

2017 WL 7518923 (Or.Cir.) (Trial Order)  
Circuit Court of Oregon.  
Multnomah County

Vivian ENGLUND, a Washington resident, and Personal  
Representative for the Estate of Kirsten Englund, Plaintiff,

v.

WORLD PAWN EXCHANGE, LLC, an Oregon for-profit corporation, J&G II, Inc. d/b/a J&G Sales,  
Ltd., an Arizona for-profit corporation, Richard James Sinatra, an Oregon resident, Defendants.

No. 16CV00598.  
June 30, 2017.

### **Opinion Regarding Defendants' Rule 21 Motions against Plaintiff's First Amended Complaint**

[Michael A. Greenlick](#), Judge.

\*1 This matter<sup>1</sup> came before the Court on March 23, 2017,<sup>2</sup> for hearing on defendants' rule 21 motions against plaintiff's first amended complaint (FAC), arguing to dismiss pursuant to [ORCP 21\(A\)\(8\)](#) plaintiff's claims of negligence, negligence *per se*, gross negligence, negligent entrustment, and public nuisance against World Pawn Exchange, LLC (World Pawn), J&G II, Inc. (J&G), and Richard James Sinatra (Sinatra) (collectively, "defendants"). Alternatively, defendants move to strike under [ORCP 21\(E\)](#) and World Pawn and Sinatra move to make more definite and certain under [ORCP 21\(D\)](#). Jonathan Lowy, Alla Lefkowitz, Thomas D'Amore, and Ray Sarola appeared for plaintiff. Jeffrey Eden and Leora Coleman-Fire appeared for World Pawn and Sinatra. Jeffrey Malsch appeared for J&G.

As explained below, the Court, after considering the arguments of counsel, the pleadings, and the submissions, denies defendants' motions to dismiss plaintiff's claims of negligence, negligence *per se*, gross negligence, negligent entrustment, and public nuisance because the predicate exception set forth in [15 USC § 7903\(5\)\(A\)\(iii\)](#) applies and plaintiff has sufficiently alleged ultimate facts to support each those claims. In addition, the Court denies defendants' motions to strike. Finally, the Court grants in part and denies in part World Pawn and Sinatra's motion to make more definite and certain. Specifically, the Court grants that motion insofar as it pertains to the allegations regarding the nature and the amount of economic damages set forth in paragraphs 135 through 138 of the FAC. Plaintiff is given leave to make more definite and certain those allegations only.<sup>3</sup>

#### **I. Factual Background**

In determining the sufficiency of plaintiff's FAC in response to a motion to dismiss pursuant to [ORCP 21 A\(8\)](#), the Court accepts as true all well-pleaded allegations and gives plaintiff, as the nonmoving party, the benefit of all favorable inferences that may be drawn from those allegations. *Scovill By and Through Hubbard v. City of Astoria*, 324 Or 159, 161 (1996) (citing *Stringer v. Car Data Sys., Inc.*, 314 Or 576, 584 (1992)). "All pleadings shall be liberally construed with a view of substantial justice between the parties." [ORCP 12 A](#).

The following is a summary of the factual allegations contained in plaintiff's FAC. World Pawn is a retailer of firearms in the State of Oregon. FAC ¶ 30. World Pawn also operates as a middleman for online firearms dealers. *Id.* J&G specializes in the interstate selling of ammunition and firearms through the Internet, including into the State of Oregon. *Id.* ¶ 31. Before December 12, 2011, Jeffrey Boyce and his mother, Diane Boyce, entered World Pawn's retail store on multiple

occasions, sometimes perusing firearms and asking World Pawn staff questions about firearms. *Id.* ¶ 32. World Pawn staff answered their questions. *Id.*

\*2 At all relevant times, Jeffrey Boyce had a felony conviction for unlawful use of a weapon and was thus ineligible to personally own or operate a firearm. *Id.* ¶¶ 35, 38. In addition, Jeffrey Boyce suffered from mental health and drug abuse issues. *Id.* ¶ 38. Those were the reasons why Jeffrey Boyce ultimately did not acquire the firearms personally and, instead, had Diane Boyce acquire the firearms as a straw purchaser on his behalf. *Id.*

