment would prohibit banning "the most popular semiautomatic rifles in America" as machineguns.[9]

Based on Plaintiffs' interpretation of the "designed to shoot" automatically definition, all semiautomatic AR-type rifles have been machineguns since at least 1982, and potentially since they were first sold in the 1960s. Pls.' Opp'n at 4-5. If this Court were to accept Plaintiffs' argument, it would mean that until the filing of Plaintiffs' Complaint in July 2019, no one realized that semiautomatic AR-type rifles are actually machineguns under the "designed to shoot" automatically definition. Thus, Plaintiffs' position requires acceptance of the following absurd conclusions:

- Congress performed a meaningless act in 1994 when it enacted the assault weapons ban, 18 U.S.C. § 922(v)(1), which defined a "semiautomatic assault weapon" in relevant part as a "Colt AR-15" and "copies or duplicates" of the AR-15 in any caliber, *id.* § 921(a)(30)(A)(iv), because those rifles would have already been banned as machineguns.
- The DOJ has not prosecuted Defendants for illegally manufacturing and selling AR-type rifles to civilians on the basis that they are machineguns despite the fact that the manufacture and sale of new machineguns (under any of the definitions in 26 U.S.C. § 5845(b)) to the civilian market has been illegal since May 19, 1986. *See* 18 U.S.C. § 922(o)(1).

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of a semiautomatic rifle or handgun would potentially meet such a *mens rea* test, *i.e.*, they would knowingly be in possession of an illegal machinegun. *Id.*

[9] DOJ's Brief at 23-24 (quotation marks and citation omitted), a copy of which is attached as Exhibit A. The DOJ also noted that the separate definition of a semiautomatic rifle precludes interpreting "ordinary semiautomatic rifles as machineguns." *Id.* at 24 n.15. It characterized an argument – which Plaintiffs make in this case – that AR-type rifles are machineguns because they can be made to fire "automatically" using the shooter's body, a belt loop, or a rubber band as absurd. *Compare id.* at 22-23 *with* Pls.' Opp'n at 4 n.4, 11-12, 16. Plaintiffs acknowledge that for AR-type rifles without a bump stock attached, the "trigger resets after each trigger pull but does not continue firing," Pls.' Opp'n at 14, thereby conceding that they do not meet the definition of a machinegun in 28 U.S.C. § 5845(b).

- When the ATF required retail dealers in the four states bordering Mexico to report multiple sales of AR-type rifles to the ATF in 2011 to help combat illegal trafficking across the border, it did so unnecessarily because those rifles were already illegal to sell because they are machineguns. *See 10 Ring Precision v. Jones*, 722 F. 2d 711 (5th Cir. 2013).
- The legislatures in seven states (California, Connecticut, District of Columbia, Maryland, Massachusetts, New Jersey, and New York) needlessly banned sales of AR-type rifles because they were already illegal machineguns under federal law. *See* Cal. Penal Code § 30500; Conn. Gen. Stat. § 53-202a; D.C. Stat. § 7-2501.01(3A)(A)(i)(I)(ee); Md. Public Safety Law § 5-101(r)(2)(xv); Mass. Gen. Laws Ch. 140 § 131M; N.J. Stat. § 2C:58-12; and N.Y. Penal Law § 265.00(22)(h). And in those states where "grandfathered" possession of banned rifles was permitted, state legislatures made it lawful to possess machineguns.

The simple fact of the matter is that the Subject Rifles are not machineguns based on the "designed to shoot" automatically definition, or any of the other definitions in 26 U.S.C. § 5845(b). Plaintiffs' claim that Defendants knowingly violated 18 U.S.C. § 922(b)(4) by allegedly manufacturing and selling machineguns fails to raise even a colorable claim to satisfy the predicate exception to the PLCAA.[10]

II. Plaintiffs Do Not Have a Valid Negligence Per Se Claim

In their Motion to Dismiss, Defendants argued that Plaintiffs do not have a valid negligence per se claim for two reasons: (1) only the violation of statutes designed for the protection of a certain class of persons to which plaintiffs belong can serve as the basis for a negligence per se claim;[11] and (2) violation of a penal statute is not negligence per se in the absence of legislative intent to impose civil liability. Mot. to Dismiss (ECF No. 80) at 9-10. In their Opposition, Plaintiffs only addressed Defendants' second argument, improperly assuming that the statutes at issue are designed to protect a class of persons consisting of "*members of the public*," from "physical injury and death caused by machineguns." Pls.' Opp'n at 19 (emphasis added). A statute designed for

[10] Even if Plaintiffs' argument was meritorious (which it is not), the predicate exception only applies where Defendants *knowingly* violated a state or federal statute applicable to the marketing or sale of firearms. 15 U.S.C. § 7903(5)(A)(iii). This begs the question: if every authoritative source (Congress, the Supreme Court, the DOJ and the ATF) have concluded that standard AR-type rifles are not machineguns as defined by 18 U.S.C. § 5845(b), how could Defendants have knowingly violated this statute at the time they manufactured and sold the Subject Rifles?

[11] For purpose of negligence per se, "whether an injured party belongs to the class of persons that the provision at issue was meant to protect" is an issue of law for the court. *Vega v. Eastern Courtyard Associates*, 24 P.3d 219, 222 (Nev. 2001).

the protection of the entire public is the opposite of a statute designed for the protection of a specific class of persons and therefore, based on Plaintiffs' own arguments, an alleged violation of 18 U.S.C. § 922(b)(4) does not constitute negligence per se pursuant to Nevada law.[12] Plaintiffs rely on *Southern Pac. Co. v. Watkins*, 435 P.2d 498 (Nev. 1967) for the proposition that the violation of a criminal statue can serve as the basis for a negligence per se claim. Pls.' Opp'n at 19. In *Watkins*, a locomotive failed to ring a bell or sound a whistle at a railway crossing in violation of Nev. Rev. Stat. § 705.430, a statute designed for the protection of a limited class of persons, *i.e.*, motorists using the railway crossing. That statute is of the exact same character as the various traffic statutes cited by Defendants, the violation of which may constitute negligence per se. Mot. to Dismiss at 10.

Plaintiffs incorrectly assert that Nevada deviates from the general rule that violation of a penal statute is not negligence per se in the absence of legislative intent to impose civil liability for such a violation and, that in Nevada, this general rule is limited to the provision of alcohol. Pls.' Opp'n at 20. *Hamm v. Carson City Nugget*, 450 P.2d 358, 360 (Nev. 1969) does not support Plaintiffs' argument, and instead supports Defendants' position, holding that an alleged violation of Nev. Rev. Stat. § 202.100 did not constitute negligence per se because it was part of the "statutory scheme regulating the sale of tobacco and intoxicating liquor . . . ." The statutes barring the manufacture and sale of machineguns upon which Plaintiffs rely are similarly an inappropriate basis for a negligence per se claim, because they are not designed for the protection of a specific class of persons, but rather are part of the statutory scheme regulating the sale of firearms.

III. Plaintiffs Do Not Have a Valid Negligent Entrustment Claim

Plaintiffs ask this Court to recognize a previously unrecognized negligent entrustment action under Nevada law against product manufacturers and retail sellers who have relinquished control of products to their buyers at the time of sale. Because Nevada state courts have not recognized this cause of action, this Court must predict whether Nevada's highest court would

[12] *See, e.g., Anderson v. Baltrusaitis*, 944 P.2d 797, 799-800 (Nev. 1997) (holding that Nev. Rev. Stat. § 484.327(1) is intended for the protection of pedestrians, not motorists); *Ashwood v. Clark County*, 930 P.2d 740, 744 (Nev. 1997) (holding that a good Samaritan was not a member of the class of persons intended to be protected by the panic hardware provision in the building code).

create a right to maintain such a claim. *See Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 434-435 (9th Cir. 1978). In their Opposition, Plaintiffs do not cite to a decision on which this Court can reasonably predict the Nevada Supreme Court's recognition of this cause of action.

Indeed, the only case Plaintiffs cite supports the opposite conclusion, namely that the Nevada Supreme Court *would not* recognize a negligent entrustment action against product manufacturers and sellers because they relinquish the right to control the product at the time of sale. In *Mills v. Continental Parking Corp*., 475 P. 2d 673 (Nev. 1970), the court unanimously affirmed the dismissal of a negligent entrustment action against the operator of a parking garage because the garage had surrendered its right to control the car to its owner, who was later involved in an accident. The court held that a negligent entrustment theory "does not apply when the right to control is absent." *Id*. at 726. The court reasoned that imposition of civil liability where the right to control the instrumentality has been surrendered would lead to "unforeseeable consequences limited only by the scope of one's imagination." *Id*. The court declined to "venture into that wonderland." *Id*.

In their Opposition, Plaintiffs do not even address Defendants' alternative basis on which the Court should dismiss their negligent entrustment action: failure to plead facts (or even unsupportable conclusions) suggesting that any Defendant knew or reasonably should have known the specific purchaser of the Subject Rifles was likely to use them criminally. *See* 15 U.S.C. § 7903(5)(B). It is not enough to simply plead that an entrusted product is capable of being used dangerously to cause harm. *See Soto v. Bushmaster Firearms Int'l, LLC*, 2012 A.2d 262, 283 (Conn. 2019) (rejecting argument that the mere commercial sale of "assault weapons" to civilian users generally constitutes negligent entrustment). The "vitally important" element of the tort is the entrustor's alleged knowledge of the specific entrustee and his intended and likely use of the potentially dangerous instrumentality. *Turner v. American Dist. Tel. & Messenger Co*., 110 A. 540, 543 (Conn. 1920). Plaintiffs' Complaint wholly omits factual allegations on this vitally important element.

IV. Plaintiffs' Claims are Barred by Nevada Revised Statute § 41.131

As Defendants' noted in their Motion to Dismiss, Nevada Statute § 41.131(1) states that no one has a "cause of action against the manufacturer or distributor of any firearm or ammunition merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death." The only exception to this general prohibition is for a "cause of action based upon a defect in design or production," *id.* § 41.131(2), which Plaintiffs do not raise. Plaintiffs argue that their claims are not barred by Section 41.131(1) because they allege that "Defendants knowingly violated state and federal statutes by selling machineguns." Pls.' Opp'n at 23. As explained in Section I, however, the Subject Rifles are not machineguns and Defendants did not violate federal or state law by manufacturing or selling them. Plaintiffs' claims are therefore reduced to nothing more than the fact that the Subject Rifles are capable of causing serious injury, damage or death when discharged, and such claims are barred by Section 41.131(a).

V. Plaintiffs Have Not Sufficiently Pleaded Causation

In their motion to dismiss, Defendants explained why Plaintiffs have failed to sufficiently allege that Defendants proximately caused their damages. In response, Plaintiffs claim that they have established causation simply because Defendants sold AR-type rifles, which they characterize as the "weapon of choice for mass shooters looking to inflict maximum casualties." Pls.' Opp'n at 22 (quoting Compl. ¶ 102). Plaintiffs further repeat their baseless claims that the Subject Rifles are machineguns. *Id.* at 22-23. As discussed in Section I, the Subject Rifles were legally manufactured and sold by Defendants, and are not machineguns. Simply because AR-type rifles are allegedly the weapon of choice for mass shooters, does not render an intentional, criminal shooting reasonably foreseeable as required to prevent the chain of proximate causation from being broken. *Price v. Blaine Kern Artista, Inc.*, 893 P.2d 367, 370 (Nev. 1995). Plaintiffs' argument is the equivalent of a claim that manufacturers and sellers of sedans may be held liable for the damages incurred by intoxicated drivers, simply because sedans are the "vehicle of choice" of most intoxicated drivers.

CONCLUSION

For the reasons stated above, Defendants respectfully request that Plaintiffs' Complaint be dismissed with prejudice.

Dated December 20, 2019.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT** was electronically served on counsel of record this 20th day of December 2019, using the Court's CM/ECF System and via email to:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons, and ANN-MARIE PARSONS,

Plaintiffs,

vs.

COLT'S MANUFACTURING COMPANY LLC; COLT DEFENSE LLC; DANIEL DEFENSE INC.; PATRIOT ORDNANCE FACTORY; FN AMERICA; FN HERSTAL; HERSTAL GROUP; NOVESKE RIFLEWORKS LLC; CHRISTENSEN ARMS; LEWIS MACHINE & TOOL COMPANY; LWRC INTERNATIONAL LLC; DISCOUNT FIREARMS AND AMMO LLC; DF&A HOLDINGS LLC; MAVERICK INVESTMENTS LP; SPORTSMAN'S WAREHOUSE; and GUNS AND GUITARS INC.,

Defendants.

CASE NO.: 2-19-cv-01189-APG-EJY

DEFENDANTS DANIEL DEFENSE AND SPORTSMAN'S WAREHOUSE'S SEPARATE REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS COMPLAINT [ECF NO. 80]

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Defendants Daniel Defense, Inc. and Sportsman's Warehouse, Inc. ("Defendants") submit this separate reply brief, focusing exclusively on Nevada law, to aid the Court in resolving this matter. Defendants also join in full the reply brief submitted by Codefendants[1] in support of the joint motion to dismiss, ECF No. 80, primarily addressing the PLCAA.

MEMORANDUM OF POINTS AND AUTHORITIES

After an ample opportunity to draft their Opposition,[2] Plaintiffs cannot avoid that both state and federal law immunizes Defendants from their claims. In addition to the reasons articulated in Codefendants' reply brief, two independent requirements of Nevada law compel dismissal of Plaintiffs' claims. Further, dismissal should be with prejudice.

First, NRS 41.131 grants gun manufacturers and distributors broad immunity from claims premised on a third-party using a firearm to harm someone. Plaintiffs' cursory attempt to portray the statute's scope as narrow is misguided and defeated by the statute's text, legislative history, and the liberal construction required under Nevada law. Moreover, Plaintiffs' interpretation of NRS 41.131 would mean that the statute only precludes claims that don't exist, rendering the statute meaningless and violating a cardinal canon of statutory construction.

Second, Plaintiffs cannot establish causation because the Shooter's criminal acts are the superseding cause of Plaintiffs' harm and thus sever the chain of causation. Plaintiffs' allegations address only the potential danger of firearms and fail to show that Defendants had actual or constructive knowledge about the Shooter's planned criminal behavior. Accepting Plaintiffs' theory would abrogate the principle of proximate causation and improperly make manufacturers and distributors of any potentially dangerous instrument the de facto insurers of the general public against criminal third-party acts.

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[1] Colt's Manufacturing Company LLC, Colt Defense LLC, Patriot Ordnance Factory, Inc., FN America, Noveske Rifle Works LLC, Christensen Arms, Lewis Machine & Tool Company, LWRC International LLC, Discount Guns & Ammo, DF&A Holdings LLC, Maverick Investments LP, and Guns & Guitars, Inc. ("Codefendants").

[2] Plaintiffs' Opposition to Defendants' Motion to Dismiss filed November 22, 2019, ("Opposition") as ECF No. 88.

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Accordingly, Plaintiffs' complaint must be dismissed with prejudice for three reasons: amendment is futile because the claims are barred as a matter of law; Plaintiffs implicitly concede that the defects identified in the motion to dismiss cannot be remedied by amending the complaint;[3] and they do not request leave for such amendment.[4]

I. NRS 41.131 wholly bars Plaintiffs' claims as a matter of law.

The Nevada Legislature, through NRS 41.131, has barred Plaintiffs' claims as a matter of law. Unable to provide any meaningful response to NRS 41.131's sweeping immunity, Plaintiffs relegate it to the final two paragraphs of their Opposition.[5] Notably, they do not dispute that Nevada law requires liberal construction of the immunity that NRS 41.131 provides; they simply assert without support that the immunity is narrow. However, NRS 41.131 is in fact broader than its federal and state counterparts, containing only a single exception that is not applicable here. Further, Plaintiffs' narrow interpretation renders the immunity meaningless and its sole exception nonsensical in violation of foundational canons of statutory construction.

A. Plaintiffs do not dispute Defendants' immunity should be construed liberally.

Plaintiffs implicitly concede, as they must, that NRS 41.131 should be construed liberally. As explained in the Motion to Dismiss, that statute is intended to protect firearm manufacturers and distributors from civil claims arising from criminal shootings by third parties and therefore should be liberally construed to provide that protection under controlling Nevada law.[6] The legislative history cited in the Motion to Dismiss[7] underscores this point: "[I]f someone shoots a firearm and hurts somebody, you can't sue the firearms manufacturer because it shoots."[8] This is because "a

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[3] *See* ECF No. 80 at 3:15–18.

[4] *See generally* ECF No. 88; *see also* Local Rule 15-1(a) ("Unless the court orders otherwise, the moving party must attach the proposed amended pleading to a motion seeking leave of the court to file an amended pleading.").

[5] ECF No. 88 at 24–25.

[6] ECF No. 80 at 21:12–22:2.

[7] *Id.* at 21:5–10.

[8] Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. Apr. 17, 1985).

gun in itself is not to be determined as at fault in the case of a death or injury . . . . [Rather] the liability would be on the handler of the gun."[9] In fact, the Senate Committee Chairman "clarified that it was [the bill sponsor's] intent to ***not*** have a firearms manufacturer sued by his heirs if he were murdered."[10]

Plaintiffs do not dispute that Defendants' immunity must be construed liberally or that the legislative history confirms that it is intended to prevent suits precisely like this one. Nevertheless, Plaintiffs improperly attempt to narrow the immunity so far that it disappears altogether.

B. NRS 41.131 is broader than its counterparts in other jurisdictions.

Based on Defendants' review, no state or federal statute provides broader immunity to firearm manufacturers and distributors than NRS 41.131. Plaintiffs' cursory, contrary analysis is mistaken. Unlike federal statutes or the analogous Colorado statute addressed in *Phillips v. Lucky Gunner*,[11] NRS 41.131 does *not* include an exception to immunity for violations of state or federal law.[12] All three statutes begin with substantially similar sweeping proclamations that no cause of action is permitted against gun manufacturers or distributors for claims based on harm caused by a third party using a firearm against a victim.[13] The three statutes also explicitly exempt product-defect claims from the scope of their grants of immunity.[14] But unlike federal statute or the analogous Colorado statute, NRS 41.131 provides only a single exception. Accordingly, NRS 41.131 is broader than federal statute or the Colorado statute and does not, as Plaintiffs implicitly contend, exclude purported violations of state or federal law from its preclusion of claims against

[9] Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. Mar. 13, 1985).

