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7

8
9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF LOS ANGELES

11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA,

13 Plaintiff,

14 v.

15 POLYMER80, INC., a Nevada corporation;
16 DAVID BORGES, an individual; LORAN
KELLEY, an individual,

17 Defendants.
18
19
20
21

Case No.: 21STCV06257

[Assigned for all purposes to the Honorable
Daniel S. Murphy; Dept. 32]

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER OF DEFENDANTS
POLYMER80, INC., DAVID BORGES,
AND LORAN KELLEY TO COMPLAINT**

Hearing Date: June 7, 2021
Hearing Time: 8:30 a.m.
Department: 32
Reservation ID: 799308383329

Complaint Filed: February 17, 2021

1 **INTRODUCTION**

2 Plaintiff, Los Angeles City Attorney Michael N. Feuer, on behalf of the People of the
3 State of California (the “State”), has sued Polymer80, Inc. and two of its principals (collectively
4 “Defendants”), alleging violations of the Unfair Competition Law (“UCL”) and creation of a
5 public nuisance. The State’s central theory is that Defendants have manufactured and sold items
6 that meet the legal definition of “firearm” without adhering to various regulations imposed on
7 “firearm” commerce. Defendants demur to the State’s Complaint.

8 Defendants demur to both Causes of Action in the Complaint on the basis that the
9 Complaint fails to explain how Defendants’ products meet the very technical elements of the
10 federal definitions of “firearm” or “handgun” in sufficient detail. The State’s failure in this regard
11 precludes Defendants from adequately evaluating the State’s claims and responding accordingly.

12 Defendants additionally demur to both Causes of Action for their failure to state a valid
13 claim. The State’s First Cause of Action is comprised of various sub-claims alleging violations of
14 the UCL under that Act’s unlawful, unfair, and fraudulent prongs. Each of them is defective.

15 First, the Complaint fails to plead a cause of action under the “unlawful” prong because
16 the Complaint fails to adequately allege that Defendants’ products are “firearms” and thus subject
17 to the firearm-sale regulations that the State accuses Defendants of violating. The State’s aiding
18 and abetting theory likewise fails to state a cause of action as a matter of law because the
19 supposed underlying crime is not a business act or practice subject to the UCL; even if it was, the
20 State fails to allege how Defendants participated in any crime.

21 Second, the Complaint fails to plead a cause of action under the “fraudulent” prong
22 because Defendants’ statement that the State contends is fraudulent is a true and accurate
23 statement that would not deceive a reasonable person. Additionally, because the Complaint fails
24 to allege Defendants’ products are “firearms,” there is no basis in the Complaint for the comment
25 to be deceiving.

26 Finally, the Complaint fails to plead a cause of action under the “unfair” prong for either
27 unfair competition or consumer fraud. The Complaint fails to allege that competitors cannot
28 lawfully engage in the same conduct as Defendants and no injury to consumers is alleged.

1 The State’s Second Cause of Action for public nuisance fails for effectively the same
2 reasons as its First. It depends on Defendants’ products being “firearms,” which the Complaint
3 has failed to adequately allege. Because the Complaint fails to allege that the products are
4 firearms, it necessarily fails to allege that Defendants have a duty to treat their products like
5 firearms in the manner the State is demanding. As such, State’s Second Cause of Action fails.

6 For these reasons, and those explained below, this Court should sustain this demurrer.

7 **STATEMENT OF ALLEGED FACTS**

8 The State asserts two causes of action in its Complaint. The First alleges violations of the
9 UCL and the Second alleges liability under California’s public nuisance statute. The gravamen of
10 both of the State’s Causes of Action is the same. The State alleges that Defendants manufacture
11 and sell items that meet the definitions of “firearm” and “handgun” under federal law
12 and that Defendants are liable under both causes of action for selling those items without adhering
13 to California and federal regulations governing firearm sales. (Complaint ¶¶ 39-82.) While the
14 Complaint quotes definitions for “firearm” and “handgun” under federal law, it does not
15 adequately explain how Defendants’ products meet the various technical elements of each of
16 those definitions. (Complaint ¶¶ 39-40.) That is the fundamental problem with the Complaint that
17 is the basis for this demurrer.