On December 12, 2011, Diane Boyce acquired an AK-47 assault rifle from World Pawn on behalf of her son, Jeffrey Boyce. *Id.* ¶ 33. That firearm was ordered via the Internet by and for Jeffrey Boyce from a nonparty firearms dealer in Minnesota. *Id.*

On January 21, 2012, Diane Boyce acquired another firearm, a Makarov 9mm semi-automatic pistol, from World Pawn on behalf of Jeffrey Boyce. *Id.* ¶ 36. Jeffrey Boyce ordered the Makarov over the Internet through J&G, which transferred the Makarov to World Pawn, which in turn transferred the Makarov to Diane Boyce on behalf of Jeffrey Boyce. *Id.* ¶ 36. Four days earlier, on January 17, 2012, Jeffrey Boyce communicated electronically with J&G, directing J&G to transfer the Makarov to World Pawn. *Id.* ¶ 54. Jeffrey Boyce used an email address he shared with his mother and paid for the firearm with his mother's credit card. *Id.*

On February 27, 2012, Diane Boyce acquired another firearm, a Rock Island semi-automatic pistol, from World Pawn on behalf of Jeffrey Boyce. *Id.* ¶ 37. Jeffrey Boyce ordered the Rock Island over the Internet through J&G, which transferred the Rock Island to World Pawn, which in turn transferred the Rock Island to Diane Boyce on behalf of Jeffrey Boyce. *Id.* ¶ 37. Beforehand, on February 21, 2012, Jeffrey Boyce used his personal email address, jeffreyboyce@gmail.com, to communicate electronically with J&G, stating, "PLEASE SEND[] TRACKING NUMBER TO JEFFREY BOYCE...." *Id.* ¶ 55. The following day, February 22, 2012, Jeffrey Boyce sent the following electronic message to J&G:  
GOOD EVENING,

I PURCHASED A Rock Island Armory 101 1a1 [] Tactical 45ACP WITH 2 ADDITIONAL MAGAZINES. WHEN FILLING OUT THE FORMS AND GIVING MY CREDIT CARD # I DID NOT NOTICE A SPOT TO PUT THE INFORMATION FOR TH[E] FFL HOLDER I WANT TO TRANSFER THE GUN TO WHEN I GO TO PICK IT UP? MY NAME IS JEFFERY BOYCE. I PURCHASED MY M1011A1 FROM J&G SALES AND I WANT THE FIREARM TRANSFERRED TO [WORLD PAWN].

THEIR FFL LICENSE IS ON FILE. MY TELEPHONE # IS (541) 267-2392. PLEASE NOTIFY ME WHEN THIS TRANSFER IS COMPLETE. I HAVE SPENT QUITE A BIT OF MONEY AND WOULD LIKE TO USE MY 1911 AS SOON AS POSSIBLE.

YOURS TRULY,

MR. JEFFREY G. BOYCE

*Id.* ¶ 57 (emphasis added).

J&G used the same customer number, OR02017, for the Makaraov and the Rock Island transactions, despite J&G's records indicating that the Makarov was "sold to Diane Boyce" and the Rock Island was "sold to Jeffrey Boyce." *Id.* ¶ 56. Notwithstanding Jeffrey Boyce's written statement that he gave "my credit card," the Makarov and Rock Island were purchased with a credit card that belonged to Diane Boyce. *Id.* ¶ 58. J&G possessed records demonstrating that Diane Boyce was the credit card holder. *Id.* J&G failed to undertake a retrospective assessment of past transactions to identify the discrepancy between Jeffrey Boyce's written statement that he used his credit card and the indisputable fact

that the credit card belonged to Diane Boyce. *Id.* ¶ 59. Similarly, J&G failed to identify that the same customer number, OR02017, was previously used to purchase firearms. *Id.*

\*3 J&G shipped the Rock Island to World Pawn on February 23, 2012, the day after Jeffrey Boyce sent J&G the foregoing electronic message. *Id.* ¶ 61. Accompanying the Rock Island was an invoice reading, "SOLD TO: JEFFREY BOYCE FOR TRANSFER." *Id.* ¶ 62. The invoice included the last four digits of the credit card associated with payment of the Rock Island, which belonged to Diane Boyce. *Id.* ¶ 63. Despite receiving an invoice that indicated the Rock Island was sold to Jeffrey Boyce and that the credit card belonged to Diane Boyce, World Pawn transferred the firearm to Diane Boyce. *Id.* ¶ 64.