[10] Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. Apr. 17, 1985) (emphasis added).

[11] *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1221–22 (D. Colo. 2015) (addressing Colo. Rev. Stat. § 13-21-501 *et seq.*).

[12] *Compare* NRS 41.131(1), *with* 15 U.S.C. §§ 7902, 7903(5)(A)(iii), *and* Colo. Rev. Stat. § 13-21-504.5(4).

[13] *Compare* NRS 41.131(1), *with* 15 U.S.C. §§ 7901(b)(1), 7902, 7903(5)(A), *and* Colo. Rev. Stat. §§ 13-21-501(1), 13-21-504.5(1).

[14] *Compare* NRS 41.131(2), *with* 15 U.S.C. § 7903(5)(A)(v), *and* Colo. Rev. Stat. § 13-21-504.5(1).

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gun manufacturers and distributors.

Plaintiffs mistakenly argue that the Colorado statute raised in *Phillips* is "far broader than" NRS 41.131 because the Colorado statute includes the phrase "any remedy" in describing the claims it precludes.[15] But that phrase merely signifies that a Colorado plaintiff may seek both damages and injunctive relief for a product-defect claim, whereas only damages are available for torts caused by a manufacturer or distributor's violation of state or federal law.[16] Thus, the *Phillips* court reasoned:

> The only exceptions to the broad immunity granted to [the defendants] are a product liability action in [Colo. Rev. Stat. § 13-21-504.5](1) and an action in tort for any damages proximately caused by the violation of a state or federal statute or regulation in [subsection](4). Plaintiffs have not pleaded a product liability action against defendants under the first exception and the second exception is not applicable because Plaintiffs are not seeking "damages [but only injunctive relief]." The Colorado legislature specifically limited suits against [defendants] to those where the plaintiff requests "damages" for relief, except in a product liability action which includes "any remedy [including injunctive relief]." Subsection (2) precludes liability of the [defendants] for the actions of [the shooter] in any type of action. The plaintiffs' claims of negligence, negligent entrustment and public nuisance based on the sales of ammunition to [the shooter] are barred and "shall" be dismissed.[17]

In contrast, NRS 41.131 does *not* limit its grant of immunity based on the type of relief a plaintiff seeks, and as discussed above, does *not* exempt claims for acts by gun manufacturers or distributors that allegedly violate state or federal law.

C. Plaintiffs' narrow interpretation of NRS 41.131 renders the statute meaningless because it would only preclude claims that don't exist.

Plaintiffs assert that NRS 41.131(1) immunizes Defendants only against allegations that independently fail to state a claim, rendering the statute meaningless. Undergirding all statutory construction is the basic and intuitive directive that "[a] statute should not be construed as to be

[15] ECF No. 88 at 25:2–5.

[16] Colo. Rev. Stat. § 13-21-504.5.

[17] *Phillips*, 84 F. Supp. 3d at 1222 (internal citation omitted).

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rendered meaningless."[18] Accordingly, Plaintiffs' narrow interpretation must be rejected.

In Plaintiffs' view, NRS 41.131 only precludes causes of action against a firearm manufacturer or distributor where the allegations are limited to the following: (1) the firearm is capable of causing serious injury, damage, or death; (2) was discharged; and (3) proximately causing serious injury, damage, or death.[19] Following Plaintiffs' flawed logic, because Plaintiffs have alleged here that Defendants also "knowingly violated federal and state law by selling and distributing machine guns," Plaintiffs erroneously contend that their claims escape the scope of NRS 41.131.[20] But there is no statutory or common-law cause of action consisting of only these three elements. So, even if NRS 41.131 did not exist, a plaintiff who asserts a cause of action using *only* these elements has failed to state a cognizable claim. To avoid dismissal under FRCP 12(b)(6), a plaintiff must therefore *always* allege additional facts that satisfy the elements of a recognized tort, such as negligence. Accordingly, Plaintiffs' interpretation of NRS 41.131 would render it meaningless: precluding claims that do not and cannot exist.

Plaintiffs ignore the inevitable conclusion that their interpretation of NRS 41.131 offers absolutely no immunity to gun manufacturers or distributors—a position directly in conflict with the statute's text, legislative history, and protective intent. This Court should liberally construe Defendants' broad immunity from Plaintiffs' claims premised on a third-party using a firearm to harm someone.

D. Plaintiffs' narrow reading also renders the immunity's sole exception nonsensical.

If Plaintiffs' narrow interpretation were correct, the sole exception to NRS 41.131's broad immunity would be nonsensical, exempting claims that by definition would already be beyond the

[18] *See, e.g.*, *Wilshire Oil Co. of Cal. v. Costello*, 348 F.2d 241, 243 (9th Cir. 1965); *Rosado v. Wyman*, 90 S. Ct. 1207, 1219 (1970) (same).

[19] *See* ECF No. 88 at 24:22–25.

[20] ECF No. 88 at 24:27–28. Plaintiffs use the same reasoning to attempt to avoid *Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001). *Compare* ECF No. 80 at 22:20–23:10, *with* ECF No. 88 at 25 n.14.

statute's scope. "[C]ourts should avoid construing statues so that any provision or clause is rendered meaningless."[21] Again, Plaintiffs' narrow interpretation must be rejected.

To successfully assert a product-defect claim in Nevada based on either a design or manufacturing defect, a plaintiff must allege, among other things, that the product is defective.[22] Accordingly, a plaintiff bringing a product-defect claim *must* assert allegations beyond the fact that the firearm (1) was capable of causing serious injury, damage, or death; (2) was discharged; and (3) proximately caused the user's serious injury, death, or damage. Thus, under Plaintiffs' narrow interpretation of NRS 41.131, an adequately alleged product-defect claim would always fall outside the statute's scope of immunity, *even if the product-defect exception didn't exist.* It would be nonsensical for the Nevada Legislature to provide an exception to NRS 41.131's immunity for claims that, under Plaintiffs' interpretation, would not be entitled to immunity in the first place. Thus, Plaintiffs' untenable interpretation of NRS 41.131 not only renders the immunity meaningless, but also makes its sole exception nonsensical.

The Nevada Legislature has broadly precluded any cause of action against a firearm manufacturer or distributor based on a third party's use of a firearm to harm someone, and Plaintiffs do not dispute that this Court should liberally construe this immunity. Defendants request that this Court effectuate the Legislature's intended protections: "[I]f someone shoots a firearm and hurts somebody, you can't sue the firearms manufacturer because it shoots."[23] This is because "a gun in itself is not to be determined as at fault in the case of a death or injury . . . . [Rather] the liability would be on the handler of the gun."[24] A narrow reading of this immunity is improper for this protective statute, eviscerates its legislative intent, and independently renders the immunity meaningless and its sole exception nonsensical.

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[21] *In re Estate of Thomas*, 998 P.2d 560, 562 (Nev. 2000); *see also Costello*, 348 F.2d at 243.

[22] *See, e.g.*, *Ford Motor Co. v. Trejo*, 402 P.3d 649, 653 (Nev. 2017).

[23] Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. Apr. 17, 1985).

[24] Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. Mar. 13, 1985).

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II. Plaintiffs cannot satisfy the causation element of their claims because the Shooter's unforeseeable criminal act was the superseding cause of the harm they incurred.

Even if Plaintiffs could avoid the immunity protection under NRS 41.131, their claims would still fail under well settled Nevada law on causation. A third party's criminal act is the superseding cause of a plaintiff's injury and thus severs the chain of causation *unless* the plaintiff can establish that the third-party's actions were foreseeable.[25] The allegations here fall far short of the mark.

As an initial matter, although Plaintiffs assert that proximate cause is "usually" a jury question,[26] that does not end the Court's inquiry. Nevada courts still address this element as a matter of law where the record does not support causation.[27] For example, in *Thomas v. Bokelman*, the plaintiff sued after his wife was murdered by the defendant's brother, a convicted rapist who was temporarily living with the defendant and who used one of the defendant's unsecured rifles to commit the murder.[28] Claiming negligence and wrongful death, the plaintiff sought "to base liability upon the inherently dangerous character of the instruments, the firearms, together with the risk of the keeping of firearms in the proximity of an ex-felon . . . ."[29] The court, however, affirmed summary judgment in favor of the defendant, concluding that the murder was not foreseeable and that his brother's crime was therefore the superseding cause of the harm. "The risk, if any," the court explained, "was that [the rapist] might again rape someone. His history [was] not one that involved weapons" and there had been no violent incidents since he moved in with the defendant.[30] The Court therefore held that, "as a matter of law," the plaintiff could not recover.[31]

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[25] *Price v. Blaine Kern Artista, Inc*., 893 P.2d 367, 370 (Nev. 1995).

[26] ECF No. 88 at 23:11–12.

[27] *Van Cleave v. Kietz-Mill Minit Mart*, 633 P.2d 1220, 1222 (Nev. 1981); *Thomas v. Bokelman*, 462 P.2d 1020, 1022 (Nev. 1970).

[28] *Thomas*, 462 P.2d at 1022.

[29] *Id*.

[30] *Id*.

[31] *Id*. at 1023.

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Likewise, even if Plaintiffs here could demonstrate that Defendants acted negligently in any manner, they do not allege that the Defendants could—let alone should—have foreseen the Shooter's abhorrent crime. Rather than squarely address this issue, Plaintiffs perplexingly assert that the Shooter's perpetration of the 1 October Shooting is somehow a "red herring" in the proximate-cause analysis.[32] Plaintiffs then cite to a machinegun's purported rate of fire and their allegation that AR-15s are the weapon of choice for mass shootings—seemingly to portray the Shooter's actions as foreseeable.[33] Under this view of causation, any manufacturer or distributor would be liable for any crime perpetrated using an AR-15. Plaintiffs' construction therefore turns the causation analysis on its head by focusing on the potential dangers of firearms rather than on what indicia made the Shooter's plan to maliciously misuse those firearms foreseeable. And as discussed immediately above, the Nevada Supreme Court rejected a similar argument in *Thomas*, where the defendant had kept unsecured firearms in the vicinity of a convicted rapist. Here, by contrast, Plaintiffs have not alleged that Defendants had any knowledge *about the Shooter*—let alone a basis for even suspecting that he would use the firearms to commit heinous crimes.

At bottom, Plaintiffs' theory of the case would altogether abrogate the principles of proximate causation and foreseeability and seeks to hold Defendants strictly liable for any harm caused by the firearms they manufacture and sell. Followed to its logical end, Plaintiffs' argument would result in liability for the manufacturers and sellers of any instrumentality that a criminal has misused in the past to harm others—be it a car, a plane, a knife—regardless of whether there was any basis for the defendant to foresee that the criminal would misuse the instrumentality. The purpose of tort law is not to force manufacturers and distributors of potentially dangerous items to insure the general public against third-party criminal activity, but Plaintiffs' theory of the case requires precisely that result.

[32] ECF No. 88 at 24:5–6.

[33] *Id.* at 24:1–12.

CONCLUSION

Nevada's Legislature enacted sweeping immunity to protect firearm manufacturers and distributors from liability for third-party criminal acts. Such protective statutes are liberally construed in order to achieve their intended purpose. Plaintiffs seek instead to narrow the immunity out of existence, and render its sole exception nonsensical. Moreover, Plaintiffs simply ignore—labelling it a "red herring"—that the Shooter's criminal conduct breaks the causal chain.

Because Plaintiffs' claims are barred, any amendment would be futile. Further, Plaintiffs implicitly concede that the defects identified in the motion to dismiss cannot be remedied by amending the complaint; and Plaintiffs did not request leave to amend. Accordingly, dismissal should be with prejudice.

DATED: December 20, 2019

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I hereby certify that on December 20, 2019, I electronically transmitted the foregoing **DEFENDANTS DANIEL DEFENSE AND SPORTSMAN'S WAREHOUSE'S SEPARATE REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS COMPLAINT [ECF NO. 80]** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel in this matter; all counsel being registered to receive Electronic Filing.

/s/ Lyndsey Luxford
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REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ANDREW P. GORDON,
UNITED STATES DISTRICT JUDGE

(Appearances on Page 2)

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LAS VEGAS, NEVADA; WEDNESDAY, MARCH 18, 2020; 9:34 A.M.

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P R O C E E D I N G S

COURTROOM ADMINISTRATOR: James Parson, et al. vs. Colt's Manufacturing Company LLC, et al., 2:19-cv-1189-APG-EJY.

THE COURT: Thank you.

This is Judge Gordon. I thank everyone on the phone for your patience and allowing this to be done telephonically. We are, as a nation, living in trying times right now. Our -- our District of Nevada is presently open for business on a limited basis. I'm trying to get as many things done as reasonably possible while still trying to protect staff and the public as best we can. Given the importance of this case and the fact that the -- at least the Motion to Remand has been pending for a while, I felt it would be best to try and get this issue resolved, first, telephonically now.

I have set this for oral argument on both the Motion to Remand and the Motion to Dismiss. I have limited each side to 10 minutes. I am -- I have some questions for each side on both of the motions. I have gone through the papers and filings, so I don't need you to repeat what you have said in your papers, but if there are particular items you wish to highlight. . . I will ask that each of you identify yourself by name before you speak and speak slowly so that my court reporter can keep up with you. I may interrupt you in the

middle of your statement if for some reason we can't hear you. But this -- we're going to try and keep this hearing as efficient and clear as we can. I know there are important issues that either -- you know, either or both sides likely will take up to the Ninth Circuit at some point, so I'm going to try to make as clear a record as possible.

To the extent that the parties want and will need a clear transcript for the appeal or other motions in this case, if any, it's imperative for all of you to speak clearly and slowly and make sure that my court reporter can take everything down because it's very difficult for her after the fact to try to recreate what was stated and -- when the recording is garbled. So I appreciate all of your patience. While I do have you on a 10-minute timer in a sense, I'm not going to strictly enforce it. I will interrupt you at times. I will certainly give you an opportunity to be heard and speak, so don't panic and feel like you have to rush and speak quickly because your time is expiring. I'll -- I will be sure you understand when I need you to summarize and finish up.

So, with that introductory statement, let me go through and make sure I have a correct list of who's on the phone. I'm going to go through who I think is on the phone.

First, for plaintiffs, Matthew Sharp. Are you here?

MR. SHARP: Sorry, Judge. Matthew Sharp. I -- I had muted my phone and forgot when I responded.

THE COURT: Thank you for --

MR. SHARP: Richard Friedman will be speaking on behalf of the plaintiffs, Your Honor.

THE COURT: Thank you. And I have Richard Friedman on the phone?

MR. FRIEDMAN: Yes, Your Honor.

THE COURT: And then Joshua Koskoff?

MR. KOSKOFF: That's correct, Your Honor.

THE COURT: Thank you. For defendants Colt Manufacturing Company, Colt Defense, Lewis Machine & Tool Company, and LWRC International, I believe I have Christopher Renzulli on the phone; correct?

MR. RENZULLI: Yes, Your Honor, and that would also include Christensen Arms, another defendant.

THE COURT: Okay. Thank you. And, also, I have Scott Allan on the phone?

MR. ALLAN: Yes, Your Honor.

THE COURT: And I have Jay Schuttert?

MR. SCHUTTERT: Yes, Your Honor.

THE COURT: For defendant Noveske Rifleworks, I have Ryan Erdreich? I apologize if I mispronounce that, but is it Erdreich?

MR. ERDREICH: Yes. That's perfect, Your Honor. Thank you.

THE COURT: For defense Discount Firearms and Ammo,

LLC; DF&A Holdings; and Maverick Investments, LP I have Ismail Amin; correct?

MR. AMIN: That's correct, Your Honor.

Good morning.

THE COURT: Good morning.

For defendants Daniel Defense, Inc.; Patriot Ordnance Factory; and Sportsman's Warehouse I have Patrick Byrne?

MR. BYRNE: That's correct, Your Honor.

THE COURT: And I have V.R. Bohman?

MR. BOHMAN: Correct, Your Honor.

THE COURT: For defendant FN America, LLC, I have Camden Webb; correct?

MR. WEBB: That's correct. Yes, Your Honor, I'm here.

THE COURT: I have C. Van Arnam.

MR. ARNAM: Yes, correct. It's Rob Van Arnam. Thank you.

THE COURT: Thank you.

I have Turner Broughton?

MR. BROUGHTON: Yes, Your Honor.

THE COURT: I have John Mowbray?

MR. MOWBRAY: Yes, Your Honor.

THE COURT: For defendant Guns and Guitars I have James Vogts?

MR. VOGTS: Yes, sir.

THE COURT: And Michael Nunez.

MR. NUNEZ: Yes, Your Honor.

THE COURT: Is there anyone else on the phone I have not just identified?

All right. Hearing none. . . let me start with the Motion to Remand. I have read the papers and here's my initial comment or concern.

I was initially troubled by the possibility of the removing defendant in this case engaging in gamesmanship by immediately removing the case before it could be served. I was also initially concerned with the ramification of that on a larger basis of any out-of-state defendant playing games to remove a case before the plaintiff had an opportunity to serve.

Once I sat down and looked at the calendar, it appears that the removing defendant waited, looks like 7 days before removing. The complaint was filed July 2 and was removed on July 9. That somewhat lessens my initial concern about gamesmanship, but I still think, in a general practical level, a defendant could -- well, let me start over. A defendant who believes or is aware or has knowledge because of pre-litigation negotiations that a complaint is going to be filed could engage in gamesmanship and immediately remove a complaint that's filed to defeat the plaintiff's choice of forum despite the presence of a local defendant. After reading the briefings, I was swayed the other way to a certain degree that the defendants properly point out that a plaintiff can certainly engage in

gamesmanship by naming a local defendant and not serving it for more than 30 days at which point then the out-of-state defendant's removal period will have expired, or the plaintiff not serving a local defendant at all. And, so, the games can be played either way.