18 Counsel for all the parties met and conferred about the bases for this demurrer via
19 telephone on March 26, 2021.

20 **LEGAL STANDARD**

21 A demurrer may be sustained where the pleading does not state facts sufficient to
22 constitute a cause of action or is uncertain. (Code Civ. Proc. § 430.10(e); (f).) “[W]hether an
23 alleged business practice violated the UCL [] may be resolved at the demurrer stage in appropriate
24 cases.” (*Drum v. San Fernando Valley Bar Assn.* (2010) 182 Cal. App. 4th 247, 252.) In ruling
25 on a demurrer, the court looks to the face of the complaint, and to matters of which the court may
26 take judicial notice. (*Franz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) Although the allegations
27 of a complaint are presumed true, a court is not obligated to accept bare legal conclusions as true
28 for purposes of a demurrer. (*Serrano v. Priest* (1971) 5 Cal.3d. 854, 591.)

1 **I. The Complaint Is Too Uncertain Because It Fails to Explain the State’s**
2 **Theories for How the Items Constitute “Firearms” or “Handguns” Under**
3 **Federal Law**

4 Federal law defines “firearm,” in relevant part, as “(A) any weapon . . . which will or is
5 designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the
6 frame or receiver of any such weapon.” (18 U.S.C. § 921, subd. (a)(3).) Short of conclusory
7 statements, the Complaint is devoid of explanation as to how the blanks alone or the blank kits
8 can be deemed “firearms” under federal law. Merely reciting the elements of the definition and
9 claiming that the kits meet them is insufficient. (Complaint ¶¶ 39-40.)

10 The State likewise fails to plead sufficient facts explaining its position on how the blanks
11 or kits meet the definition of “handgun” under federal law. Federal law defines “handgun” as
12 either “(A) a firearm which has a short stock and is designed to be held and fired by the use of a
13 single hand; and (B) any combination of parts from which a firearm described in subparagraph
14 (A) can be assembled.” (18 U.S.C. § 921, subd. (a)(29).) The State utterly fails to explain how
15 Defendants’ products specifically meet this technical definition.

16 Defendants are entitled to know at the pleading stage what specifically they are being
17 sued for. The State must address the vagueness of these critical allegations. In sum, the State must
18 more specifically explain its theories for how Defendants’ products meet these very technical
19 definitions. Because the State has failed to do so, the demurrer should be sustained for the
20 Complaint being uncertain.

21 **II. The Complaint Fails to Plead a Valid UCL Violation**

22 **A. The Complaint Fails to Plead “Unlawful” Conduct**

23 The Complaint alleges that Defendants have directly violated federal laws and aided and
24 abetted violations of California law as the predicates for the claims under the “unlawful” prong of
25 Section 17200. (Complaint ¶¶ 62-67.) If there are no such violations, then there is no UCL
26 violation under the “unlawful” prong of section 17200. (*See Krantz v. BT Visual Images*, 89
27 Cal.App.4th 164, 178 (2001) [the viability of an "unlawful" UCL claim "stands or falls" with the
28 underlying claim]; *Whiteside v. Tenet Healthcare Corp.*, 101 Cal.App.4th 693, 706 (2002) [if the
 complaint fails to state a violation of an underlying law, the § 17200 claim on which it is

1 premised fails too].) Because the Complaint fails to adequately allege that Defendants’ products
2 are “firearms” or “handguns” under the GCA, the Complaint necessarily also fails to allege that
3 Defendants have violated any federal laws by selling their products. Regardless of the definitional
4 issue, the Complaint also fails to allege aiding and abetting liability under the UCL. Thus, no
5 UCL violation alleged in the Complaint under the “unlawful” prong of Section 17200 can stand.

6
7 **1. The Complaint Fails to Adequately Allege How the Sale of
Defendants’ Products Violates Any Federal Law**

8 The Complaint alleges that “because these products are in fact ‘firearms’ under federal
9 law, Polymer80’s business practice of selling them without serial numbers, without conducting
10 background checks, and to purchasers residing in a different state, is illegal.” (Complaint ¶ 13.)
11 The converse of that statement is that if those products do not meet the definition of “firearm”
12 under federal law, then there is no UCL violation under the “unlawful” prong of section 17200 by
13 selling them. As explained above in Section I, the State has failed to adequately allege that the
14 products at issue are “firearms” under federal law.

15 The Complaint also alleges that the Buy Build Shoot (“BBS kit”) kit meets the federal
16 definition of “handgun” and thus, by selling that kit without being accompanied by a
17 “supplemental or external locking device or gun storage container,” Defendants have violated the
18 federal 2005 Child Safety Lock Act. (Complaint ¶ 48.) Again, as explained above in Section I,
19 the Complaint fails to allege facts explaining specifically how the blank or blank kits meet that
20 definition. (Complaint ¶¶ 47-49, [emphasis added].) It is noteworthy that, contrary to the
21 allegations in the Complaint, ATF has not determined that the BBS kit is a “firearm” as defined
22 under federal law. (Complaint, Note 54.)