Jeffrey Boyce created a customer account with J&G and used it to order the Makarov and Rock Island pistols. *Id.* ¶ 52. To create the customer account, Jeffrey Boyce had to provide his name, date of birth, email address, residence, and select a password. *Id.* J&G had access to Jeffrey Boyce's customer account. *Id.* For all three firearms, Jeffrey Boyce exclusively communicated with the online dealers, including J&G, as well as with World Pawn to arrange purchase and transfer of the firearms. *Id.* ¶ 51.

All three weapons were paid for by Jeffrey Boyce, were types of guns not typically used for hunting, and were all transferred to Diane Boyce roughly within a three month period. *Id.* ¶¶ 50, 39. Diane Boyce signed a Form 4473 for all three firearms, thereby falsifying a response by indicating that she was the actual transferee and buyer of each firearm. *Id.* ¶ 47. J&G had general knowledge that its firearms were being sold to straw purchasers and that its firearms were being used in crimes at alarming rates. *Id.* ¶¶ 40, 41. Despite knowledge of frequent straw purchases, J&G did nothing to prevent such unlawful purchases from continuing. *Id.* ¶ 40. World Pawn falsified its 4473 Form by indicating that Diane Boyce was the purchaser of the Rock Island even though World Pawn knew that J&G's invoice stated that Jeffrey Boyce was the actual purchaser. *Id.* ¶ 65. Additionally, World Pawn knew, and had reason to believe, that Diane Boyce was acting as a straw purchaser for her son, Jeffrey Boyce, and World Pawn failed to undertake any reasonable inquiry or steps to prevent the unlawful straw purchase of the Rock Island. *Id.* ¶ 64, 60, 66, 67. Because World Pawn knew that Diane Boyce was a straw purchaser of the Rock Island, World Pawn should have retrospectively determined that the Makarov and AK-47, both guns previously transferred to Diane Boyce, were likewise straw purchases. *Id.* ¶ 66. Indeed, World Pawn would have realized that Diane Boyce had previously acted as a straw purchaser for the AK-47 and Makarov if World Pawn had undertaken a reasonable records review.<sup>4</sup> *Id.*

As a result of neither J&G nor World Pawn employing reasonable care to undertake a record review or to inquire about whether straw purchases had been afoot, Jeffrey Boyce, a convicted felon suffering from mental illness and drug addiction, was ultimately able to possess all three firearms and engage in an extended criminal episode occurring in both Oregon and California. *Id.* ¶¶ 67, 35, 38, 85, 86. On April 28, 2013, Jeffrey Boyce drove a pickup truck out to the Oregon coast and fired his Makarov six times at a stranger, Kirsten Englund, taking her life. *Id.* ¶¶ 67, 89. Jeffrey Boyce proceeded to douse Kirsten Englund in gasoline and set her on fire. *Id.* ¶ 85.

The following day, April 29, 2013, Jeffrey Boyce employed the Rock Island in Sonoma County, California to coerce a stranger to drive him to a church. *Id.* ¶ 86. Upon arrival at the church, Jeffrey Boyce drove off in the stranger's car. *Id.* Afterwards, Jeffrey Boyce brandished the Rock Island again to coerce a different person in Marin County, California to give him their car. *Id.* ¶ 87. Shortly thereafter, law enforcement officers arrested Jeffrey Boyce while he was attempting to break into a nearby home. *Id.* ¶ 88. At the time of arrest, Jeffrey Boyce was carrying the Rock Island and the AK-47. *Id.* ¶ 88. Jeffrey Boyce told law enforcement that he murdered Kirsten Englund with the Makarov. *Id.* ¶ 89. Oregon State Police located six spent casings at the scene of the homicide, later confirming they were fired by the Makarov. *Id.* ¶ 89. The officers also found a heretofore unmentioned Ruger .22 caliber semi-automatic rifle inside Jeffrey Boyce's pickup truck, which according to Alcohol, Tobacco, and Firearms records was acquired by Diane Boyce in 2008. *Id.* ¶ 90. Also found inside the pickup truck was ammunition, methadone, Valium prescribed to Diane Boyce, and marijuana. *Id.* Jeffrey Boyce thereafter committed suicide while in custody. *Id.*

## II. Defendants' Motions to Dismiss Plaintiff's Claims Because the Predicate Exception, Negligent Entrustment Exception, and Negligence *Per Se* Exception Are Inapplicable Are Denied.