My concern is that if gamesmanship can be played by either side, it seems to me it's Congress' job to decide where to draw that line in the statute as to whether there should be a period of waiting to allow the plaintiff to -- a certain period of time to serve, to see if it's going to before removal occurs, something like that. That's not for -- the Court's job; that's a congressional job on a policy basis to draw that line, absent, obviously, an obvious games playing situation where I think I could step in. But I don't see that here at this stage.

So my question, I guess, to plaintiff's counsel, is, address that for me. How -- how long should a defendant have to wait to see if the plaintiff will serve the in-state defendant before it loses its removal right?

So, one of the plaintiff's attorneys, tell me who's speaking and please address that issue for me.

MR. FRIEDMAN: Yes, Your Honor, this is Rick Friedman and I'll be doing all the speaking for the plaintiff today. And, you know, the -- the first thing that strikes me is that both sides have briefed this issue really well and thoughtful,

intelligent judges have come down on both sides of this issue, so I don't think there is a -- it's almost like a Rorschach test for judges. You can -- but, having said that, essentially, we have 3 business days. Because the complaint was served on July 2nd, there's 3 -- the defendants waited 3 business days. During those days, we were in the process of trying to get a summons issued by the state court, which you may or may not know can sometimes take a while. So, you know, gamesmanship is a harsh term, but there's no question that the defendants were seeking to take advantage of the wording of the statute that -- the statute -- the language of "properly joined and served" I think pretty clearly was intended to address the problem of plaintiffs just pulling in any defendant, no matter how frivolous the claim against that defendant because they're in state, and then leaving them there, not serving them, but pointing to them as a basis to defeat federal jurisdiction.

So, I -- I -- I don't want to spend too much of our limited time today arguing this issue because I think the Court has really put its finger on the two sides so to speak. You know, on one side it's what's the intent of this, and I think pretty clearly, as discussed a little bit by Judge Robert Jones of this court in the *Burnett* decision, the intent is pretty clearly to retain to plaintiff their choice of forum, but to prevent the gamesmanship of naming a defendant and not serving and joining them -- or I should say joining and serving them.

So, you could go either way on this. Our -- our position, as we laid out, is that Judge Jones' analysis in *Burnett* is probably the better view, but there are clearly intelligent, thoughtful judges who have gone the other way.

THE COURT: Thank you, Mr. Friedman. I appreciate your candor on that.

I -- I read Judge Jones' opinion in that and I do think he was quite thoughtful in it and did a nice analysis of both sides. I -- on one hand, the selfish part of me says I agree with Judge Jones that if I remand the case to state court it's not reviewable and I can wash my hands of this case, but I obviously need to do my job and I can't remand a case just based on my pure selfish instinct.

He does raise an interesting point that if I keep jurisdiction that the Ninth Circuit will have a chance to review it. Another option, and I really haven't thought through it and I'm not giving anybody any advice on this, but -- is whether it's worthwhile taking my decision up on a writ to the Ninth Circuit if I keep the case. I don't know if this is a writable decision or not. I haven't really thought through it, but it would certainly help me and other judges in our circuit if the Ninth Circuit gave us some guidance on this. No fault to the Ninth Circuit, it's just an issue that doesn't come up all that often. But I agree with you, Mr. Friedman.

Here's what I'm going to do and I'll save the

defendants the argument on this. I'm going to deny the Motion to Remand. I do think that I have to enforce the plain language of the statute. I think, as I mentioned earlier about the policy decisions on either side, that's a job for Congress. The statute says any local defendant joined and served. The local defendant had not yet been served and, so, I'm going to deny the Motion to Remand and certainly invite plaintiff, if they'd like, I won't be offended if you want to take me up on a writ to see if we can get some determination from the Ninth Circuit before this case gets too old and the parties spend a lot of time litigating here but --

MR. FRIEDMAN: No. We're not going to do that, Your Honor. Thank you.

THE COURT: Well, I appreciate that. Again, I wouldn't be offended at all. I always like to get help from the Ninth Circuit whenever possible.

All right. So let me turn to the Motion to Dismiss, and I have not -- both sides can rest assured, I have not started your 10-minute timer on that removal issue. I think this is a separate issue on the Motion to Dismiss.

So let me turn to the Motion to Dismiss and, again, I have read the papers so please don't repeat what's in there, but if there's certain things you want to highlight, let me know.

So, who wants to take the lead. It's the defendants'

motion. Who's going to argue for the defendants?

MR. RENZULLI: Your Honor, this is Christopher Renzulli.

THE COURT: Christopher Renzulli, you're going to argue for the defendants. Thank you. Go ahead.

MR. RENZULLI: Yeah. I think what's the most important thing you said is that you read all the papers and you understand the issues, so I am not going to go through our brief again in the short amount of time we have. I just want to point out some of the very obvious, that plaintiffs in this case are asking you to rewrite the federal definition of a machine gun. And in that regard, if the Court were to do that, it would make, you know, instant felons out of hundreds of thousands of citizens in the U.S. If we adopt what the plaintiffs have asked the Court to do here today, then a lot of people got it wrong. And that's Congress, that's the U.S. Supreme Court, it's the Bureau of Alcohol, Tobacco, Firearms, and Explosives, it's state legislatures, it's prosecutors, it's law enforcement across the country, and that's -- that's just absurd.

The assault weapons ban of 1994 was basically meaningless then. State statutes banning AR-type rifles would be meaningless if the Court were to adopt what the plaintiffs have asked the Court do.

PLCAA clearly applies here. It provides immunity to

the manufacturers and the sellers based upon these facts. This is exactly the case that Congress envisioned when they enacted the statute. They said, and they wrote, any action that was pending on the date it was enacted must be immediately dismissed.

Your Honor, this case rises and falls on whether or not a semiautomatic rifle, the most popular rifle in America, is a machine gun. Based upon the arguments in the record, which I know you've read, that simply is not the case.

In that regard, the plaintiffs have not satisfied any exceptions to the immunity provided to the defendants in this case based upon negligent entrustment, negligence per se, for violation of the statute, or for the sale of marketing of the firearms.

I'm not going to go into each exception, Your Honor. I think you have the arguments. If there are any questions you have in this regard, please direct them to me or anyone on the phone.

THE COURT: All right. Thank you, Mr. Renzulli. I do have a couple of questions. Let me -- I'm kind of going through my notes here to get myself organized so I can try to ask some intelligent and sequential questions.

Both of the parties rely upon rulings from the ATF, Alcohol, Tobacco, and Firearms. They don't -- neither side really discusses the weight that should be accorded to those

ATF rulings. How much deference is any -- is owed to the ATF on interpretation of the statute, Mr. Renzulli, or someone else on that?

MR. RENZULLI: The ATF -- and I'll let someone jump in, but the ATF is the agency within the Department of Justice that's -- that's authorized, Your Honor, to promulgate and publish orders, notification, determinations, rules, personal actions, permits, agreements, grants, contracts, certificates, licenses, registrations, and privileges. That comes from 27 CFR § 70.7001. So, they're really the ruling body here. They're the ones that make the decisions. And the Court can take judicial notice of that.

Scott, do you want to answer that?

MR. ALLAN: Yes, Your Honor, this is Scott Allan.

It is generally appropriate for the courts to defer to an administrative agency with expertise on the specific statute at issue. As Mr. Renzulli said, the ATF is the federal law enforcement agency that has jurisdiction over federal firearms laws. In addition, this Court, in a -- another -- related case, *Prescott vs. Slide Fire*, Judge Navarro's --

(Court reporter admonishment).

THE COURT: Wait. A little bit slower. What was the name of the case?

MR. ALLAN: *Prescott* -- P-r-e-s-c-o-t-t -- *vs. Slide Fire Solutions*. That was the case in front of Judge Navarro of

this court, and she took judicial notice of ATF open letters in her decision.

THE COURT: Thank you.

The language -- the phrase, I should say, "designed to shoot," the parties focus a lot of time and attention on that. If the "designed to shoot" phrase does not include weapons that possess design features to allow fully automatic firing by simply eliminating and replacing a component part, what does that phrase "elimination of existing parts" refer to? In other words, can an AR-15 be converted to fire automatically by eliminating an existing component alone, or does it have to have an addition to that and if so, does that addition take it out of the definition?

MR. RENZULLI: So, we are looking at the phrase "designed to" --

THE COURT: Who's -- wait. Wait. Who's speaking?

MR. RENZULLI: I'm sorry. Christopher Renzulli. I apologize.

THE COURT: Thank you.

MR. RENZULLI: We are looking at that phrase "designed to shoot." And in looking at that and in looking at the analysis of that term, it is clear that a firearm must be able to fire automatically when an existing component part -- existing component part is eliminated, taken out, or simply modified. By replacing a butt stock with a bump stock, as the

plaintiff suggests, that does not. . . include an existing component part that is eliminated or simply modified. We're replacing. We're taking one out and putting one in. It does not fall within the definition of "designed to shoot."

They do have a definition that they want the Court to adopt, and that's "readily convertible to full automatic," and that's not within the statutes, that's not within the case law, that's not the definition of a machine gun, "readily convertible to full automatic." That's what they want the Court to adopt, and that's -- there's no support for that.

Scott, do you want to fin- -- finalize that?

MR. ALLAN: This is Scott Allan.

Your Honor, the AR-15 rifles, they cannot be converted to fire fully automatic simply by removing one part from them. You would have to remove a part and then replace it with another part such as an auto sear or a bump stock. If it was a situation where you could take out a single part, such as, you know, removing the bump stock and simply by doing that it became capable of fully automatic fire, that would be within the "designed to shoot" definition. But that is not the case here and therefore since you have to not only remove a part, you have to add in a new part, it does not fall within the "designed to shoot" definition.

THE COURT: The -- the plaintiffs argue that the definition of machine gun, under 26 U.S.C. 5845, says, any

weapon which "is designed to shoot"; that the defendants market the AR-15 as a military bona fide. They argue -- they advertise of its modularity, that it's easily changed, that it's easily modified, that therefore, it is, in fact, designed -- possibly with a modification, or a replacement -- it's designed and advised as something that can be a machine gun. Why is that wrong?

MR. RENZULLI: Quite simply, Your Honor, it does not --

THE COURT: Who is this -- wait. Is this Mr. --

MR. RENZULLI: I'm sorry. Christopher -- Christopher Renzulli. Apologies twice.

THE COURT: Thank you. Go ahead.

MR. RENZULLI: Quite simply, Your Honor, that does not fall within the definition of a machine gun pursuant to the National Firearms Act, which is 28 U.S.C. 5845. And bigger picture, that would mean that all of these AR-15-type rifles throughout the country would all be machine guns and we are all felons. It just doesn't make sense and it's absurd.

THE COURT: Well, let me -- let me interrupt because the definition of "designed to shoot" comes from an ATF ruling, not from the statute and not from Congress. So you're saying I'm still bound by the ATF ruling on the definition of "designed to shoot" as opposed to if I decide it's plain on its face, like I had to on the remand statute, I wouldn't be bound

by the ATF ruling, would I?

MR. RENZULLI: Well, you're bound by the plain language, and you're bound by, as helpful considerations, what the ATF says and how they analyze the statute. I think that there's only one plain meaning, and the plain meaning is that it does not fall here under these facts under this case and under the plaintiffs' argument. So on its face, Your Honor, we argue that it is plain.

THE COURT: All right. There's an argument that the defendants' interpretation of the statute -- and by -- let me switch gears here. I'm talking about now Nevada Revised Statute § 41.131. The defendants' interpretation of that statute would bar lawsuits even against the manufacturers and sellers of Tommy Guns and M16s. Address that for me.

MR. BYRNE: Your Honor, this is Pat Byrne, because I believe this goes to a Nevada specific issue and I really did want to address this --

THE COURT: Please.

MR. BYRNE: -- particularly as a lawyer who practices in Nevada.

Our legislature has stepped in under N.R.S. 41.131 and has granted immunity that's even broader than the federal immunity that we've been talking about. There's only one exception, and that's for an action that -- where there's a -- you know, a product liability claim. So, ultimately, as you

just raised in your question, Your Honor, it doesn't matter if the firearm is, in fact, a machine gun under Nevada law. There is immunity. That is the plain language of the statute. The plaintiffs' attempt to try to argue otherwise essentially renders the statute meaningless as we've addressed in our brief. So we don't have to get into the weeds as to whether this is a machine gun. It doesn't matter because we believe separately there is Nevada immunity to the manufacturers and distributors of these guns under Nevada statute -- broad immunity statute.

THE COURT: So, certainly the Nevada legislature can't immunize manufacturers from a federal claim, or from a violation of a federal statute. If the federal statute bars Tommy Guns and M16s, the Nevada legislature couldn't immunize them from that. You're saying it would just not be a claim under state law?

MR. BYRNE: Well, Your Honor, they would not have a -- they would not have a civil remedy under state law.

THE COURT: Yeah.

MR. BYRNE: And, so, that would bar these claims. There may in fact be other consequences to that, but it wouldn't create a cause of action for civil damages under Nevada law.

THE COURT: All right. Let me check my notes here. Hang on a second, everyone.

(Brief pause in proceedings).

THE COURT: Mr. Renzulli, I think I know the answer to this but let me ask it to you. Do I need factual development or expert testimony to help me decide the issue of whether an AR-15 that can be modified with a bump stock to shoot automatically is considered a machine gun?

MR. RENZULLI: Absolutely not, Your Honor, and that's -- let me start with this -- this immunity statute, the PLCAA. That was enacted purposely for this issue. This is an immunity statute; it's not a defense. That's something we raise in the defense. And Congress found it important that we prevent going into issues of discovery, et cetera.

Now, as far as whether or not we need to do discovery, no. This is an interpretation statute, interpretation of the PLCAA. It's something that the Court can do and there's no amount of discovery that would change it. Is this firearm, these AR-15s that are all over the country, are they machine guns, and that can be determined as a matter of law. And the Court can do that as a matter of law.

THE COURT: That was the answer I was expecting, but I wanted to make sure you had an opportunity to say that.

Thank you, Mr. Renzulli.

All right. Anything else before I turn to the plaintiffs? Mr. Renzulli, anything further?

MR. RENZULLI: No, Your Honor. Thank you.

THE COURT: All right. Let me turn to Mr. Friedman.

MR. FRIEDMAN: Thank you, Your Honor. I am going to jump around a little bit in light of the questions you asked to try to keep this as efficient as possible.

THE COURT: Thank you.

MR. FRIEDMAN: One of the first questions you -- one of the first questions you asked was about the level of deference to the ATF and, frankly, that has not been briefed very well by the parties, but one of the cases cited to the Court was a case called *Guedes,* I think it -- I don't know how to pronounce it, but it's G-u-e-d -- as in "dog" -- e-s *vs. Bureau of ATF*, and it's 920 F.3d, Page 1. That case talks extensively about the Chevron doctrine and when deference should be given to administrative agencies and, frankly, I just kind of -- the same question you asked came to my mind as I was preparing for this argument so I can't pretend to have researched it extensively, but my impression from reading the *Guedes* case is that under the Chevron doctrine, the ATF rulings at issue here are to be given deference. They don't have to be the best reading of the statute, simply a plausible, reasonable interpretation of the statute. So where that leads us is to ATF ruling 82-2, which both sides have cited to you. You mentioned it in your question, the design -- interpreting the "designed to shoot" language, the ATF says that includes those weapons which have not previously functioned as machine guns

but possess design features which would facilitate full automatic fire by simple modification, or elimination of existing component parts. That definition, as we pointed out in our brief, has been adopted by several federal courts and it is, of course, what we're urging to this Court today.

The main infirmity, or one of the main infirmities in the defendants' position is that they are conflating or confusing enforcement with statutory interpretation. You've got a statute and you've got an administrative interpretation of that statute that permits, under the facts we've pled, a finding that the AR-15s are machine guns. The fact that the defendants lean so heavily on the fact that various other entities have not interpreted the statute this way and, you know, the arguments that you'll make a thousand -- or a hundred thousand people, felons and so on, the -- the facts -- well, let me -- let me say this. In the state of Washington, where I'm from, and from Nevada, you can -- you can drive along the street and see giant marijuana stores that are the size of Walmart with big trucks pulling in and out carrying a Class 1 substance that's prohibited by federal law from people even possessing, and yet nobody is prosecuting those people for violating the federal statute. Nevertheless, if you were called upon as a judge to interpret the federal statute on marijuana, the argument that, well, it hasn't been enforced, look, you know, look at all these stores, would not be

persuasive. Enforcement decisions are made for political reasons and if there's any issue that's been politicized in this country it's guns. So, the fact of non-enforcement or non-interpretation in this manner really should not be influencing the Court's own determination. You've got a statute, you have an ATF ruling, and you have our complaint, which alleges facts within the ATF ruling that this is a machine gun.

The defendants point to the 1994 assault weapons ban, but they -- they leave out a very important aspect of that ban. The -- if you go and actually look at the statute, what you'll see is the assault weapons ban bans more than just machine guns. It bans any semiautomatic weapon that has the ability to accept a detachable magazine and has at least two of the following characteristics: A folding or telescope -- telescoping stock, a pistol grip that protrudes conspicuously beneath the action of the weapon, a bayonet mount, a flash suppresser, a grenade launcher. So, simply put, a semiautomatic weapon that is not easily modifiable to become a machine gun, in other words, not easily modifiable to shoot multiple rounds with one function of the trigger without reloading, a weapon that is not easily modifiable but is a semiautomatic weapon, if it's got a folding stock and a pistol grip, it's banned by the assault weapons ban. If it's got a bayonet mount and a pistol grip, it's banned by the assault

weapon ban. So the 1994 assault weapon ban reached far broader than the statute and ATF ruling that we're relying upon and outlawed many weapons that would not necessarily have been easily converted. So, that's the answer to the assault weapon ban argument.