23
24 **2. Defendants Do Not Aid and Abet Violations of Any California Law
by Selling Their Products to Customers in California**

25 The Complaint alleges that Defendants aided and abetted criminal acts in two ways. First,
26 “by marketing, selling, and transferring all of the components, parts, materials, tools and
27 instructional videos needed to build an unsafe handgun in the state.” (Complaint ¶ 57.) Second,
28 “by knowingly sell[ing] unfinished pistol frames that do not contain either 3.7 ounces of the type

1 of stainless steel embedded in it or a unique serial number engraved or permanently affixed,” as
2 California requires of pistols in order to be lawfully possessed, which allows people to build a
3 handgun without those required features. (Complaint ¶ 60.) These arguments both fail as a matter
4 of law on various grounds.

5 First, the State fails to allege any unlawful act by a third-party under Section 17200 that
6 Defendants could aid and abet. Section 17200 is concerned only with an unlawful “*business act*
7 or practice.” (Bus. Prof. Code § 17200, [emphasis added]; see also *Blank v. Kirwan* (1985) 39
8 Cal.3d 311, 329 [explaining that plaintiffs fail to state a UCL claim where the challenged act is
9 not a business practice].) The State’s theory is that Defendants are aiding and abetting *consumers*
10 who manufacture firearms in violation of the California Unsafe Handgun Act (the “CUHA”).
11 (Complaint ¶ 15:3-5.) But personal manufacturing of a firearm cannot reasonably be considered a
12 “*business act or practice*” subject to Section 17200. Tellingly, the State does not allege that it is,
13 which is fatal to its claim. Without a violation of *Section 17200* (not just any law) by a third-
14 party, there can be no aiding and abetting liability for Defendants.

15 Second, even assuming consumers’ personal activity could constitute a business act under
16 Section 17200, the Complaint fails to allege a sufficient connection between Defendants and any
17 unlawful act. As an initial matter, the “CUHA” does not even apply to Defendants because it only
18 applies to a “*person in this state*.” (Cal. Pen. Code § 3200, subd. (a).) All Defendants are from
19 out of state. (Complaint ¶ 18.) As such, they cannot violate the CUHA, as a matter of law.

20 Even if they were subject to the CUHA, however, the Complaint is devoid of any
21 allegation that Defendants intended that Californians violate the CUHA or had knowledge of any
22 individual violating the CUHA. (*See Upasani v. State Farm General Ins. Co.* (2014) 227
23 Cal.App.4th 509, 519 [“The words ‘aid and abet’ as thus used have a well understood meaning,
24 and may fairly be construed to imply an intentional participation with knowledge of the object to
25 be attained.”].) Nor does the Complaint allege that Defendants provided “substantial assistance or
26 encouragement” to any person allegedly violating the UHA, as the Complaint must to assert a
27 proper claim for aiding and abetting. (*See Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86,
28 97 [60 Cal.Rptr.3d 810].)

1 The State’s case is even weaker with respect to the alleged violations of the “Assembly of
2 Firearms Law” ((Pen. Code, §§ 29180-29184.) “The UCL does not apply if the Legislature has
3 expressly declared the challenged business practice to be lawful in other statutes.” (*Lazar v. Hertz*
4 *Corp.* (1999) 69 Cal.App.4th 1494, 1505-1506.) Those laws expressly sanction the making of
5 personal firearms from parts that initially lack a serial number. (Pen. Code, § 29180.) That alone
6 is fatal to the State’s cause of action for aiding and abetting liability.

7 * * * *

8 For the above reasons, the Complaint fails to allege any UCL violation under the
9 “unlawful” prong of section 17200.

10 **B. The Complaint Fails to Adequately Plead “Fraudulent” Conduct.**

11 A business practice is “fraudulent” under Section 17200 if “members of the public are
12 likely to be deceived”. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983)
13 35 Cal.3d 197.) “No published California decision has defined what “likely” means, but the
14 identical language used in the federal Lanham Act requires that the confusion be “probable” and
15 not just “likely.” (Stern, Cal. Practice Guide: Bus. & Prof.C. §17200 Practice (The Rutter Group
16 2020) ¶ 3:154, p. 3-55, citing *Murray v. Cable NBC* (9th Cir. 1996) 86 F.3d 858, 861.) In order to
17 be deceived, members of the public must have had an expectation or assumption about the subject
18 addressed by the allegedly misleading statement. (*Bardin v. DaimlerChrysler Corp.* (2006) 136
19 Cal.App.4th 1255, 1275.) The likelihood of deception is tested by the reasonable person standard.
20 (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 506-507.)