\*4 The Protection of Lawful Commerce in Arms Act (PLCAA), 15 USC § 7901 *et seq.*, prohibits any “qualified civil liability action,” which is defined as “a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, 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 (5)(A). A “qualified product” means any firearm or ammunition, or component part thereof, that has been shipped or transported in interstate or foreign commerce. *Id.* § 7903(4). A “seller” means, among other things, a person or entity engaged in the business of selling firearms or ammunition. *See Id.* § 7903(6). The term “unlawful misuse” means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product. *Id.* § 7903(9). In short, Congress granted immunity generally to manufacturers and sellers of firearms and ammunition for injuries or harm caused by use of firearms sold by them.

However, Congress carved out six exceptions to that immunity, rendering specific conduct outside the scope of a qualified civil liability action, thereby exposing to liability certain manufacturers and sellers of qualified products in limited circumstances. Here, plaintiff argues that the predicate exception, negligent entrustment exception, and negligence *per se* exception apply to this case.

### A. Predicate Exception

The first question presented is whether plaintiff sufficiently alleges a claim governed by the predicate exception under 15 USC § 7903(5)(A)(iii).

The predicate exception brings a case outside the scope of a qualified civil liability action and, thus, allows that case to proceed to trial. Initially, the Court notes that the predicate exception's broad language provides that an entire “action” survives—including all alleged claims—if a seller of a qualified product knowingly violated and/or aided and abetted the violation of a statute applicable to the sale or marketing of the qualified product, and that violation was the proximate cause of the harm for which relief is sought. 15 USC § 7903(5)(A)(iii). In support of that conclusion, subsections (5)(A)(iii)(I) and (5)(A)(iii)(II) employ “any case” not “any claim,” suggesting that Congress intended for all otherwise justiciable claims to go forward in cases that trigger application of the predicate exception. *See id.* Accordingly, the Court construes section 7903(5)(A)(iii) as providing that all claims—*e.g.*, negligence, public nuisance, negligent entrustment, negligent *per se*—overcome the immunity protections afforded by section 7902. *See e.g., Williams v. Beemiller, Inc.*, 100 AD3d 143, 151 (NY App Div 4<sup>th</sup> Dep't 2012), *amended by* 103 AD3d 1191 (NY App Div 4<sup>th</sup> Dep't 2013) (concluding that a separate analysis of the plaintiff's negligent entrustment and negligence *per se* exceptions is unnecessary after determining that the predicate exception applies); *Smith & Wesson Corp. v. City of Gary*, 875 NE2d 422, 434-45 (Ind Ct App 2007) (allowing a negligence claim to proceed without a claim-by-claim analysis after concluding that violation of a statutory public nuisance law triggered application of the predicate exception); *but see Woods v. Steadman's Hardware, Inc.*, No CV 12-33-H-CCL, 2013 WL 709110 (D Mont Feb. 26, 2013) (discussing approvingly the lower court's dismissal of some claims after determining that other claims survived because they satisfied the predicate exception). Conversely, where the negligent entrustment exception of section 7903(5)(A)(ii) applies, it does not automatically open the gate to all claims. Rather, looking at the plain statutory language, the negligent entrustment provision solely authorizes “an action brought against a seller *for* negligent entrustment or negligence *per se.*” *See id.* (emphasis added).

The statutory language of the predicate exception reads:

(iii) 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, including—

\*5 (I) any case in which the manufacturer or seller *knowingly* made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or *aided, abetted*, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller *aided, abetted*, or conspired with any other person to sell or otherwise dispose of a qualified product, *knowing, or having reasonable cause to believe*, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18;

*Id.* § 7903(5)(A)(iii) (emphasis added). Plaintiff expressly alleges that defendants knowingly violated and/or aided and abetted Diane Boyce and Jeffrey Boyce in violating state and federal statutes applicable to the sale or marketing of firearms, and that such violation was a proximate cause of the harm for which relief is sought in this case. *See* FAC ¶¶ 82, 83, 84 (alleging violations of ORS §§ 166.416, 166.418 as well as 18 USC §§ 922(a)(1)(A), 922(a)(6), 922(d), 922(g), 922(m), 924(a)(1), 924(a)(2), 924(a)(3)).