Let me go then to, you know, essentially the PLCAA provides three relevant exceptions so to speak, three exceptions to immunity. Those are -- and we've alleged -- well, it actually has more than three, but we've alleged three: Knowing violation of a state or federal statute applicable to the sale or marketing of a product, we've alleged that; negligence per se, we've alleged that; and, of course, negligent entrustment. Whether or not we've adequately plead those under Nevada law is a separate issue from whether we've adequately pled them under PLCAA. Under PLCAA, our allegations are basically they conform with the stat- -- with the PLCAA exceptions, knowing violation, negligence per se, and negligent entrustment. So our allegations may or may not be sufficient as a matter of Nevada law, but they're sufficient to take us out of PLCAA.

Then we go to our specific claims. I know you read the briefing. I'm not going to belabor what we've already said, but whether a machine gun -- whether an AR-15, a particular AR-15 is a machine gun is a mixed question of fact and law. We've got the whole issue of is it designed to shoot

more than one shot without manual reloading. Well, what is "designed to shoot"? That is a factual issue. And I'll point out to the Court, there's been no real dispute that the AR-15 was developed -- originally developed to be designed to shoot automatically. It's like if somebody designs a Formula 1 race car designed to go over 200 miles an hour and then they put a governor on it so it only goes 60 miles an hour, that car was still designed to go 200 miles an hour. The same thing with the AR-15. It was designed, originally, its origin story is all about being designed to shoot automatically. Then, as our complaint alleges, it was modified so that -- sort of the equivalent of putting a governor on it. But then the manufacturers advertised it. The -- everybody knows by -- there's no real mistake here, everybody knows that this gun was modified to get around Congress' intent and allow ordinary citizens to have an automatic weapon.

Not only was it designed originally to shoot automatically, but the complaint alleges, and there's been no refutation by the defense, this gun can shoot automatically without any modification. There's a YouTube video with over a million views that shows people shooting it. If you hold it right, you can shoot multiple shots, auto- -- essentially automatically without a bump stock, without any modification.

Next, you can modify it -- and by the way, that's a fact issue that we've alleged; you have to accept as true for

purposes of this motion that this weapon can fire automatically without any modifications. Then, it can be modified with a shoelace, a belt loop, a bump stock, various mechanical parts can be put in and this is what's been marketed all along. This is no secret. The gun companies are intentionally trying to encourage people to believe that these weapons are designed to shoot automatically with just simple modifications. So, again, those are fact questions.

And I guess the last point, other than whatever questions you might have -- well, actually I'll make two quick points. The issue of causation and foreseeability. Those are fact questions as well. The Nevada pattern instructions, such as Product Liability Instruction 7.8, you know, all through the Nevada pattern instructions are foreseeability issues and, so, anyway, that's a fact issue.

Let me turn to the Nevada limitation of liability. What the defendants fail to do is -- or I should say what they're trying to do is read certain words out of that statute. As the Court's aware, the statute says, "No person has a cause of action against the manufacturer or distributor of any firearm or ammunition merely because the firearm," et cetera, "was discharged and proximately caused serious injury, damage, or death." They read out the word "merely" and then they read out the last sentence of that paragraph, "This subsection is declaratory and not in derogation of the common law."

We have not merely alleged that this gun is capable of hurting people and it did; we're alleging it's an illegal firearm. And I think the concession from the defense that their reading of the statute would mean there would be no liability if somebody sold a .50 caliber machine gun or grenade launcher or whatever sort of shows the problem with their position.

If you go to the legislative history, what's very clear is there was concern about frivolous lawsuits. Sort of like the old one of, you know, can you sue a knife manufacturer for product defect because the knife cut someone. They were concerned that suits like that were being brought and that they were costing the manufacturers money. And that's why they said, just the fact. That's why the word "merely" is in there, and that's why they say, "This subsection is declaratory and not in derogation of the common law." In other words, we're trying to put a stop to those frivolous suits, and we're not changing the common law. And if you look at the legislative history, everything I just said, I think, shows up very clearly. This was never intended to protect the sale of illegal firearms, or civil liability for the sale of illegal firearms.

THE COURT: All right. Mr. Friedman, let me --

MR. FRIEDMAN: So, other than addressing any questions you might have, Your Honor, those -- those are the points I

wanted to cover.

THE COURT: Thank you. Let me take you back to the PLCAA and ask you the following:

The PLCAA limits claims of negligent entrustment and negligence per se to claims against sellers. Here, it appears that the manufacturer defendants are not sellers. So, shouldn't I have to -- and I don't know that they qualify as dealers either. Aren't I required to dismiss the negligent entrustment and negligence per se claims against the manufacturers because of that barrier?

MR. FRIEDMAN: No, Your Honor, and I'm just flipping through my notes here to find the exact statute I wanted to cite to you. The -- the definition of seller, if you just give me a second here. . .

THE COURT: Section -- Section --

MR. FRIEDMAN: The definition. . .

THE COURT: Go ahead.

MR. FRIEDMAN: Excuse me?

THE COURT: Go ahead.

MR. FRIEDMAN: The definition of seller includes -- well, actually, let me just take a minute and find my exact note if I could so that I don't misspeak.

(Brief pause in proceedings).

MR. FRIEDMAN: Here we go.

So, the term seller, under PLCAA, includes importer or

dealer, or a person engaged in the business of selling ammunition as defined in 18 U.S.C. § 921(a).

So, the -- the answer to your question is we have pled causes of action that fall within PLCAA. There's a factual issue as to whether any or all of these defendants are sellers, importers, dealers, or engaged in selling ammunition. I think just from the fact that some are foreign corporations -- well, let me just say this. That requires factual development. If -- if -- I did not see anything in the brief where the defendants affirmatively said we are not importers, we are not dealers, we are not engaged in the business of selling ammunition and, so, the cite I wanted to give you was 18 U.S.C. § 921(a) and then Subparagraph 9, 10, and 11, and 17(A). So that's our answer to that question, Your Honor.

THE COURT: But you're suing them as manufacturers of a product, not as sellers or dealers of a product, so, does that change the analysis in this case?

MR. FRIEDMAN: Well, when you say we're suing them as manufacturers, I don't know -- well, I guess if you feel like we've not adequately pled -- the way I look at it is we have alleged facts which take this out of PLCAA, in other words, certain causes of action. We have alleged the defendants are responsible. In Paragraph 172 of our complaint, for example, we allege that it's illegal for a licensed manufacturer, importer, or dealer to sell a machine gun. So, it's -- you

know, the complaint is not artfully drafted to address that specific issue, but I think our Paragraph 172, read in context, we are alleging that they are importers or dealers as well.

If you were to dismiss the case based on that, we'd just ask for leave to amend to allege that they were importers and dealers. You know, I think a better way to handle that is to do some discovery and simply ask them, do you have an importer license? Do you have a dealer license? And they either will be or they won't be at which point they would be kept in or dismissed.

THE COURT: All right. Thank you.

Let me check my notes here to see if there was something else that I wanted to ask you that you didn't address.

(Brief pause in proceedings).

THE COURT: All right. I'm going to turn it back briefly to Mr. Renzulli for just a short rebuttal, if anything.

MR. RENZULLI: Thank you, Your Honor. It's Christopher Renzulli. I'm just going to add a couple things and then see if any of my co-defendants on the phone have to add anything, but number one, my first comment is every single source, every authoritative source has concluded that standard AR-15-type rifles are not machine guns as defined by the statute. Now, that's Congress, that's the Supreme Court in *Staples* against the United States. It was clear in that ruling

that AR-15 is a semiautomatic weapon.

If the AR-15 was a machine gun, like the plaintiffs are arguing here, there would have been no need for the Court to look in that case whether defendant's rifle was a machine gun based upon the modification of existing parts. And the Supreme Court, they had a comment in that ruling that all semiautomatic firearms -- I'm not just talking about long guns, I'm talking about handguns, et cetera -- can be convertible to full automatic. That doesn't mean that they're machine guns. It's absurd. So the Supreme Court has said this.

The Department of Justice, Your Honor, in *Gun Owners of America vs. Whitacre*, they also argued that AR-15 rifles, on which the bump stocks are designed to be installed, are not machine guns.

So I've got the ATF, I've got the Department of Justice, I've got the Supreme Court, and I've got Congress all reaching the same conclusion, that AR-15-type rifles are not machine guns.

And with regard to the assault weapons ban, it doesn't matter what kind of features are on there. Congress said you can't sell them. Well, why would they have to do that if the manufacturers and sellers weren't able to sell them originally, if they were machine guns? Why would they need that? It's silly.

THE COURT: Let me interrupt you briefly. Let me

interrupt you.

MR. RENZULLI: I just --

THE COURT: You mentioned *Staples* and the holding there. The Seventh Circuit, in *United States vs. Olofson* -- O-l-o-f-s-o-n -- at 563 F.3d 652, the pinpoint cite is 657, the Seventh Circuit held that *Staples* was really a narrow holding that just dealt with mens rea as an element of the crime and that it shouldn't be interpreted as going further to take the position that you do. Address that for me.

MR. RENZULLI: No court, anywhere, no court in the country, nowhere does anyone adopt the position that the plaintiffs are asking Your Honor to adopt here today, that AR-15-type rifles are full automatic machine guns as defined by the statute. There is zero support for that, and none has been presented here today.

THE COURT: All right. Thank you. I interrupted. I didn't -- go ahead.

MR. RENZULLI: Yeah. At all times throughout this lawsuit bump stock installed on the rifles, they were legal. They were reclassified some time after the shooting, and, Your Honor, it's -- if -- if Congress and the Supreme Court and the legislatures and everyone in America didn't know that these were machine guns, then how can there be knowing violations of any statute? If all those entities didn't know, then how could the manufacturers and sellers have violated these statutes?

So I turn it over to my folks -- co-defendants on the phone if anyone has anything to add.

THE COURT: And I'll interrupt. If anybody --

MR. BYRNE: Your Honor, this is --

THE COURT: Wait. Wait. Wait.

MR. BYRNE: Your Honor, Pat Byrne.

THE COURT: Wait. Wait. Wait. I was just going to say, if anybody is going to chime in, please say your name first. Mr. Byrne, I think I heard you.

MR. BYRNE: Thank you, Your Honor. Really quick.

The -- because, again, handling just the Nevada specific issue, the Nevada immunity statute, the plaintiffs' reading, as we point this out in our reply, would render this immunity meaningless if you just -- that the "merely because" language, if you plead more, it takes it out of the statute. You would always have to plead more than that the -- that the firearm in and of itself was capable of serious injury in order to plead state law damages. And, so, it would --

THE COURT: Wait. Wait.

MR. BYRNE: -- essentially make the immunity statute meaningless, Your Honor.

THE COURT: Hold on, Mr. Byrne. Hold on. Hold on. We -- you broke up there for just a second. You had -- you said, you would always have to plead more, that the firearm in and of itself was capable of serious injury and then we lost

you.

MR. BYRNE: Yeah, you'd have to plead more than just that language in order to assert a state law claim. So -- because there is no state law claim for that. So the -- the plaintiffs' reading of the statute would make the statute meaningless.

It would also not require the legislature to provide an exception. There would be no need for the product liability exception, the only exception under Nevada statute because, again, by pleading that the gun itself was defective, you would be pleading more than it was merely capable of causing serious injury.

And, finally, Your Honor, the legislative history -- and we cite to it, the plaintiffs don't, we cite to it extensively -- is inconsistent with our interpretation, the broad interpretation and the plain meaning. When you have Senator Robinson saying that "a gun in and of itself is not to be determined as at fault in a case of death or injury unless the weapon is faulty in design, materials, or workmanship, the liability would be on the handler of the gun." That -- that's the language, and that's the clear intent. And, so, they've not pled product liability -- the product liability exception so under the Nevada statute, there is no state law claim.

THE COURT: All right. Anyone else for the defendants?

MR. WEBB: Your Honor, this is Camden Webb. I just want to, if I may, briefly, emphasize a point that Mr. Renzulli reached at the end of his argument and I wanted to urge the Court to focus again on the exception, the narrow window through which these claims have to make it, because the statute does say "knowingly violated." And I do realize that in a -- if you have a pleading deficiency, oftentimes an amendment would be allowed. I don't think this is an area where we can have an amendment because I think that both sides would agree that we are looking at the potential, as urged by the plaintiff, of an interpretation that as after the fact these are declared machine guns. Mr. Renzulli made the very fine point that I'd like to reemphasize. Under the *Twombly* standard, there are no facts pled in this complaint that lay out a plausible theory that any one of these defendants knew that this was a machine gun. And I understand the logical chain is that these are machine guns and therefore that's the violation of a statute that provides the exception, but you have to knowingly violate it. So, Your Honor, I would just urge the Court to very much focus on that aspect of the case and I believe that a dismissal is warranted because we have no facts that would indicate knowingly violation -- a knowing violation.

THE COURT: All right. Mr. Webb, since you stepped up to the plate, and I don't know if you can answer this question

or you need to defer to Mr. Renzulli, but the cases that you all cite to or maybe I just don't fully understand the timing of this, but it seems to me that the cases and the authorities that you're relying upon predate the emergence of bump stocks and the defendants' awareness of them. And, so, although there might be cases from a while ago supporting your position, does that lose some of its authority or power because since then, bump stocks and the use of them to convert weapons has come up and now this is a -- sort of a newer area of the law. So I don't know who -- whoever is going to address that, say your name first.

MR. WEBB: Sure, Camden Webb, Your Honor.

I think we've got a very -- a very direct and precise answer to that, which are the two completely different ATF rulings on the issue. At one point they said bump stocks were lawful. After this -- frankly, after this incident itself, they said that they were not. So going into October 1st, 2017, everyone understood the ATF's interpretation to mean that a bump stock was not a machine gun. Certainly an AR-15 to which that bump stock was attached is not a machine gun. So, that's where we were in October 2017 and, so, it's extraordinarily difficult for me to square that with a federal statute that uses that word "knowingly," which we see in a lot of federal statutes and we really have an understanding of what that means is if -- if you've got the agency in charge of interpreting a

certain area of the law saying this is not a machine gun, how could you then knowingly violate a statute that says don't sell a machine gun.

So, I think, Your Honor, you're right, a lot of this dates back to *Staples* in 1994 and even further back in the '80s or the ATF's interpretation, but when we have the ATF saying that it is -- bump stock itself is lawful in an interpretation, and that is where we stand on October 1st, 2017, then after the fact they actually change that interpretation, I think sitting there on October 1st, 2017, we do not have a knowing violation and cannot have a knowing violation under any plausible theory of pleading.

THE COURT: All right. Mr. Renzulli or anyone else wanting to add in, state your name first.

MR. RENZULLI: This is Christopher Renzulli and I just want to add to what counsel just said, he's a hundred percent right, but what's even -- what's also important is that the bump stock itself was found to be a machine gun. There was no comment, there was no ruling that AR-15s, which if you change out the butt stock and put a bump stock on, that the AR-15s themselves, without it, are machine guns, and that's exactly what the plaintiffs are saying in this case. AR-15s alone are machine guns. That's important.

THE COURT: Thank you, Mr. Renzulli.

All right. Let me -- what I'm going to do -- I'm

sorry, somebody else.

MR. FRIEDMAN: Your Honor, this is -- yeah, this is Rick Friedman. I wonder if I might be able to address the knowing issue that you just had the exchange with counsel about.

THE COURT: I'll give you 60 seconds.

MR. FRIEDMAN: All right. I would ask the Court to read the case of *Bryan vs. United States*, B-r-y-a-n v. United States, 524 U.S. 184 for the proposition that knowing doesn't mean that they had to know that the -- what this -- that the legal definition made the gun illegal and, in fact, the *Bryan* case cites the *Staples* case for that proposition, and there are pattern instructions in this circuit. The question of knowing means, in essence -- and I'm oversimplifying for brevity -- but, in essence, the concept of knowingly means you have to know that the gun is easily convertible. You don't have to know that that's illegal. So, the -- and -- I mean, there's a whole bunch of legal arguments that are tied into this concept but for now, I'd just ask you to read that case if you're inclined to accept the defendants' argument.

THE COURT: All right. Thank you.

Let me -- let me state for the record, I guess, to make sure that my courtroom deputy has it down, I'm going to deny the Motion to Remand. I'll not issue a further decision on that. The record that I've put on -- the statements I've

put on the record constitute my decision.

With regard to the Motion to Dismiss, I'm going to take that under advisement. I'm going to issue a written decision on that. But let me ask a follow-up question to each of you. I am struggling with N.R.S. 41.131 and given that it's an important policy issue at stake -- I should say it's an important Nevada policy issue at stake -- it appears that this interpretation of the statute is a matter of first impression. I'm considering certifying to the Supreme Court of the State of Nevada the interpretation of that statute. Because I don't want to make Nevada law. And the Nevada courts should do that.

Does either side have a strong opinion one way or another on that issue?

What I would probably do is try to draft the certified question or questions and -- or seek input from the parties, or draft it and then run that past the parties to make sure that the question is, in fact, certifiable to the Supreme Court of Nevada under its rules.

Mr. Friedman, what's the plaintiffs' position on that?

MR. FRIEDMAN: We'd have no objection to you doing that, Your Honor. I can see why that's a tempting way to go. Our belief is that if you look at the legislative history, the language of the statute, it pretty clearly does not, it was never intended to immunize the sale of illegal guns and, so, we think you've got enough to rule in our favor. I think the

Nevada Supreme Court will do the same thing, but -- so I -- I'm not fond of the delay, frankly, but -- so, anyway, that's my response.

THE COURT: And Mr. Friedman, let me follow up with you then. With regard to the last sentence in Subsection 1 of the statute saying that this subsection is declaratory and not in derogation of the common law, what do you think that means or does here?