21 The Complaint alleges Defendants “knowingly engaged in fraudulent and deceptive acts
22 and practices by falsely advertising to consumers, either expressly or by implicated, that its kit
23 products were legal to purchase and possess.” (Complaint ¶¶ 88-89.) The only supposedly
24 “misleading statement” the Complaint alleges is that Defendants stated on their website that ATF
25 has determined that unfinished blanks that Defendants sell are not considered “firearms” under
26 federal law. (Complaint ¶ 71.) Yet, the Complaint concedes that ATF previously determined that
27 those unfinished blanks are not firearms. (Complaint ¶ 72.) The State still alleges the statement is
28 misleading because ATF has not made any determination about whether the *kits* are firearms. (*Id.*)

1 That allegation assumes that the sale of those kits violates either state or federal law. As
2 explained above in Section I, the Complaint has failed to adequately explain how they are
3 “firearms.” If a practice or advertisement is not likely to mislead anyone, then there is no
4 deception. (*Shvarts v. Budget Group, Inc.* (2000) 81 Cal.App.4th 1153, 1160.) Here, the kits have
5 not been adequately alleged to be “firearms” so it cannot be said that anyone was misled. What’s
6 more, while the presence of consumer complaints is not a necessary element of the fraudulent
7 prong of section 17200 claims, the absence of such complaints and returns of the product is
8 “highly relevant” to show that no consumer was likely to have been deceived. (*Consumer*
9 *Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1361.) The Complaint does
10 not allege any actual examples of consumers who complain they were deceived.

11 **C. The Complaint Fails to Adequately Plead “Unfair” Conduct.**

12 **1. Because Defendants’ conduct is not adequately alleged to be illegal,**
13 **there is no unfair competition with licensed firearm vendors**

14 The Complaint alleges that Defendants’ sale of its “kits in contravention of state and
15 federal gun law requirements constitutes unfair competition to licensed gun dealers in California
16 who abide by the applicable state and federal laws and regulations . . .” (Complaint ¶ 90,
17 [emphasis added].) That allegation assumes that the sale of those kits violates either state or
18 federal law. As explained above in Section I, the Complaint has failed to adequately allege any
19 such violation. There is, therefore, no unfair competition, as licensed vendors have the option of
20 selling the same type of products as Defendants, if they so choose.

21 **2. The Complaint fails to allege any consumer injury**

22 “The UCL does not precisely define the term ‘unfair’ and ‘courts have struggled to come
23 up with a workable definition.” (*Davis v. Ford Motor Credit Co. LLC* (2009) 179 Cal.App.4th
24 581, 593-594.) As a result, Courts “have applied three different tests for unfairness in consumer
25 cases.” (*Drum, supra*, 182 Cal. App. 4th at 256.) The trend appears towards following the three-
26 part standard that federal courts use to interpret the analogous Federal Trade Commission Act.
27 (Stern, Cal. Practice Guide: Bus. & Prof.C. §17200 Practice (The Rutter Group 2020) ¶ 3:121.1,
28 p. 3-35.) The Second District Court of Appeal articulated that test as follows: (a) the *consumer*

1 *injury* must be substantial; (b) it must not be outweighed by any countervailing benefits to
2 consumers or competition; and (c) it must be an injury that *consumers* themselves could not
3 reasonably have avoided. (*Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th
4 824, 838-839 [emphasis added].)

5 First, the Complaint fails to allege that any consumer has been injured, let alone
6 substantially. Rather, it is filled with political rhetoric about how Defendants' products
7 supposedly harm society at large. The focus of the analysis for a UCL violation is on consumers,
8 not others who may be affected by those consumers. (*Buller v. Sutter Health* (2008) 160
9 Cal.App.4th 981, 986 ["The purpose of the UCL 'is to protect both consumers and competitors by
10 promoting fair competition in commercial markets for goods and services.'"]) Perhaps most
11 importantly, the Complaint says nothing about the essential element that the injury alleged be
12 "one that consumers themselves could not reasonably avoid." (*Id.*; see also *In re Firearm Cases*,
13 126 Cal.App.4th at 981.) California residents are presumed to know the law. (*Arthur Andersen v.*
14 *Superior Court* (1998) 67 Cal.App.4th 1481, 1506-1507.) Consumers could easily discover with a
15 simple internet search how to lawfully make a personal firearm using Defendants' products. (*See*
16 Request for Judicial Notice in support of Defendant's Demurrer, Exhibit A.) That some failed to
17 do so does not make Defendants liable. (*See Davis v. Ford Motor Credit Co. LLC* (2009) 179
18 Cal.App.4th 581, 598-599, citing *Camacho v. Automobile Club of Southern California* (2006) 142
19 Cal.App.4th 1394 [holding that the plaintiff "could have avoided any and all action taken by
20 defendants by obtaining and carrying insurance, as the law requires."].)