After considering the applicable law, accepting as true plaintiff's factual allegations, giving plaintiff the benefit of all reasonable inferences therefrom, and based upon the totality of circumstances, including the nature and pattern of firearm purchases, the invoice and electronic messages that expressly identified Jeffrey Boyce as the purchaser, the shared online account associated with Diane Boyce's credit card, Jeffrey Boyce's personal email address correspondence, among other things, the Court is satisfied that plaintiff has alleged sufficient ultimate facts to support a knowing violation and/or aiding and abetting theory against J&G and Word Pawn. *See* ORS §§ 166.416, 166.418; 18 USC §§ 922(a)(1)(A), 922(a)(6), 922(d), 922(m). Put differently, a reasonable person could find that both World Pawn and J&G knowingly violated and/or aided and abetted Diane Boyce and Jeffrey Boyce in violating a statute applicable to the sale or marketing of firearms. The inquiry, however, does not end there.

The predicate exception also requires that the violation of federal or state statute constitute a proximate cause of the harm for which relief is sought, *i.e.*, a proximate cause of the damages stemming from Jeffrey Boyce's murder of Kirsten Englund. No party disputes that Jeffrey Boyce shot and killed Kirsten Englund using the Makarov. Additionally, plaintiff implicitly argues that Jeffrey Boyce possessed the Rock Island at the time of the murder and that such possession emboldened Jeffrey Boyce, thereby facilitating his ultimate murder of Kirsten Englund. FAC ¶¶ 67, 80, 85. Indeed, case law supports the legal theory that possession of a weapon may be “in furtherance” of a crime when such possession emboldens a defendant in the commission of a crime. *See US v. Thongsy*, 577 F3d 1036, 1041-42 (2009) (holding that a rational jury could find that possession of a firearm was “in furtherance” of a drug crime). While *Thongsy* involved a drug crime, and this case involves a murder, the Court concludes that it is appropriate to extend the *Thongsy* rationale to nondrug scenarios. *See id.* Plaintiff has alleged that Jeffrey Boyce was armed with both the Makarov and Rock Island at the time of the murder. FAC ¶¶ 67, 80, 85. A reasonable jury could infer that possessing the Rock Island at the time of the murder emboldened Jeffrey Boyce and was, therefore, possessed in furtherance of the Jeffrey's Boyce's killing of Kirsten Englund.

\*6 Defendants' also raise arguments that Jeffrey Boyce's actions were not foreseeable. The Oregon Supreme Court, in *Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1 (1987), explained that foreseeability “depends on whether [defendants' conduct] created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff.” *Id.* at 17. The Court concludes that a foreseeable outcome arising from a seller of firearms violating gun safety laws that were designed to keep firearms out of the hands of dangerous people is that innocent people would be harmed or worse murdered.

The Court notes that the question of foreseeability is a fact-intensive inquiry rightfully belonging to a jury. *See Thongsy*, 577 F3d at 1041.

In sum, based upon the foregoing, the Court concludes that application of the predicate exception is appropriate in this case because plaintiff has alleged sufficient ultimate facts upon which a reasonable jury could find that defendants knowingly violated and/or aided and abetted violation of federal or state statutes, and that such violation was a proximate cause of Kirsten Englund's death.

### B. Negligent Entrustment

PLCCA provides an exception to immunity for actions brought against a seller for negligent entrustment. 15 USC § 7903(5)(A)(ii). Congress defines “negligent entrustment” as “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) (emphasis added).

World Pawn argues that the negligent entrustment exception is not applicable because the firearms were supplied to Diane Boyce who did not “use” the firearms to commit a violent crime. Plaintiff argues that Diane Boyce's “use” involved transferring the firearms to Jeffrey Boyce, which necessarily involved unreasonably risk to others. The Court is not required to reach the question of whether plaintiff's broad interpretation of “use” is appropriate, or whether the negligent entrustment exception under federal law is applicable, because the Court has determined the predicate exception applies, and, therefore, plaintiff is entitled to bring all well-pleaded claims valid under Oregon law. *See e.g., Williams v. Beemiller, Inc.*, 100 AD3d 143, 151 (NY App Div 4<sup>th</sup> Dep't 2012), *amended by* 103 AD3d 1191 (NY App Div 4<sup>th</sup> Dep't 2013); *Smith & Wesson Corp. v. City of Gary*, 875 NE2d 422, 434-45 (Ind Ct App 2007).