MR. FRIEDMAN: Well, I think what it means is we're -- we, as the legislature, are trying to make a statement that simply the fact that a gun can kill somebody doesn't make it -- doesn't create a cause of action. Sort of like the knife, the fact that a knife can hurt somebody doesn't make it a defective product. So they're trying to say, look -- and I think the legislative history's fairly clear on this. There are these frivolous suits around the country where people are suing just saying any gun is defective because it can kill somebody, we need to declare that, no, that's not enough under -- you know, in Nevada and -- but, you know, we're not changing the common laws so you can win or not win a case, just these frivolous cases -- you know, I -- I think in practical terms what was going on is the NRA was pushing them hard to pass something like this so they did, but I -- it's pretty clear from the history that -- especially including the words "merely," that they are trying to immunize manufacturers and dealers from the

kind of argument that back in those days, you know, with tort reform and all, they were getting these parade of horribles of these ridiculous cases. So they're trying to exclude those ridiculous cases, and I think that's the reading of the plain language of the statute as well as the legislative history.

THE COURT: All right. Thank you, Mr. Friedman.

Mr. Renzulli, as the quarterback for the defendants, I'm going to turn to you. Is this the -- the issue of certification, is that something you want Mr. Byrne to address since he's been covering the Nevada statute, or who's going to address that?

MR. RENZULLI: Yes, Mr. Byrne can address that but, Your Honor, I don't know that we would even need to go there based upon the strong immunity provided by the PLCAA. And if the Court would dismiss it based upon the PLCAA, you don't have to address -- perhaps you don't have to address that issue. I think the case law, the interpretation by the various agencies, the Supreme Court, DOJ, ATF, et cetera, all reach the same conclusion, AR-15s are not machine guns.

As far as the Nevada statute, I'll let Mr. Byrne answer that.

THE COURT: All right. Thank you.

Mr. Byrne.

MR. BYRNE: Well, Your Honor, thank you.

The first thing I was going to say is what

Mr. Renzulli just said, which is we don't have to get there unless the first question is answered that you think there is a claim under PLCAA. But in terms of if it's going to rest ultimately on the Nevada legal issue, I think certification makes sense because ultimately it makes more sense for the Nevada Supreme Court to address it than the Ninth Circuit on an appeal.

To answer the question -- Court's question, it's a little frustrating, Your Honor, because, you know, we took the time of putting in the argument pretty extensively, including the legislative history and then, of course, we also included separately our own reply and the plaintiffs took a full whopping paragraph I believe in their opposition to address this argument. They didn't give it any attention, Your Honor, and they certainly didn't address the legislative history, which we did address. So, to the extent the Court would like additional briefing now that the plaintiffs have decided to put their attention on it, we're certainly open to that. We're also open to a certification. We believe the language is -- the declaratory language is referring to the fact that the statute should be liberally construed and we think the legislative history is inconsistent with that language. And this was not an attempt to just address frivolous claims; it was attempted -- an attempt to address this concept that, you know, when guns are being used to do what guns do, there will

be immunity to the gun manufacturer. And that's exactly what we have here, Your Honor. And the one exception is the product liability exception. And they've not pled it. And it makes Nevada unique because in other jurisdictions, as we point out, the violation of state or federal law exception is included. It's not in Nevada, and that wasn't an accident, Your Honor. But again, if the Court is ultimately going to rest this issue on the Nevada statute, then a certification makes sense.

THE COURT: All right. Then let me -- Mr. Byrne, staying with you and, please, this is going to sound bad, it's absolutely not meant as a criticism, I'm -- this next question, I want to see if you can answer it in about 60 seconds or less, not because you're verbose but because I'm running out of time. The question is, that last sentence in 41.131(1) that says, "This subsection is declaratory and not in derogation of the common law," what does that sentence mean? Is it simply -- I mean, one interpretation is this is just our statement of a policy but it doesn't change anything, or does it have some other meaning?

MR. BOHMAN: Your Honor, could -- this is V.R. Bohman. Could I interject briefly and respond?

THE COURT: Who is this? Mr. Bohman, yes, go ahead.

MR. BOHMAN: This is V.R. Bohman on behalf of Daniel Defense and Sportsman's and co-counsel with Mr. Byrne.

So the -- so a declaratory statute is actually a term

of art. The purpose of a declaratory statute is twofold. First, it makes clear what the common law is but, secondly, when a statute is -- is in derogation of the common law, it's entitled to a strict construction. That entire second sentence appears to be aimed at ensuring that there is a liberal construction applied to the statute, that it's not a derogation, therefore not -- should not be strictly construed, but also Nevada has a public policy that these sorts of protective statutes are entitled to a liberal construction.

THE COURT: All right. Thank you, Mr. Bohman. I appreciate that.

All right. I'm going to, as I said, take this under advisement. I'll issue a decision as quick as I reasonably can given the circumstances we're all operating under.

I thank you all. This was well-briefed and well-argued and I'll consider the matter submitted.

Thank you all, and best wishes to everyone on getting through this national crisis.

We're in recess on this matter. We're going to dis- -- we're in recess on the matter. I've got another telephonic hearing coming up so I'm going to keep the phone open but everyone else can get off.

Thank you very much.

(Proceedings adjourned at 10:46 a.m.)

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COURT REPORTER'S CERTIFICATE

I, Heather K. Newman, Official Court Reporter, United States District Court, District of Nevada, Las Vegas, Nevada, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true, complete, and correct transcript of the proceedings had in connection with the above-entitled matter.

DATED: 6-21-2020

/s/ Heather K. Newman
Heather K. Newman, CCR #774
OFFICIAL FEDERAL REPORTER

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES PARSONS, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CAROLYN LEE PARSONS, *et al.*,

Plaintiffs

v.

COLT'S MANUFACTURING COMPANY, LLC, *et al.*,

Defendants

Case No.: 2:19-cv-01189-APG-EJY

Order Granting in Part Defendants' Motion to Dismiss

[ECF No. 80]

Carrie Parsons was killed in the October 1, 2017 mass shooting in Las Vegas. Her parents, plaintiffs James Parsons and Ann-Marie Parsons, sue the manufacturers[1] (Manufacturers) and dealers[2] (Dealers) that made and sold the AR-15 rifles used in the shooting. The Parsons assert claims for wrongful death, negligence per se, and negligent entrustment. The wrongful death and negligence per se claims are premised on the Parsons' contention that the defendants manufactured and sold firearms that were designed to shoot automatically, rendering them illegal machine guns under federal and Nevada law.

The defendants move to dismiss the Parsons' complaint, arguing that their claims are barred by the Protection of Lawful Commerce in Arms Act (PLCAA), Nevada Revised Statutes (NRS) § 41.131, and common-law causation principles. I dismiss the Parsons' negligent entrustment and negligence per se claims without leave to amend because they fail to state a

[1] Colt's Manufacturing Company LLC, Colt Defense LLC, Daniel Defense Inc., Patriot Ordnance Factory, FN America, Noveske Rifleworks LLC, Christensen Arms, Lewis Machine & Tool Company, and LWRC International LLC.

[2] Discount Firearms and Ammo LLC, Sportsman's Warehouse, and Guns and Guitars Inc.

cognizable claim. The Parsons plead a wrongful death claim that is not barred by the PLCAA or common-law causation principles, but I will certify questions regarding the proper interpretation of NRS § 41.131 to the Supreme Court of Nevada.

I. BACKGROUND[3]

Congress enacted the National Firearms Act in 1934 to combat an important national problem: the use of machine guns, like the so-called Tommy Gun, in gang shootings. ECF No. 1 at 15. The Act imposed a 100% tax on machine guns, which were defined as firearms with the ability to fire "more than one shot, without manual reloading, by a single function of the trigger." *Id.* at 16. Congress later banned machine guns outright and expanded their definition to include, among other things, conversion kits enabling semi-automatic rifles to fire automatically. *Id.* at 19.

The AR-15 rifle was designed as a military weapon called the M-16 and first saw use in the Vietnam War. *Id.* at 17-18. The M-16's "selective fire" feature enabled soldiers to choose between fully automatic, semi-automatic, and three-round burst firing. *Id.* at 17. As the Vietnam War wound down, AR-15 manufacturers turned to the civilian market. *Id.* at 18. Rather than design a new weapon, the manufacturers removed the selector switch from the AR-15. *Id.* Redesign was cost-prohibitive, while removal of the selector switch was cost-effective and allowed marketing of the weapon's military bona fides. *Id.* AR-15 exterior components like the stock, barrel, and rail system were preserved as removeable and interchangeable with M-16 parts (a feature the firearm industry calls "modularity"). *Id.* at 18-19. The Manufacturers named in this case emphasized the AR-15's military bona fides or modularity in their marketing. *Id.* at 23–25.

[3] The facts set forth below reflect the Parsons' allegations. They are not factual findings.

Over the past decade, new devices called "bump stocks" have been developed to enable reliable and continuous automatic fire by capitalizing on the AR-15's recoil and removable stock. *Id.* at 21. An AR-15 equipped with a bump stock will continually fire rounds with a single trigger pull, replicating automatic fire. *Id.* Videos available on the internet show the ease of installing a bump stock, and the Slide Fire bump stock can be installed with "nothing more than a screwdriver." *Id.* at 22.

Despite their knowledge of the availability of bump stocks, the Manufacturers continued to manufacture AR-15s with a stock that can be easily removed and replaced. *Id.* Slide Fire advertised, using the Colt trademark, its bump stock's compatibility with Colt's AR-15. *Id.* at 24. As the result of an agreement between Colt and Slide Fire, a Colt Competition AR-15 was sold with a Slide Fire bump stock already "integrated."[4] *Id.* at 25. Christensen Arms' AR-15 manual warned users that "any damage or malfunction due to fully automatic operation and any other modification to this firearm" voids its warranties. *Id.*

Between November 23, 2016 and July 5, 2017, the October 1 shooter[5] purchased from the Dealers twelve AR-15 rifles made by the Manufacturers. *Id.* at 23-25. The shooter removed the stocks from the weapons and replaced them with bump stocks. *Id.* at 26. On October 1, the shooter used the AR-15s equipped with bump stocks to fire 1,049 rounds in less than ten minutes, killing 58 people and injuring hundreds. *Id.* at 28. One of the rounds hit Carrie Parsons in the shoulder. *Id.* Carrie was transported to the hospital before succumbing to her wound. *Id.* at 29.

[4] The Parsons do not allege that this type of Colt AR-15 was used in the October 1 shooting.

[5] I will not name him.

The Parsons assert three causes of action against the defendants: (1) wrongful death under NRS § 41.085 caused by the defendants' design, manufacture, and sale of AR-15s that were capable of automatic fire through simple modification in knowing violation of 18 U.S.C. § 922(b)(4) and NRS § 202.350(1)(b); (2) negligence per se, premised on violations of the same statutes; and (3) negligent entrustment. *Id.* at 35. The defendants move to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that the claims are barred by the PLCAA, NRS § 41.131, and general causation principles. ECF No. 80. I held oral argument on this motion and took it under advisement. ECF No. 97.

II. DISCUSSION

In considering a motion to dismiss under Rule 12(b)(6), "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, I do not assume the truth of legal conclusions merely because they are cast in the form of factual allegations. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). A plaintiff must make sufficient factual allegations to establish a plausible entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Such allegations must amount to "more than labels and conclusions, [or] a formulaic recitation of the elements of a cause of action." *Id.* at 555. "As a general rule, [d]ismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by any amendment." *Sonoma Cty. Ass'n of Retired Emps. v. Sonoma Cty.*, 708 F.3d 1109, 1118 (9th Cir. 2013) (quotation omitted).

A. The PLCAA and its Exceptions

The PLCAA provides that a "qualified civil liability action may not be brought in any Federal or state court." 15 U.S.C. § 7902(a).

> The term "qualified civil liability action" means a civil action or proceeding . . . brought by any person against a manufacturer or seller of a [firearm] . . . for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . .

Id. §§ 7903(4)-(5)(A). However, this definition is subject to six exceptions, including: (1) "an action brought against a seller for negligent entrustment or negligence per se" and (2) "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought. . . ." *Id.* §§ 7903(5)(A)(ii)-(iii).

A seller is one who is "engaged in the business" as a firearms dealer and licensed to "engage in business" as a firearms dealer. *Id.* § 7903(6)(b). The term "manufacturer" is defined separately. *Id.* § 7903(2).

The Parsons have not alleged facts showing that the Manufacturers are sellers within the PLCAA's meaning. I therefore dismiss the Parsons' negligent entrustment and negligent per se claims against the Manufacturers on this basis. I deny leave to amend because, as discussed below, the Parsons cannot allege plausible negligence per se or negligent entrustment claims even if they could allege facts showing that the Manufacturers are sellers.

B. Negligent Entrustment

The PLCAA permits negligent entrustment actions against sellers for "the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." *Id.* § 7903(5)(b). Under Nevada law, a "negligent entrustment theory may apply where one who has the right to control [an instrumentality] permits another to use it in circumstances where he

knows or should know that such use may create an unreasonable risk of harm to others, [but] it does not apply when the right to control is absent." *Mills v. Cont'l Parking Corp.*, 475 P.2d 673, 674 (Nev. 1970). Although Nevada negligent entrustment caselaw relates solely to motor vehicles, Nevada courts have not foreclosed application of the doctrine outside of that context. Indeed, the Restatement (Second) of Torts § 390 extends negligent entrustment to "chattels."

The Parsons' state law negligent-entrustment claim fails because they do not allege that the defendants had a right to control the shooter's AR-15s after they manufactured and sold them. In any event, the focus of the negligent entrustment tort at common law and under the PLCAA definition is on the entrustor's knowledge of the entrustee, not the instrumentality entrusted. The Connecticut Supreme Court recently affirmed dismissal of a similar negligent entrustment claim against gun manufacturer Bushmaster for this reason. *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 282-283 (Conn. 2019). The Parsons plead no facts showing that the Manufacturers or Dealers knew that permitting the shooter to use an AR-15 would create an unreasonable risk of harm. So I dismiss the Parsons' negligent entrustment claim against both the Manufacturers and Dealers, without leave to amend because the Parsons are not pursuing a cognizable negligent entrustment claim.

C. Negligence Per Se

The PLCAA allows claims against sellers for negligence per se but it does not define negligence per se. 15 U.S.C. §7903(5)(A)(ii). Under Nevada law, "violation of a statute may constitute negligence per se only if the injured party belongs to the class of persons that the statute was intended to protect, and the injury is of the type that the statute was intended to prevent." *Sagebrush Ltd. v. Carson City*, 660 P.2d 1013, 1015 (Nev. 1983). The Supreme Court of Nevada has twice rejected negligence per se claims premised on violations of alcohol laws,

reasoning that "[i]n the absence of legislative intent to impose civil liability, a violation of a penal statute is not negligence per se." *Hinegardner v. Marcor Resorts, L.P.V.*, 844 P.2d 800, 802 (Nev. 1992); *Bell v. Alpha Tau Omega Fraternity, Eta Epsilon Chapter*, 642 P.2d 161, 162 (Nev. 1982). In *Hinegardner*, the court inferred from the legislature's silence that it did not intend to impose civil liability. 844 P.2d at 802.

These decisions cited and reaffirmed the Supreme Court of Nevada's decision in *Hamm v. Carson City Nugget, Inc.*, which rejected a negligence per se claim premised on violations of alcohol laws. The *Hamm* court reasoned that the legislature made clear its intention not to extend civil liability because it provided for civil liability in the immediately preceding section of the statute. 450 P.2d 358, 360 (Nev. 1969). The *Hamm* court recognized that "it had recognized that a violation of a penal statute is negligence per se" in prior cases, but "decline[d] to so rule in this case since to do so would subvert the apparent legislative intention." *Id.*

Given these cases, one could argue either way: that there is a presumption that a violation of a penal statute is not negligent per se absent legislative intent, or that there is a presumption that a violation of a penal statute is negligent per se absent legislative intent to the contrary. But federal courts applying Nevada law have opted for the former, and I do the same here. *See Conboy v. Wynn Las Vegas, LLC*, No. 2:11-cv-01649-JCM-CWH, 2012 WL 5511616, at *3 (D. Nev. Nov. 14, 2012); *Mazzeo v. Gibbons*, 649 F. Supp. 2d 1182, 1200 (D. Nev. 2009); *Harlow v. LSI Title Agency*, Inc., No. 2:11-cv-01775-PMP-VCF, 2012 WL 5425722, at *3 (D. Nev. Nov. 6, 2012).

The Parsons' negligence per se claim is premised on the defendants' violations of federal and state prohibitions of machine guns. 18 U.S.C. § 922(b)(4); NRS § 202.350(1)(b). The Parsons do not provide, and I have not found, evidence of either Congress's or the Nevada

legislature's intent to impose civil liability along with those prohibitions. So I dismiss with prejudice the Parsons' negligence per se claim against the Manufacturers and Dealers.

D. Wrongful Death

1. PLCAA Exception

The PLCAA permits "action[s] in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii). The Parsons' wrongful death claim is premised on the defendants' violations of 18 U.S.C. § 922(b)(4) and NRS § 202.350(1)(b), which prohibit firearms manufacturers and dealers from selling "machinegun[s]." Machine gun is defined as:

> any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845. Nevada's definition of "machine gun" mirrors the federal definition. NRS § 202.253. The ATF has defined "designed to shoot" to include "those weapons which have not previously functioned as machineguns but possess design features which facilitate full automatic fire by simple modification or elimination of existing component parts." ATF Ruling 82-2.

The Parsons allege that the defendants knowingly violated 18 U.S.C. § 922(b)(4) and NRS § 202.350(1)(b) by manufacturing and selling firearms that were "designed to shoot . . . automatically more than one shot, without manual reloading by a single function of the trigger." 26 U.S.C. § 5845; *see also* NRS § 202.253. And they allege that AR-15s are designed to shoot automatically because they possess a design feature—an interchangeable stock—that facilitates

full automatic fire by simple modification or elimination of the existing stock. The Parsons plead numerous facts suggesting that this claim is plausible, including the defendants' use of stocks that can be easily replaced with bump stocks, the defendants' marketing of the AR-15's modularity and military bona fides, the defendants' knowledge that commercially-available bump stocks enabled AR-15s to fire automatically, Colt's agreement with Slide Fire, and Christensen Arms' recognition that the AR-15 could be modified to fire automatically. The defendants raise a number of arguments against this conclusion.