21 The Complaint seems to suggest that this Court apply a test that asks "whether the alleged
22 business practice 'is immoral, unethical, oppressive, unscrupulous or substantially injurious to
23 consumers and requires the court to weigh the utility of the defendant's conduct against the
24 gravity of the harm to the alleged victim.'" (Complaint ¶ 77, subd. (b).) This Court should reject
25 that test, as it has been described as "amorphous," (*In re Firearm Cases*, 126 Cal. App. 4th 959,
26 977-978), and is applied less regularly than the Second District's test articulated above. But even
27 if this Court adopts that test here, the Complaint still fails to meet that standard. Indeed, the State
28 has not specifically alleged how Defendants' conduct meets that standard. Rather, the State

1 merely makes the conclusory statement that by selling their kits, Defendants meet that standard.
2 (See Complaint ¶¶ 79-91.) That is insufficient to plead an injury. What’s more, to Defendants’
3 knowledge, there are “no cases finding a manufacturer has engaged in an unfair practice solely by
4 legally selling a nondefective product based on actions taken by entities further along the chain of
5 distribution.” (*In re Firearm Cases* 126 Cal. App. 4th 959, 985.)

6 Finally, if this Court adopts the third and final test, the State’s claim likewise fails. That
7 test requires that the unfair claim “must be tethered to specific constitutional, statutory, or
8 regulatory provisions.” (*Drum*, supra, 182 Cal. App. 4th at 256.) The State’s claim fails because,
9 as explained above in Section I, the State has “failed to allege any violation or incipient violation
10 of any statutory or regulatory provision, or any significant harm to competition.” (*Id.*)

11 In sum, the Complaint fails to allege any UCL violation under the “unfair” prong of
12 section 17200.

13 **III. The Complaint Fails to State a Valid Public Nuisance Cause of Action**

14 The Complaint alleges that Defendants “created a public nuisance by marketing, selling
15 and distributing ghost gun kits to California residents without serial numbers, without background
16 checks, and without appropriate safety features.” (Complaint ¶ 81.) Based on those allegations,
17 the State asks this Court to order Defendants to cease selling the “Ghost Gun kits, frames, and
18 receivers to California consumers unless and until they are in compliance with state and federal
19 laws.” (Complaint, Prayer for Relief, ¶ 2.) The State fails to state a valid nuisance cause of action.

20 Because the Complaint has failed to adequately allege that the kits are “firearms,” the
21 Complaint likewise necessarily fails to adequately allege that Defendants have a duty to serialize
22 or include “safety features” on the parts in their kits or require background checks for their
23 purchase.

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1 **CONCLUSION**

2 For the foregoing reasons, Defendants respectfully request that the Court sustain their
3 demurrer to both causes of action in the Complaint.

4
5 Dated: April 20, 2021

MICHEL & ASSOCIATES, P.C.

6 

7 _____
8 Sean A. Brady
9 Attorneys for Defendants

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA
3 COUNTY OF LOS ANGELES

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

7 On April 20, 2021, I served the foregoing document(s) described as

8 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER OF**
9 **DEFENDANTS POLYMER80, INC., DAVID BORGES, AND LORAN KELLEY TO**
10 **COMPLAINT**

11 on the interested parties in this action by placing

- 12 [] the original
13 [X] a true and correct copy

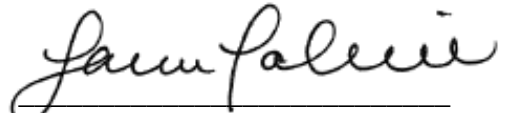
14 thereof by the following means, addressed as follows:

15 Michael N. Feuer
16 Michael J. Bostrom
17 **Office of the Los Angeles City Attorney**
18 200 North Spring Street, 14th Floor
19 Los Angeles, CA 90012
20 Email: michael.bostrom@lacity.org
21 *Attorneys for Plaintiff*

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

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

27 Executed on April 20, 2021, at Long Beach, California.

28 
Laura Palmerin