Because the predicate exception applies, the Court must determine solely whether plaintiff has sufficiently alleged ultimate facts to support a negligent entrustment claim under Oregon law. Oregon courts commonly rely on the Restatement (Second) of Torts when evaluating legal concepts. *See e.g., Marlow v. City of Sisters*, 281 Or App 462, 470 (2016) (relying on the Restatement (Second) of Torts in analyzing common trespass principles). Section 390 of the Restatement (Second) of Torts defines “negligent entrustment” as:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

*Restatement (Second) of Torts § 390 (1965)*. In short, the Court concludes that plaintiff is entitled to go forward on a theory that defendants supplied these firearms to Jeffrey Boyce, through a third person, Diane Boyce, having reason to know that such supplying involved unreasonable risk to others based upon the inherent dangerous nature of straw-purchase transactions.

\*7 Plaintiff has essentially alleged that J&G and Word Pawn supplied the firearms to Jeffrey Boyce through Diane Boyce, a third person. *See e.g., FAC* ¶¶ 117, 118, 120. The Court finds that plaintiff has alleged sufficient facts to infer that Diane Boyce had actual knowledge that Jeffrey Boyce was likely to use the firearms in an unsafe manner. More to the point, the Court concludes that plaintiff has alleged sufficient facts to infer that J&G and World Pawn had reason to know that Jeffrey's possession of the weapons would likely create an unreasonable risk of harm due to the inherent dangerous nature of straw-purchase arrangements. The fundamental purpose of background checks is to prevent firearms from coming into the possession of people that Congress determined are dangerous for one reason or another. A common

method of bypassing such background checks for buyers who are ineligible to purchase firearms is what took place in this case: a straw purchase. Plaintiff alleges that J&G knew that a number of weapons it sold previously were transferred through straw buyers and ultimately used in dangerous crimes. *Id.* ¶¶ 40, 41. In addition, plaintiff alleges that World Pawn had reason to know that Jeffrey Boyce not only received the Rock Island through a straw purchase, but also the Makarov and the Ak-47. And Jeffrey Boyce's receipt of the so-called “arsenal of weapons he acquired through J&G and [World Pawn]” increased the degree of unreasonable risk to others. FAC ¶¶ 85.

For the foregoing reasons, defendants' motions to dismiss plaintiff's negligent entrustment claim is denied. The Court, accepting as true all well-pleaded allegations and giving plaintiff, as the nonmoving party, the benefit of all favorable inferences that may be drawn from those allegations, concludes that plaintiff has alleged sufficient ultimate facts to bring a negligent entrustment claim under Oregon law.

### C. Negligence *Per Se*

Turning now to plaintiff's negligence *per se* claim. As previously explained, because the predicate exception applies, the Court need not determine whether the negligence *per se* exception is specifically applicable. *See e.g., Williams v. Beemiller, Inc.*, 100 AD3d 143, 151 (NY App Div 4<sup>th</sup> Dep't 2012), *amended by* 103 AD3d 1191 (NY App Div 4<sup>th</sup> Dep't 2013); *Smith & Wesson Corp. v. City of Gary*, 875 NE2d 422, 434-45 (Ind Ct App 2007).

Oregon courts recognize that violation of a statutory duty constitutes negligence *per se* if the statute “so fixes the legal standard of conduct that there is no question of due care left for a factfinder to determine.” *Shahtout v. Emco Garbage, Co.*, 298 Or 598, 601 (1985). As defendant J&G acknowledges, to establish a claim for negligence *per se*, a plaintiff must provide factual allegations to support that (1) defendant violated a statute or rule; (2) plaintiff was injured as a result of that violation; (3) plaintiff was a member of the class of persons intended to be protected by the statute or rule; and (4) the injury plaintiff suffered was of a type that the statute or rule was designed to protect. *Scheffel v. Or. Beta Chapter of Phi Kappa Psi Fraternity*, 237 Or App 390, 415 (2015).