The defendants first argue that in *Staples v. United States*, the Supreme Court of the United States held that semi-automatic rifles are not machine guns simply because they are "readily convertible" to machine guns. 511 U.S. 600, 612 n.6 (1994). But the Court in that case was not considering the definition of a machine gun but rather whether 26 U.S.C. § 5861(d) required proof that the defendant knew the rifle he possessed had characteristics that made it a machine gun. *Id.* at 602; *see also United States v. Olofson*, 563 F.3d 652, 657 (7th Cir. 2009) ("The narrow holding from *Staples* is that mens rea was an element of the crime in question—i.e., that the government had to prove the defendant's knowledge of the features of the weapon (including automatic firing capability) that brought it within the proscriptive purview of [§ 5861(d)]."). The Supreme Court did not consider the meaning of "designed to shoot" or commercially-available parts facilitating rapid conversion to machine guns. Indeed, the term "readily convertible" does not appear in the definition of a machine gun. 26 U.S.C. § 5845. And passing references distinguishing semi-automatic rifles from automatic weapons are dicta. So *Staples* does not require dismissal of this case.

The defendants next point to three ATF rulings.[6] First, they point to the definition of "designed to shoot" in ATF Ruling 82-2 as weapons "possess[ing] design features which facilitate full automatic fire by simple modification or elimination of existing component parts." They argue that because installation of a bump stock involves elimination and replacement of an existing component part, the existence of bump stocks do not mean that AR-15s are "designed to shoot" automatically. The Parsons argue that the definition of "designed to shoot" is satisfied because installation of a bump stock involves elimination of the existing stock. For purposes of a motion to dismiss, this allegation supports a plausible claim for relief.

ATF Ruling 81-4 addressed whether an AR-15 Auto Sear conversion kit consisting of a "sear mounting body, sear, return spring, and pivot pin" was "a combination of parts designed and intended for use in converting a weapon . . . ." And ATF Ruling 2006-2 addressed whether an early bump stock device was "a part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun." So the ATF was considering only whether the third-party components themselves were machine guns. The ATF did not consider whether the weapons these parts could be installed in were "designed to shoot" automatically. Passing references to the weapons as semi-automatic rifles prior to conversion do not support the defendants' contention that as a matter of law the existence of third-party components cannot transform a semi-automatic rifle into a machine gun.

[6] The parties do not fully address what weight should be accorded to the ATF rulings, which interpret the term "designed to shoot" in statutory and regulatory definitions of machine guns. Other courts have cited them, but do not address whether they are entitled to deference. *See United States v. TRW Rifle 7.62X51mm Caliber, One Model 14 Serial 593006*, 447 F.3d 686, 688 (9th Cir. 2006). Because it does not appear the rulings were the product of notice and comment proceedings or are entitled to so-called *Auer* deference, I give deference to them only insofar as they have the "power to persuade." *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019).

The defendants make a number of arguments that ultimately address whether they knowingly violated 18 U.S.C. § 922(b)(4) and NRS § 202.350(1)(b), including that: (1) bump stocks were legal at all relevant times during the lawsuit, and it was not until after the shooting that the ATF reclassified bump stocks as a machine gun; (2) if semi-automatic rifles like the AR-15 are machine guns, Congress and the states would not have needed to ban them outright in various assault weapons bans; and (3) the Department of Justice has not prosecuted the defendants for illegally manufacturing and selling AR-15s. But these arguments ignore the Parsons' well-pleaded allegations that (1) bump stocks have emerged only in the past decade and (2) the defendants knew these bump stocks allowed their AR-15s to fire automatically through simple modification. So these arguments do not merit dismissal for failure to state a claim.

The defendants argue in reply, and repeatedly stated in oral argument, that the Parsons are asking me to "make hundreds of thousands of United States citizens who lawfully manufactured, sold, purchased, and/or possessed AR-type rifles felons overnight." ECF No. 92 at 2. The Parsons' allegations are narrower. They allege that these defendants knowingly manufactured and sold weapons "designed to shoot" automatically because they were aware their AR-15s could be easily modified with bump stocks to do so. The Parsons have alleged a wrongful death claim that is not precluded by the PLCAA.

2. Causation

"[W]hile it is true that criminal or tortious third-party conduct typically severs the chain of proximate causation between a plaintiff and a defendant, the chain remains unbroken when the third party's intervening intentional act is reasonably foreseeable." *Price v. Blaine Kern Artista, Inc.*, 893 P.2d 367, 370 (Nev. 1995). Under Nevada law, "issues of negligence and proximate

cause are usually factual issues to be determined by the trier of fact." *Frances v. Plaza Pacific Equities, Inc.*, 847 P.2d 722, 724 (Nev. 1993).

Daniel Defense and Sportsman's Warehouse point to the Supreme Court of Nevada's decision in *Thomas v. Bokelman* to argue that the Parsons must allege the defendants had knowledge of the shooter's propensity for violence to establish causation. ECF No. 93 at 7 (citing 462 P.2d 1020 (Nev. 1970)). In that case, the court held that it was not foreseeable that a convicted rapist who had access to an unsecured rifle would murder someone because "[t]he risk, if any, was that [t]he rapist might rape someone." *Thomas*, 462 P.2d at 1022. However, a reasonable fact finder might conclude that the risk of manufacturing and selling AR-15s that could be easily modified to fire automatically was that a bad actor might do exactly that and use them in a mass shooting. So *Thomas* does not require dismissal.

The defendants argue that the shooter's criminal conduct severs the chain of proximate causation. But the Parsons plead facts from which a reasonable fact finder could conclude that the shooter's use of an AR-15 modified to shoot automatically in a mass shooting was reasonably foreseeable. The danger of machine guns has been well known since the 1930s, when their use in gang shootings prompted the National Firearms Act. Machine guns are illegal because they can kill or injure large numbers of people in a short period of time. And the Parsons plead facts showing that the defendants' AR-15s could be easily modified with bump stocks to shoot automatically, which the shooter did with tragic results. So the Parsons have sufficiently alleged causation.

3. NRS § 41.131

Under Nevada law, "[n]o person has a cause of action against the manufacturer or distributor of any firearm or ammunition merely because the firearm or ammunition was capable

of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death." NRS § 41.131. The statute states it is "declaratory and not in derogation of the common law" and includes an exception for actions based on production or design defects. *Id.*

The defendants argue this statute bars the wrongful death claim because the Parsons do not allege that the AR-15s used in the October 1 shooting were defective. The Parsons respond that their suit falls outside of § 41.131's reach because their central allegation is that the defendants violated federal and Nevada law by manufacturing and selling illegal machine guns. Thus, they contend, they are not suing the defendants "merely" because the firearms were capable of causing—and caused—their daughter's death.

The text and legislative history are open to multiple reasonable interpretations. The text appears to provide broad immunity to firearms manufacturers and distributors, but the term "merely" must be given meaning. Similarly, the defendants point to one senator's statement that it was the bill's sponsor's intent "to not have a firearms manufacturer sued by his heirs if he were murdered." Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. Apr. 17, 1985). But the sponsor of the bill began the discussion by noting that "[s]uits are being brought such as a person injured in a hunting accident saying the person who sold the gun and the manufacturer were at fault." *Id.*

Section 41.131 was enacted in 1985, but Nevada courts have yet to interpret it. The parties have not identified, and I have not found, a federal or state decision that has even cited it. I would ordinarily predict how the Supreme Court of Nevada would interpret the statute. *See Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007). But this case presents important public policy concerns for the state of Nevada that should be addressed by the Nevada court. I am

particularly concerned by the defendants' concession in oral argument that under their interpretation § 41.131 would immunize even a defendant that manufactured and sold Tommy guns or M-16 rifles to civilians. The Supreme Court of Nevada should be allowed to interpret § 41.131 on first impression. *See Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008) ("Certification of open questions of state law to the state supreme court can in the long run save time, energy, and resources and helps build a cooperative judicial federalism, but its use in a given case rests in the sound discretion of the federal court." (quotations and alterations omitted)). So I will certify by separate order the following questions to the Supreme Court of Nevada:

- Does a plaintiff asserting a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions have "a cause of action against the manufacturer or distributor of any firearm . . . merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death[,]" under Nevada Revised Statutes § 41.131?

- Does Nevada Revised Statutes § 41.131 allow a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions because the statute is "declaratory and not in derogation of the common law"?

In the interim, I deny this portion of the defendants' motion to dismiss without prejudice to refiling it within 30 days of the Supreme Court of Nevada's decision.

III. CONCLUSION

I THEREFORE ORDER that the defendants' **motion to dismiss (ECF No. 80) is GRANTED in part and DENIED in part.** The plaintiffs' negligent entrustment and negligence per se claims are dismissed without leave to amend. The motion to dismiss the

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plaintiffs' wrongful death claim is denied without prejudice to refiling it within 30 days of the Supreme Court of Nevada's decision on the certified questions.

DATED this 10th day of April, 2020.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES PARSONS, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CAROLYN LEE PARSONS, *et al.*, Plaintiffs v. COLT'S MANUFACTURING COMPANY, LLC, *et al.*, Defendants	Case No.: 2:19-cv-01189-APG-EJY **Order Certifying Questions to the Supreme Court of Nevada**

I respectfully certify to the Supreme Court of Nevada the following two questions of law that may be determinative of matters before me and as to which there is no clearly controlling precedent in the decisions of the Supreme Court of Nevada or the Nevada Court of Appeals:

- Does a plaintiff asserting a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions have "a cause of action against the manufacturer or distributor of any firearm . . . merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death[,]" under Nevada Revised Statutes § 41.131?

- Does Nevada Revised Statutes § 41.131 allow a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions because the statute is "declaratory and not in derogation of the common law"?

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I. BACKGROUND

Carrie Parsons was killed in the October 1, 2017 mass shooting in Las Vegas. Her parents, plaintiffs James Parsons and Ann-Marie Parsons, sue the manufacturers[1] (Manufacturers) and dealers[2] (Dealers) that made and sold the AR-15 rifles used in the shooting.

The Parsons filed suit in the Eighth Judicial District Court for Clark County, Nevada on July 2, 2019, asserting claims for wrongful death, negligence per se, and negligent entrustment. The defendants removed the case to the United States District Court for the District of Nevada. The defendants moved to dismiss the Parsons' complaint, arguing that their claims are barred by the Protection of Lawful Commerce in Arms Act (PLCAA), Nevada Revised Statutes (NRS) § 41.131, and common-law causation principles. I dismissed the Parsons' negligent entrustment and negligence per se claims without leave to amend because they failed to state a cognizable claim under the PLCAA and Nevada common law. I denied the motion to dismiss the wrongful death claim, concluding that as pleaded it was not barred by the PLCAA or common-law causation principles. *Id.*

The defendants also argued that the Parsons' wrongful death claim is barred by NRS § 41.131, which states that "[n]o person has a cause of action against the manufacturer or distributor of any firearm or ammunition merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death." The statute further states that it is "declaratory and not in derogation

[1] Colt's Manufacturing Company LLC, Colt Defense LLC, Daniel Defense Inc., Patriot Ordnance Factory, FN America, Noveske Rifleworks LLC, Christensen Arms, Lewis Machine & Tool Company, and LWRC International LLC.

[2] Discount Firearms and Ammo LLC, Sportsman's Warehouse, and Guns and Guitars Inc.

of the common law" and includes an exception for actions based on production or design defects. *Id.*

The defendants argue this statute bars the wrongful death claim because the Parsons do not allege that the AR-15s used in the October 1 shooting were defective. The Parsons respond that their suit falls outside of § 41.131's reach because their central allegation is that the defendants violated federal and Nevada law by manufacturing and selling illegal machine guns. Thus, they contend, they are not suing the defendants "merely" because the firearms were capable of causing—and caused—their daughter's death.

The text and legislative history of § 41.131 are capable of multiple reasonable interpretations. The statute was enacted in 1985, but Nevada courts have yet to interpret it. The parties have not identified, and I have not found, a federal or state decision that has even cited it. This case presents important public policy concerns that should be addressed by the Nevada court. I am particularly concerned by the defendants' concession in oral argument that under their interpretation § 41.131 would immunize even a defendant that manufactured and sold Tommy guns or M-16 rifles to civilians. The Supreme Court of Nevada should be allowed to interpret § 41.131 on first impression. So I denied the defendants' motion to dismiss on this ground without prejudice to refiling it, and I certify the above questions to the Supreme Court of Nevada.

II. PARTIES' NAMES AND DESIGNATION OF APPELLANT AND RESPONDENTS

Plaintiffs: James Parsons, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; Ann-Marie Parsons.

Defendants: Colt's Manufacturing Company LLC; Colt Defense LLC; Daniel Defense Inc.; Patriot Ordnance Factory; FN America; Noveske Rifleworks LLC; Christensen Arms; Lewis Machine & Tool Company; LWRC International LLC; Discount Firearms and Ammo LLC; DF&A Holdings, LLC; Maverick Investments, LP; Sportsman's Warehouse; Guns and Guitars Inc.

Because the defendants argue that § 41.131 mandates dismissal of this lawsuit, I designate the plaintiffs as the appellants.

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IV. ANY OTHER MATTERS THE CERTIFYING COURT DEEMS RELEVANT TO A DETERMINATION OF THE QUESTIONS CERTIFIED

I defer to the Supreme Court of Nevada to decide whether it requires any other information to answer the certified questions. I do not intend my framing of the questions to limit the Supreme Court of Nevada's consideration of the issues.

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V. CONCLUSION

I THEREFORE ORDER the Clerk of Court to forward this Order under official seal to the Supreme Court of the State of Nevada, 201 South Carson Street, Suite 201, Carson City, Nevada 89701-4702.

DATED this 10th day of April, 2020.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES PARSONS, et al,

Plaintiffs,

vs.

COLT'S MANUFACTURING COMPANY LLC, et al.,

Defendants.

Case No.: 2:19-CV-01189-APG-EJY

PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION

Plaintiffs James Parsons and Ann-Marie Parsons, through counsel, move for partial reconsideration of this Court's April 10, 2020 Order Granting in Part Defendants' Motion to Dismiss, ECF No. 98. Specifically, the Parsons ask the Court to reconsider its decision to decide the question of whether violation of a penal statute can support a claim for negligence per se under Nevada law absent specific evidence of legislative intent to provide for civil liability, and instead certify this question to the Nevada Supreme Court.

Local Rule of Civil Practice 59-1 governs motions for reconsideration of non-final, interlocutory orders of this Court. Pursuant to this rule, plaintiffs appeal to this

Court's "inherent power to reconsider an interlocutory order for cause." Plaintiffs contend that Nevada would recognize a cause of action for negligence per se in the current factual context, in which, plaintiffs allege, defendants violated both state and federal law prohibiting the sale of machineguns. Plaintiffs recognize that this Court followed prior decisions from this District applying "a presumption that a violation of a penal statute is not negligent per se absent legislative intent," but ask the Court to exercise its discretion to ask the Nevada Supreme Court to address this issue.

This Court has already certified two questions arising from the defendants' motion to dismiss to the Nevada Supreme Court. The April 10, 2020 Order, ETF No. 98, also acknowledges that there is substantial uncertainty regarding the application of negligence per se to penal statutes. Although prior decisions of this Court have impliedly required affirmative evidence of legislative intent to allow a statute to provide the basis for civil liability,[1] they did so without explicitly addressing why a presumption against the application of negligence per se was preferable to the alternative. And the Nevada Supreme Court has not clearly addressed this issue. As the Nevada Supreme Court will already be answering two questions about the proper application of Nevada law, this is an especially good opportunity to ask it to address this question as well. Doing so now "can in the long run save time, energy, and resources and help[] build a cooperative judicial federalism …." *Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)).

This case raises important issues under Nevada law and would have been decided by the Nevada state courts but for defendant FN America's snap removal. Plaintiffs respectfully request that this Court reconsider its decision to resolve the application of negligence per se and instead certify the question to the Nevada Supreme Court.

[1] *Conboy v. Wynn Las Vegas, LLC*, No. 2:11-cv-01649-JCM-CWH, 2012 WL 5511616, at *3 (D. Nev. Nov. 14, 2012); *Mazzeo v. Gibbons*, 649 F. Supp. 2d 1182, 1200 (D. Nev. 2009); *Harlow v. LSI Title Agency, Inc.*, No. 2:11-cv-01775-PMP-VCF, 2012 WL 5425722, at *3 (D. Nev. Nov. 6, 2012).

DATED: April 13, 2020.

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CERTIFICATE OF SERVICE

I certify that on April 13, 2020, I electronically transmitted the foregoing to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants in this action.

/s/ Dana C. Watkins
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES PARSONS, individually and as Special Administrator of the Estate of Carolyn Lee Parsons, and ANN-MARIE PARSONS,

Plaintiffs,

vs.

COLT'S MANUFACTURING COMPANY LLC; COLT DEFENSE LLC; DANIEL DEFENSE INC.; PATRIOT ORDNANCE FACTORY; FN AMERICA; FN HERSTAL; HERSTAL GROUP; NOVESKE RIFLEWORKS LLC; CHRISTENSEN ARMS; LEWIS MACHINE & TOOL COMPANY; LWRC INTERNATIONAL LLC; DISCOUNT FIREARMS AND AMMO LLC; DF&A HOLDINGS LLC; MAVERICK INVESTMENTS LP; SPORTSMAN'S WAREHOUSE; and GUNS AND GUITARS INC.,

Defendants.

CASE NO.: 2-19-cv-01189-APG-EJY

DEFENDANTS' JOINT RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION [ECF No. 100]

This Court recently granted in part and denied in part Defendants' joint motion to dismiss.[1] In dismissing Plaintiffs' negligence per se theory, the Court found "that there is a presumption that

[1] ECF No. 98 (granting in part and denying in part ECF No. 80).

a violation of a penal statute is not negligent per se absent legislative intent . . . ."[2] And because neither Congress nor the Nevada Legislature expressed an intent to impose civil liability under their respective gun-control statutes at issue here,[3] the Court correctly concluded that these penal statutes cannot support Plaintiffs' negligence per se theory.[4] Separately, this Court sua sponte certified two questions to the Nevada Supreme Court to assess whether the "broad immunity" from suit granted "to firearms manufacturers and distributors" under NRS 41.131 is dispositive of Plaintiffs' sole-remaining wrongful-death claim.[5]

Plaintiffs now move for partial reconsideration, requesting the Court certify a third, unrelated question regarding their now-dismissed negligence per se theory.[6] Their motion should be denied for three independent reasons. **First**, the simple fact that Plaintiffs did not request certification until *after* the Court's ruling makes certification inappropriate. A party cannot use certification to seek a second chance for victory after an adverse district court ruling. **Second**, Plaintiffs provide no legitimate rationale for certifying a question regarding their negligence per se theory. The Nevada Supreme Court and courts in this District have consistently articulated the legislative-intent requirement for over five decades. Plaintiffs' theory therefore fails to raise an issue of first impression under state law that would warrant certification. **Third**, the motion fails to even address—let alone satisfy—the standard for reconsideration. For each of these independent reasons, Defendants jointly request[7] that this Court deny Plaintiffs' motion for reconsideration.

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[2] *Id.* at 7:13–14.

[3] 18 U.S.C. § 922(b)(4); Nev. Rev. Stat. § 202.350(1)(b).

[4] ECF No. 98 at 7–8.

[5] *Id.* at 13–14; *see also* ECF No. 99 (Order Certifying Questions to the Supreme Court of Nevada).

[6] ECF No. 100.

[7] Defendants are Colt's Manufacturing Company LLC, Colt's Defense LLC, Daniel Defense, Inc., Patriot Ordnance Factory, Inc., FN America, LLC, Noveske Rifle Works LLC, Christensen Arms, Lewis Machine & Tool Company, LWRC International LLC, Discount Guns & Ammo, DF&A Holdings LLC, Maverick Investments LP, Guns & Guitars, Inc., and Sportsman's Warehouse, Inc.

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Argument

I. Plaintiffs' Attempt to Revive Their Dismissed Negligence Per Se Claim Through Certification Violates the Rule Against Belated Certification Requests and Should Be Denied.

Plaintiffs' motion improperly seeks to revive their dismissed negligence per se claim through certification. As this Court has previously stated,[8] "[t]here is a presumption against certifying a question to a state supreme court after the federal district court has issued a decision."[9] These disfavored "requests for certification are generally inappropriate . . . because a party should not be allowed a second chance at victory through certification."[10] "Once a question is submitted for decision in the district court, the parties should be bound by the outcome unless other grounds for reversal are present."[11] "Otherwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse ruling."[12] Thus, a party violates the "rule against belated certification requests" when it "had an opportunity to suggest certification in its pre-argument brief or even at oral argument" but moves for certification only "after it becomes apparent at oral argument that it is not likely to prevail[.]"[13] Worse still, where a party "did not seek certification until after it received an adverse decision from the district court," "[t]hat fact alone persuade[d] [the Court] that certification is inappropriate."[14]

Here too, Plaintiffs requested certification only *after* the Court entered its written order dismissing their negligence per se claim. That fact alone makes certification inappropriate. Plaintiffs' attempt to revive their claim through certification flagrantly violates the rule against belated certification requests, seeking to set aside the Court's adverse decision in hopes of a

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[8] *7912 Limbwood Court Tr. v. Wells Fargo Bank, N.A.*, 2:13-CV-00506-APG-GWF, 2016 WL 7900371, at *1 (D. Nev. Jan. 20, 2016).

[9] *Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008).

[10] *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1108–09 (9th Cir. 2013) (internal quotation marks and alterations omitted) (quoting *Complaint of McLinn*, 744 F.2d 677 (9th Cir. 1984)).

[11] *Perkins v. Clark Equip. Co., Melrose Div.*, 823 F.2d 207, 210 (8th Cir. 1987).

[12] *Thompson*, 547 F.3d at 1065 (quoting *Perkins*, 823 F.2d at 210).

[13] *Hinojos*, 718 F.3d at 1109.

[14] *Thompson*, 547 F.3d at 1065 (quoting *Enfield ex rel. Enfield v. A.B. Chance Co.*, 228 F.3d 1245, 1255 (10th Cir. 2000)).

favorable result in another forum. Plaintiffs' improper request for a second bite at the apple should be denied.

II. Certification of a Question that Has Been Consistently Answered for Decades Would be Improper.

In dismissing Plaintiffs' negligence per se theory, this Court found that a long line of Nevada Supreme Court cases establish "a presumption that a violation of a penal statute is not negligent per se absent legislative intent . . . ."[15] This holding comports with the view of every court in this District to have interpreted this precedent.[16] Nonetheless, Plaintiffs contend that this District has only "impliedly required affirmative evidence of legislative intent" and that "the Nevada Supreme Court has not clearly addressed this issue."[17] Plaintiffs are wrong. Nevada state and federal courts have consistently and unequivocally required plaintiffs to provide evidence of legislative intent to impose civil liability under a penal statute in order to support a theory of negligence per se.

The Nevada Supreme Court first developed this rule over 50 years ago in *Hamm v. Carson City Nugget*.[18] After examining the structure of "the statutory scheme regulating the sale of tobacco and intoxicating liquor to minors and drunkards," the Court held that the statute at issue "does not impose civil liability upon one in charge of a saloon or bar, nor is such a violation negligence per se."[19] The Court examined a different provision of the same scheme more than a decade later and expressly declined to deviate from this holding, stating that "[i]t would be inconsistent with [*Hamm*] and legally unsound . . . to hold that violation of th[e] statute by furnishing beer to [someone underage] constituted

[15] ECF No. 98 at 7:13–14.

[16] *Id*. at 15–20 (citing *Conboy v. Wynn Las Vegas, LLC*, No. 2:11-cv-01649-JCM-CWH, 2012 WL 5511616, at *3 (D. Nev. Nov. 14, 2012); *Harlow v. LSI Title Agency, Inc*., No. 2:11-cv-01775-PMP-VCF, 2012 WL 5425722, at *3 (D. Nev. Nov. 6, 2012); *Mazzeo v. Gibbons*, 649 F. Supp. 2d 1182, 1200 (D. Nev. 2009)).

[17] ECF No. 100 at 2:11–15.

[18] *Hamm v. Carson City Nugget, Inc*., 450 P.2d 358, 360 (Nev. 1969).

[19] *Id*.

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negligence as a matter of law."[20] The Court therefore "adhere[d] to [its] view that absent evidence of legislative intent to impose civil liability [it] shall not conclude that a violation of a statute is negligence per se."[21] Another decade later, the Court once again applied this rule, finding no evidence that the Nevada Legislature intended "to impose civil liability for violations of th[e] penal statute" at issue.[22] The Nevada Supreme Court has therefore unequivocally required evidence of a legislative intent to impose civil liability under a penal statute as a condition precedent to asserting a negligence per se theory based on that statute.

As this Court highlighted in its order, the courts in this District have consistently applied this precedent.[23] Contrary to Plaintiffs' intimation,[24] these decisions have identified only one possible interpretation of *Hamm* and its progeny: a presumption *against* negligence per se premised on a criminal statute.[25] And despite the intervening years, the Nevada Supreme Court has not chosen to revisit the issue or alter this long-standing precedent. In contrast, the questions that this Court certified have never been addressed by any court in any jurisdiction.

So, contrary to the lack of clarity and due consideration that Plaintiffs portray, there is uniformity on this issue among Nevada's state and federal courts. Plaintiffs' request for certification is merely an improper attempt to prompt the Nevada Supreme Court to revisit its long-standing rule that precludes Plaintiffs' claims. This objective is not only unwarranted given the Court's history of reaffirming this precedent, it is also an improper use of certification, which is designed to give state high courts the opportunity to address issues of first impression regarding state law.[26]

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[20] *Bell v. Alpha Tau Omega Fraternity, Eta Epsilon Chapter*, 642 P.2d 161, 162 (Nev. 1982).

[21] *Id.*

[22] *Hinegardner v. Marcor Resorts, L.P.V.*, 844 P.2d 800, 803 (Nev. 1992).

[23] ECF No. 98 at 7:15–20.

[24] ECF No. 100 at 2:11–14.

[25] *Mazzeo*, 649 F. Supp. 2d at 1200 (quoting *Hinegardner* for the principle that, "in the absence of legislative intent to impose civil liability, a violation of a penal statute is not negligence per se"); *accord Conboy*, 2012 WL 5511616, at *3 ("*Mazzeo* correctly articulates the state of the law in Nevada for negligence per se. And the court is bound by this standard."); *Harlow*, 2012 WL 5425722, at *3 (also citing *Mazzeo* for its recitation of Nevada law).

[26] *See Thompson*, 547 F.3d at 1065.

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Accordingly, there is no merit to Plaintiffs' request to certify a question to the Nevada Supreme Court regarding their negligence per se theory.

III. Plaintiffs' Motion Fails to Address—Let Alone Meet—the Standard for Reconsideration.

Although Plaintiffs cite to a district court's inherent power to reconsider an interlocutory order,[27] they fail to address—let alone satisfy—the standard for obtaining such relief. As this Court has explained, "the District of Nevada uses the standard for a motion to alter or amend judgment under Rule 59(e) when a party seeks reconsideration of an interlocutory order."[28] Reconsideration is therefore appropriate only when "(1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law."[29] Plaintiffs raise none of these.

/ / /

[27] ECF No. 100 at 1–2 (citing LR 59-1).

[28] *Sherwin v. Infinity Auto Insurane Co.*, No. 2:11-CV-00043-APG-GWF, 2013 WL 12214724, at *1 (D. Nev. Aug. 6, 2013).

[29] *Id.* (quoting *Sec. Exch. Comm'n v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1100 (9th Cir. 2010)).

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CONCLUSION

Plaintiffs' attempt to revive their dismissed negligence per se claim violates the rule against belated certification requests. Requesting certification *after* dismissal of their claim is dispositive of the motion. Independently, through long-standing and settled precedent, the Nevada Supreme Court and this District have required a showing of legislative intent in order to maintain a claim for negligence per se under a penal statute. The Court should not indulge Plaintiffs' request to abuse the certification process by certifying a question that has been unequivocally answered multiple times over the course of 50 years. Finally, Plaintiffs assert that their motion is one for reconsideration but do not attempt to articulate—let alone meet—the required standard. For each of these independent reasons, this Court should deny Plaintiffs' motion for reconsideration.

DATED: April 27, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2020, I electronically transmitted the foregoing **DEFENDANTS' JOINT RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION [ECF No. 100]** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel in this matter; all counsel being registered to receive Electronic Filing.

/s/ Lyndsey Luxford
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES PARSONS, et al,

Plaintiffs,

vs.

COLT'S MANUFACTURING COMPANY LLC, et al.,

Defendants.

Case No.: 2:19-CV-01189-APG-EJY

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION

Plaintiffs James Parsons and Ann-Marie Parsons respond to Defendants' Joint Response to Plaintiffs' Motion for Partial Reconsideration as follows:

1. The Parsons Sought Remand, Not Certification of Issues.

The Parsons agree that they did not ask this Court to certify this issue, or any issue, to the Nevada Supreme Court prior to this Court's April 10, 2020 Order Granting in Part Defendants' Motion to Dismiss, ECF No. 98. But defendants seem to forget the Parsons filed this action in state court and moved for remand, following FN America's "snap removal." The motion for remand was heard by this Court at the same time as the

defendants' motion to dismiss. In other words, the Parsons asked this Court to send *every* issue back to state court.

While "[t]here is a presumption against certifying a question to a state supreme court after the federal district court has issued a decision," *Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008), this is not an absolute prohibition. *See 7912 Limbwood Court Tr. v. Wells Fargo Bank, N.A.*, 2:13-CV-00506-APG-GWF, 2016 WL 7900371, at *1 (D. Nev. Jan. 20, 2016) (recognizing possibility that party may overcome presumption against certification after decision). Under "limited circumstances," certification may be granted after a case has been decided. *Perkins v. Clark Equip. Co.*, 823 F.2d 207, 210 (8th Cir. 1987).

The Parsons respectfully suggest that this is one of those limited circumstances. The Court is already certifying two other questions to the Nevada Supreme Court. Certification of this additional issue will therefore not cause any meaningful delay. The Court also recognized that "one could argue [this issue] either way: that there is a presumption that a violation of a penal statute is not negligent per se absent legislative intent, or that there is a presumption that a violation of a penal statute is negligent per se absent legislative intent to the contrary." ETF No.98 at 7:13-15. Because the other issues have already been certified to the Nevada Supreme Court, this case provides a unique opportunity to resolve the question.

2. Nevada Decisions Support A Presumption of Negligence Per Se, Absent Legislative Intent to the Contrary.

It is misleading to claim that this issue has been consistently answered for decades, in "a long line of Nevada Supreme Court cases." This implies that the court has applied a clearly articulated rule in a number of different circumstances. But the only Nevada cases that discuss legislative intent in relationship to the use of a penal statute as the basis for negligence per se arise in a single context: the attempt to hold alcohol providers liable for damage caused by the intoxicated recipient. As those cases involve a unique area of the common law and a unique regulatory scheme, the courts require some

affirmative evidence of legislative intent to allow for civil liability. In a non-alcohol context, the cases do not address the question of what is required before penal statutes are used as the basis for negligence per se. The non-alcohol cases that do address the general question of what is required for negligence per se do not require affirmative evidence of legislative intent.

The lead case relied on by the defendants is *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969). Heirs of pedestrians killed by a drunk driver sued the casino which overserved the driver. The court first recognized that in the traditional common law, "[a] liquor vendor was not responsible to innocent third persons for injury or death due to the inebriated person's conduct. The proximate cause of damage was deemed to be the patron's consumption of liquor, and not its sale." 85 Nev. at 100. The court rejected the plaintiffs' argument that the common law should change; the court concluded that because the choice was a matter of public policy, any change to impose civil liability "should be accomplished by legislative act after appropriate surveys, hearings, and investigations to ascertain the need for it and the expected consequences to follow." *Id.* at 101.

This conclusion led directly to the court's discussion of the plaintiffs' claim that negligence per se applied. The court noted that the relevant Nevada statute, unlike the dram shop acts of other states, did not specifically provide for civil liability. *Id.* at 102. The court recognized that some other states had extended civil liability in that context while others did not. It looked therefore to the overall statutory scheme in place in Nevada and found affirmative evidence that the legislature did not intend to provide a civil remedy:

> The statute before us is but one of many in the statutory scheme regulating the sale of tobacco and intoxicating liquor to minors and drunkards. The section immediately preceding NRS 202.100 (NRS 202.070) does impose a limited civil liability upon the proprietor of a saloon who sells liquor to a minor. ***By providing for civil liability in one section and failing to do so in the section immediately following, the legislature has made its intention clear.*** Accordingly, we must conclude that a violation of NRS

> 202.100 does not impose civil liability upon one in charge of a saloon or bar, nor is such a violation negligence per se.

Id. (emphasis added). In other words, the court rejected negligence per se because there was affirmative evidence of a contrary legislative intent. *Hamm* simply does not support the proposition that the court presumes that a penal statute cannot be the basis for negligence per se absent legislative intent.

In reaching its conclusion regarding the statute regulating the sale of alcohol, the *Hamm* court acknowledged that in other contexts, it had "recognized that violation of a penal statute is negligence per se." *Id.* (citing *Southern Pacific Co. v. Watkins*, 83 Nev. 471, 435 P.2d 498 (1967); *Ryan v. Manhattan Big Four Mining Co.*, 38 Nev. 92, 145 P. 907 (1914)). The court did not question the correctness of those prior decisions, and it is therefore noteworthy that neither contained any evidence of legislative intent. In *Watkins*, the relevant statute, NRS 705.430, which is quoted in full, contains no reference one way or the other to civil liability, but the court approved of its use as a basis for a jury instruction. 83 Nev. at 491 & n.6. The court apparently presumed that a violation of a penal statute is negligent per se absent legislative intent to the contrary. Similarly, in *Ryan*, the statute in question, which required mining companies to employ an "iron-bonneted safety cage" in vertical mining shafts greater than 350 feet in depth, does not mention civil liability. 145 P. at 908. Nevertheless, the court recognized,

> as a general proposition, that whenever an act is enjoined or prohibited by law, and the violation of the statute is made a misdemeanor, any injury to the person of another, caused by such violation, is the subject of an action, and that the violation of the law is the basis of the right to recover and constitutes negligence per se.

145 P. at 910.

Following *Hamm*, the Nevada Supreme Court has applied and reaffirmed its holding regarding alcohol distribution statues many times. Those decisions must be read in light of *Hamm.* After the Nevada Supreme Court stated both that the legislature would have to affirmatively provide for civil liability to change the common law and that a statute regulating the provision of alcohol without providing for civil liability could not

be the basis for a negligence per se, legislative action was clearly required before statutes within this same regulatory scheme could be used as the basis for civil liability.

So, in *Bell v. Alpha Tau Omega Fraternity, Eta Epsilon Chapter*, 98 Nev. 109, 642 P.2d 161 (1982), where the plaintiffs sought to impose liability based on a different section of the same regulatory scheme considered in *Hamm*, the court followed *Hamm*:

> It would be inconsistent with our previous decision and legally unsound for us to hold that violation of this statute by furnishing beer to an adult under twenty-one years of age constituted negligence as a matter of law. We adhere to our view that absent evidence of legislative intent to impose civil liability we shall not conclude that a violation of a statute is negligence per se.

98 Nev. at 111. As the court explicitly states that it is just following *Hamm*, its statement that evidence of legislative intent to impose civil liability is required should not be taken as a broad statement of law, applicable in all circumstances. It is merely an accurate statement of what is required to impose civil liability for violation of a statute regulating alcohol distribution after *Hamm*.