Defendant J&G argues that the complaint does not adequately contains facts to support violation of 18 USC § 922(d), ORS § 166.416, and ORS § 166.418. Defendant J&G seems to rely upon a technical and overly limited reading of those statutes by asserting J&G did not transfer firearms to Diane Boyce or Jeffrey Boyce and instead transferred firearms to World Pawn. The Court cannot read the complaint in such a limited fashion for reasons discussed above. The gravamen of plaintiff's complaint alleges facts sufficient to support a finding that J&G and World Pawn knowingly violated and/or aided and abetted each other and Diane Boyce in unlawfully completing Form 4473 in addition to executing the straw purchases associated with the Makarov and Rock Island.

The Court also finds that World Pawn's argument regarding whether negligence *per se* exists in Oregon rests upon semantics. It is the case that Oregon courts recognize a cause of action based upon a theory of negligence *per se*. *See Doyle v. City of Medford*, 356 Or 336, 345 n 7 (2014) (“Negligence *per se* is a shorthand descriptor for a judicially recognized negligence claim based on a duty that is imposed by a statute or regulation.”) (citing *Abraham v. T. Henry Const., Inc.*, 350 Or 29, 36 n 5 (2011)). It is also true that the plain language of the statutory provision authorizes “an action against a seller \*\*\* for negligence *per se*.” 15 USC § 7903(5)(A)(ii). Fundamentally, section 7903(5)(A)(ii) authorizes a negligence *per se* theory to go forward regardless of whether it is technically a standalone action or an alternate method of establishing a standard of care for a negligence claim. The Court finds no persuasive basis to conclude that Congress intended to prohibit negligence *per se* claims in jurisdictions that characterize negligence *per se* as a subspecies of common law negligence instead of a standalone cause of action.

\*8 World Pawn also disputes the question of whether violation of a gun safety law can constitute the basis of a negligence *per se* theory of recovery. The Court notes that, to its knowledge, no clear binding precedent exists to resolve this question. Nevertheless, the Eleventh Circuit Court of Appeals, in *King v. Story's, Inc.*, 54 F3d 696 (1995), held that a retailer's sale

of a rifle without obtaining the buyer's signature on Form 4473 violated a federal regulation, 27 CFR § 178.124, and, therefore, constituted negligence *per se*. *Id.* at 697. Here, the focused gun safety statutes established a fixed standard of care applicable to defendants. Those focused gun safety statutes were designed to prevent innocent civilians, such as Kirsten Englund, from becoming victims of gun violence. Consequently, the Court concludes plaintiff has adequately alleged that defendants' violation of state and federal statutes constituted negligence *per se*.

### III. Motion to Strike and Motion to Make More Definite and Certain

After reviewing defendants' motions to strike and World Pawn and Sinatra's motion to make more definite and certain, the Court denies the motions to strike entirely and denies in part and grants in part the motion to make more definite and certain. Specifically, the Court grants World Pawn and Sinatra's request to make more definite and certain allegations regarding the nature and amount of economic damages set forth in paragraphs 135 through 138 of plaintiff's complaint.

### IV. Conclusion

For the foregoing reasons, defendants' motions to dismiss plaintiff's claims of negligence, negligence *per se*, negligent entrustment, gross negligence, and public nuisance are denied, because the predicate exception applies to this case, and plaintiff has alleged ultimate facts that, if taken as true and from which reasonable inferences are drawn, could support her claims. In addition, defendants' motions to strike are denied. Lastly, the Court grants in part and denies in part World Pawn and Sinatra's motion to make more definite and certain.

SIGNED this 30th day of June, 2017.

<<signature>>

**Michael A. Greenlick**

Circuit Court Judge

#### Footnotes

- 1 As the defendants' arguments cover similar subject matter, the Court addresses them together as opposed to independently.
- 2 On November 16, 2016, the Court heard argument on J&G's motion to dismiss, among other issues, and therefore relies upon such prior argument in this opinion.
- 3 Any motions not specifically discussed in this opinion are denied without further discussion.
- 4 The Court recognizes that J&G was not a party to the original AK-47 sale.