In *Hinegardner v. Marcor Resorts, L.P.V.*, 108 Nev. 1091, 1093-95, 844 P.2d 800 (1992), the court rejected a renewed attempt to change the common law rule of no liability for vendors of alcohol as well as yet another attempt to apply negligence per se. The court recognized that, after *Hamm* and *Bell* and other decisions applying the same rule, the legislature had modified the statute which the plaintiff claimed defendants violated, without mentioning civil liability. As the court had already declared that the legislature would have to provide for civil liability to change the result, the court "infer[red] from the legislature's inaction that it did not intend to impose civil liability for violations of this penal statute." 108 Nev. at 1096. Finally, the court stated it would "continue to follow the *Hamm* rule—only legislative mandate should create civil liability for vendors who serve alcohol to minors." *Id.* Thus, the Nevada Supreme Court itself has stated that general rule to be derived from *Hamm* is limited to the distribution of alcohol.

Nevada law does not contain a series of cases applying "a presumption that a violation of a penal statute is not negligent per se absent legislative intent" in a variety

of contexts. Instead, it features a single case finding affirmative evidence of a legislative intent not to impose civil liability in a particular context, based on the inclusion of civil liability in one statute and its exclusion in others, and then the application of this precedent multiple times in the same regulatory context.

More recently, the Nevada courts have stated the requirements for negligence per se without reference to the type of statute or the legislature's intent regarding its use in litigation: "[T]he violation of a statute constitutes negligence per se if the injured party belongs to class of persons that the statute was intended to protect and the injury suffered is of the type the statute was intended to prevent." *Vega v. E. Courtyard Assocs*., 117 Nev. 436, 24 P.3d 219, 221 (Nev. 2001). A fair implication of this formulation is that it is assumed that the legislature understands that statutory violations may be used as the basis for negligence per se, in the absence of affirmative evidence of a contrary legislative intent.

Unlike the state cases, the federal court decisions discussing possible use of penal statues as a basis for negligence per se do arise in a variety of circumstances. In *Mazzeo v. Gibbons*, 649 F. Supp. 2d 1182, 1200 (D. Nev. 2009), the plaintiff made negligence per se claims based on a long list of criminal statutes, mostly involving intentional crimes. The court determined that most of the statutes did not contemplate civil liability. In *Harlow v. LSI Title Agency, Inc.,* No. 2:11-cv-01775-PMP-VCF, 2012 WL 5425722, at *3 (D. Nev. Nov. 6, 2012), the court cited *Mazzeo* in rejecting negligence per se claims based on several criminal statutes regarding notaries and false instruments. Similarly, in *Conboy v. Wynn Las Vegas, LLC*, No. 2:11-cv-01649-JCM-CWH, 2012 WL 5511616, at *3 (D. Nev. Nov. 14, 2012), the court followed *Mazzeo* and *Hinegardner* in refusing to allow a negligence per se claim based on alleged violations of criminal statutes prohibiting coercion and extortion.

The Parsons do not disagree with this Court's characterization of these decisions as requiring affirmative evidence of legislative intent to allow a criminal statute to provide the basis for civil liability; however, none of them recognized that the cases they

relied on arose in a narrower context, and relied on the initial judgment, from *Hamm*, that the legislature had in fact made its intention clear. Ultimately, whether affirmative evidence of an intention to allow a penal statute to be used as the basis for civil liability is required in other contexts, still needs to be decided by the state courts.

3. Local Rule 59-1 Recognizes the Court's Inherent Power to Reconsider Its Interlocutory Orders.

Defendants ignore Local Rule of Civil Practice 59-1, although it was cited in the Parsons' motion. It—not Civil Rule 59(e)—governs reconsideration of interlocutory orders, like this one. The Parsons also do not claim that this Court made any "clear error." Rather, they were clear in their motion that they are appealing to this Court's "inherent power to reconsider an interlocutory order for cause." As this Court recognized, it is possible to read the prior Nevada state cases in either of two ways and, in this case, the decision between the two was dispositive. As discussed above, the state cases are in fact more favorable to plaintiffs' position, or at least more ambiguous, than previous federal decisions have recognized. Given the importance of the issues presented and the fact that this Court has certified two other questions to the Nevada Supreme Court, the Parsons respectfully suggest that "cause" exists here.

Conclusion

This Court has already certified two questions regarding the application of Nevada law to this case to the Nevada Supreme Court. As the Court has also recognized that another state-law issue is not clearly resolved by existing Nevada decisions, it makes sense to ask the Nevada Supreme Court to address this question as well. As this case is stayed pending the answers from the state court anyway, adding an additional question will likely add no time to the resolution of this case, and will likely save the parties from re-arguing the meaning of state law before the Ninth Circuit sometime in the future.

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DATED: April 30, 2020.

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CERTIFICATE OF SERVICE

I certify that on April 30, 2020, I electronically transmitted the foregoing to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants in this action.

/s/ Dana C. Watkins
Dana C. Watkins

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES PARSONS, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CAROLYN LEE PARSONS, *et al.*,

Plaintiffs

v.

COLT'S MANUFACTURING COMPANY, LLC, *et al.*,

Defendants

Case No.: 2:19-cv-01189-APG-EJY

Order Granting Motion for Reconsideration

[ECF No. 100]

Plaintiffs James and Ann-Marie Parsons move for partial reconsideration of my order dismissing their negligence per se claim. They argue that because I am certifying two questions of law to the Supreme Court of Nevada and the legal basis for dismissal is an open question of state law, I should certify their negligence per se claim to the Supreme Court of Nevada as well. The defendants respond that the Supreme Court of Nevada has decided the legal issue and the Parsons do not meet the standards for certification or reconsideration. I grant the Parsons' motion because the Supreme Court of Nevada has not addressed negligence per se in this context and certification of this question will "save time, energy, and resources and help[] build a cooperative judicial federalism." *Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008) (quotations omitted).

I. DISCUSSION

A district court "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient" so long as it has jurisdiction. *City of L.A., Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001)

(quotation and emphasis omitted); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983) (citing Fed. R. Civ. P. 54(b)). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *see also* LR 59–1(a). A district court may also reconsider its decision if "other, highly unusual, circumstances" warrant it. *Sch. Dist. No. 1J, Multnomah Cty., Or.*, 5 F.3d at 1263.

"Certification of open questions of state law to the state supreme court . . . rests in the sound discretion of the federal court." *Thompson*, 547 F.3d at 1065 (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). District courts should consider whether the state law question presents significant issues with "important public policy ramifications," comity, the state supreme court's case load, and federalism. *Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003). However, "[t]here is a presumption against certifying a question to a state supreme court after the federal district court has issued a decision." *Thompson*, 547 F.3d at 1065.

In my underlying order, I recognized there are reasonable arguments under Nevada law "that there is a presumption that a violation of a penal statute is not negligent per se absent legislative intent, or that there is a presumption that a violation of a penal statute is negligent per se absent legislative intent to the contrary." ECF No. 98 at 7. I applied the former interpretation because courts in this district have opted for it. *Id.* Having reread the underlying state court decisions, I am persuaded that the Supreme Court of Nevada should answer that question in this context.

In *Hamm v. Carson City Nugget, Inc.*, the Supreme Court of Nevada rejected a negligence per se claim premised on violations of alcohol laws. 450 P.2d 358, 360 (Nev. 1969).

The court reasoned that because the legislature had provided for civil liability in the immediately preceding section of a statute, a violation of the statute was not negligence per se because that "would subvert the apparent legislative intention." *Id.* The *Hamm* court recognized that its holding was a departure from two prior decisions finding negligence per se on the basis of a violation of a penal statute. *Id.* (citing *Southern Pacific Co. v. Watkins*, 435 P.2d 498 (1967); *Ryan v. Manhattan Big Four Mining Co.*, 145 P. 907 (1914)). Neither of these cases, however, considered legislative intent to impose civil liability. *Watkins*, 435 P.2d at 492; *Ryan*, 145 P. at 908.

In two later cases, the Supreme Court of Nevada cited *Hamm* for the proposition that "[i]n the absence of legislative intent to impose civil liability, a violation of a penal statute is not negligence per se." *Hinegardner v. Marcor Resorts, L.P.V.*, 844 P.2d 800, 803 (Nev. 1992); *Bell v. Alpha Tau Omega Fraternity, Eta Epsilon Chapter*, 642 P.2d 161, 162 (Nev. 1982). Like *Hamm*, both cases involved violations of alcohol laws. Neither case considered that *Hamm* also supports a presumption that a violation of a penal statute is negligence per se absent legislative intent not to impose civil liability because it found an expression of legislative intent not to impose civil liability. Nor did they consider that *Hamm* relied on two earlier cases devoid of any mention of legislative intent.

Finally, the federal courts that have addressed the issue have done so without any analysis of the origins of this presumption under Nevada law. *See Conboy v. Wynn Las Vegas, LLC*, No. 2:11-cv-01649-JCM-CWH, 2012 WL 5511616, at *3 (D. Nev. Nov. 14, 2012); *Mazzeo v. Gibbons*, 649 F. Supp. 2d 1182, 1200 (D. Nev. 2009); *Harlow v. LSI Title Agency, Inc.*, No. 2:11-cv-01775-PMP-VCF, 2012 WL 5425722, at *3 (D. Nev. Nov. 6, 2012). Because the Supreme Court of Nevada's decisions support either presumption and do not address the issue

outside the context of alcohol laws, the issue remains an open question of state law. And because I dismissed the Parsons' negligence per se claim on this basis, it is a dispositive one.

The Parsons also meet the standards for reconsideration and certification. The Parsons did not argue for certification of this question in the briefing on the defendants' motion to dismiss, but the motion was briefed and argued alongside their motion to remand, which argued that the entire case should be heard by state courts. Certification will save time and judicial resources because the Ninth Circuit may certify this question on appeal and I am certifying two other questions to the Supreme Court of Nevada. And, most importantly, certification will allow the Supreme Court of Nevada to decide an issue that has important public policy ramifications for the citizens of this state. These circumstances constitute "other, highly unusual, circumstances" warranting reconsideration. *Sch. Dist. No. 1J, Multnomah Cty., Or.*, 5 F.3d at 1263. So I amend my certification order to include the following question:

- Under Nevada law, can a plaintiff assert a negligence per se claim predicated on violations of criminal federal and state machine gun prohibitions absent evidence of legislative intent to impose civil liability?

I also dismissed the Parsons' negligence per se claim against the manufacturer defendants[1] because they were named only in their capacity as manufacturers and the Protection of Lawful Commerce in Arms Act (PLCAA) permits negligence per se actions only against sellers. ECF No. 98 at 5. If the Supreme Court of Nevada's answer on the certified question allows the negligence per se claim to proceed, I grant the Parsons' leave to amend it against the manufacturer defendants if they can plead facts showing that the manufacturer defendants are subject to suit as sellers under the PLCAA. In the interim, I modify my prior order by denying

[1] Colt's Manufacturing Company LLC, Colt Defense LLC, Daniel Defense Inc., Patriot Ordnance Factory, FN America, Noveske Rifleworks LLC, Christensen Arms, Lewis Machine & Tool Company, and LWRC International LLC.

the defendants' motion to dismiss the Parsons' negligence per se claim against the seller defendants without prejudice to refiling.[2]

II. CONCLUSION

I THEREFORE GRANT that the plaintiffs' **motion for reconsideration (ECF No. 100)** of my order granting in part and denying in part the defendants' motion to dismiss. The plaintiffs' negligence per se claim is dismissed against the manufacturer defendants with leave to amend within 30 days of the Supreme Court of Nevada's decision on the certified questions. The defendants' motion to dismiss the plaintiffs' wrongful death claim against all defendants and negligence per se claim against the seller defendants is denied without prejudice to refiling it within 45 days of the Supreme Court of Nevada's decision on the certified questions. But if the plaintiffs amend their complaint, the normal motion deadlines will apply.

DATED this 8th day of May, 2020.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

[2] The seller defendants are Discount Firearms and Ammo LLC, Sportsman's Warehouse, and Guns and Guitars Inc.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES PARSONS, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CAROLYN LEE PARSONS, *et al.*,

Plaintiffs

v.

COLT'S MANUFACTURING COMPANY, LLC, *et al.*,

Defendants

Case No.: 2:19-cv-01189-APG-EJY

Amended Order Certifying Questions to the Supreme Court of Nevada

I respectfully certify to the Supreme Court of Nevada the following two questions of law that may be determinative of matters before me and as to which there is no clearly controlling precedent in the decisions of the Supreme Court of Nevada or the Nevada Court of Appeals:

- Under Nevada law, can a plaintiff assert a negligence per se claim predicated on violations of criminal federal and state machine gun prohibitions absent evidence of legislative intent to impose civil liability?

- Does a plaintiff asserting a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions have "a cause of action against the manufacturer or distributor of any firearm . . . merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death[,]" under Nevada Revised Statutes § 41.131?

- Does Nevada Revised Statutes § 41.131 allow a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions because the statute is "declaratory and not in derogation of the common law"?

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I. BACKGROUND

Carrie Parsons was killed in the October 1, 2017 mass shooting in Las Vegas. Her parents, plaintiffs James Parsons and Ann-Marie Parsons, sue the manufacturers[1] (Manufacturers) and dealers[2] (Dealers) that made and sold the AR-15 rifles used in the shooting.

The Parsons filed suit in the Eighth Judicial District Court for Clark County, Nevada on July 2, 2019, asserting claims for wrongful death, negligence per se, and negligent entrustment. The defendants removed the case to the United States District Court for the District of Nevada. The defendants moved to dismiss the Parsons' complaint, arguing that their claims are barred by the Protection of Lawful Commerce in Arms Act (PLCAA), Nevada Revised Statutes (NRS) § 41.131, and common-law causation principles. I originally dismissed the Parsons' negligent entrustment and negligence per se claims without leave to amend because they failed to state a cognizable claim under the PLCAA and Nevada common law. I denied the motion to dismiss the wrongful death claim, concluding that as pleaded it was not barred by the PLCAA or common-law causation principles. *Id.*

A. Negligence Per Se

I originally dismissed the Parsons' negligence per se claims because federal courts sitting in Nevada have applied a rule announced in two Supreme Court of Nevada decisions that the violation of a penal statute is not negligence per se absent evidence of legislative intent to impose civil liability. *See Hinegardner v. Marcor Resorts, L.P.V.*, 844 P.2d 800, 803 (Nev. 1992); *Bell v. Alpha Tau Omega Fraternity, Eta Epsilon Chapter*, 642 P.2d 161, 162 (Nev. 1982). I later

[1] Colt's Manufacturing Company LLC, Colt Defense LLC, Daniel Defense Inc., Patriot Ordnance Factory, FN America, Noveske Rifleworks LLC, Christensen Arms, Lewis Machine & Tool Company, and LWRC International LLC.

[2] Discount Firearms and Ammo LLC, Sportsman's Warehouse, and Guns and Guitars Inc.

reconsidered my order dismissing the Parsons' negligence per se claims because: (1) the Supreme Court of Nevada's decisions could be read to support a presumption that a violation of a penal statute is not negligent per se absent legislative intent or alternatively a presumption that a violation of a penal statute is negligence per se absent legislative intent to the contrary; and (2) the prior decisions do not address the issue outside the context of alcohol laws. I decided to certify an additional question to the Supreme Court of Nevada because: (1) the question presents significant issues with important public policy ramifications for Nevada; and (2) certification of this dispositive question alongside the other questions will save time and judicial resources. So I certify the above question regarding under what circumstances a violation of a penal statute constitutes negligence per se.

B. NRS § 41.131

The defendants argued that the Parsons' wrongful death claim is barred by NRS § 41.131, which states that "[n]o person has a cause of action against the manufacturer or distributor of any firearm or ammunition merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death." The statute further states that it is "declaratory and not in derogation of the common law" and includes an exception for actions based on production or design defects. *Id.*

The defendants argue this statute bars the wrongful death claim because the Parsons do not allege that the AR-15s used in the October 1 shooting were defective. The Parsons respond that their suit falls outside of § 41.131's reach because their central allegation is that the defendants violated federal and Nevada law by manufacturing and selling illegal machine guns. Thus, they contend, they are not suing the defendants "merely" because the firearms were capable of causing—and caused—their daughter's death.

The text and legislative history of § 41.131 are capable of multiple reasonable interpretations. The statute was enacted in 1985, but Nevada courts have yet to interpret it. The parties have not identified, and I have not found, a federal or state decision that has even cited it. This case presents important public policy concerns that should be addressed by the Nevada court. I am particularly concerned by the defendants' concession in oral argument that under their interpretation § 41.131 would immunize even a defendant that manufactured and sold Tommy guns or M-16 rifles to civilians. The Supreme Court of Nevada should be allowed to interpret § 41.131 on first impression. So I denied the defendants' motion to dismiss on this ground without prejudice to refiling it, and I certify the above questions to the Supreme Court of Nevada.

II. PARTIES' NAMES AND DESIGNATION OF APPELLANT AND RESPONDENTS

Plaintiffs: James Parsons, individually and as Special Administrator of the Estate of Carolyn Lee Parsons; Ann-Marie Parsons.

Defendants: Colt's Manufacturing Company LLC; Colt Defense LLC; Daniel Defense Inc.; Patriot Ordnance Factory; FN America; Noveske Rifleworks LLC; Christensen Arms; Lewis Machine & Tool Company; LWRC International LLC; Discount Firearms and Ammo LLC; DF&A Holdings, LLC; Maverick Investments, LP; Sportsman's Warehouse; Guns and Guitars Inc.

Because the defendants argue that § 41.131 mandates dismissal of this lawsuit, I designate the plaintiffs as the appellants.

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IV. ANY OTHER MATTERS THE CERTIFYING COURT DEEMS RELEVANT TO A DETERMINATION OF THE QUESTIONS CERTIFIED

I defer to the Supreme Court of Nevada to decide whether it requires any other information to answer the certified questions. I do not intend my framing of the questions to limit the Supreme Court of Nevada's consideration of the issues.

V. CONCLUSION

I THEREFORE ORDER the Clerk of Court to forward this Order under official seal to the Supreme Court of the State of Nevada, 201 South Carson Street, Suite 201, Carson City, Nevada 89701-4702.

DATED this 8th day of May, 2020.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of Friedman | Rubin PLLP, and that on this date, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to:

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DATED this 21st day of July, 2020.

/s/ Dana C. Watkins
An Employee of Friedman | Rubin PLLP