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7

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

10
11 THE PEOPLE OF THE STATE OF
CALIFORNIA,

12 Plaintiff,

13 v.

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

17 Defendants.
18
19

Case No.: 21STCV06257

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

**DEFENDANTS’ REPLY TO PLAINTIFF’S
OPPOSITION TO DEMURRER**

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

Complaint Filed: February 17, 2021

1 **INTRODUCTION**

2 The premise of the State’s action is that Defendants have violated the UCL and created a
3 public nuisance by selling products that the State contends meet the federal law “firearm”
4 definition without adhering to laws governing firearm sales. As alleged, therefore, both of the
5 State’s causes of action entirely depend on establishing the predicate that those products meet that
6 “firearm” definition. Yet, the State has failed to allege sufficient facts connecting Defendants’
7 products to that definition’s specific, technical elements. It merely makes conclusory statements
8 that leave Defendants guessing which of their products are at issue and why the State believes
9 they are firearms. As such, the complaint is too uncertain and the demurrer should be sustained.

10 **ARGUMENT**

11 There are various elements that comprise the federal “firearm” definition. (*See* 18 U.S.C.
12 921(a)(3).) The State does not explain how specifically any of Polymer80’s products meet the
13 requisite elements. Since Defendants filed their demurrer, the State has clarified that with respect
14 to “unfinished” or “80%” frames and receivers, “the Complaint is [sic] does not attack these
15 stand-alone parts.” (See State’s Oppn. Defs.’ Ex Parte Appl. Stay, p. 1.) Beyond that, other than
16 the Buy Build Shoot (“BBS kit”), throughout the Complaint, the items the State targets are
17 described merely as “kits” or “gun building kits” or “frame and receiver kits” or “ghost gun kits”
18 or “pistol frame kits.” (Complaint, *passim*.) While it points to some specific examples of products
19 it considers to fall in those categories, the State fails to explain both what precise grouping of
20 parts it considers to be a “kit” that constitutes a “firearm” under federal law or how those parts
21 specifically satisfy each element of that definition.

22 In defending its vague pleading, the State points out that it has alleged that that the “[BBS]
23 kits include ‘all component parts of a firearm’ and are ‘designed to’ be and ‘may readily be
24 converted’ into an operable weapon” and that the “frame and receiver kits containing an
25 unfinished frame or receiver along with the jigs and drill bits that enable a customer to complete
26 the frame or receiver . . . are “firearms” because they are ‘designed to’ be and ‘may readily be
27 converted’ into an operable weapon,’ and/or are the ‘frame or receiver’ of a weapon that is
28 ‘designed to’ be or ‘readily may be converted’ into an operable weapon, all under 18 U.S.C.

1 921(a)(3)(A) & (B).” (Opp., pp. 5-6.) But these are merely conclusory statements that recite the
2 bare language of federal law. Even assuming the allegations are accurate, which they are not, they
3 leave unsaid *how* the nature of the identified products specifically meets those elements.

4 The State additionally argues that Defendants’ statement that the ATF has not determined
5 the BBS kit is a “firearm” is “misleading, if not outright false.” (Opp., note 2.) But it is the State
6 that is playing loose with the facts. Only written opinions by ATF constitute that agency’s formal
7 determination of whether an item is a “firearm” under federal law. (See 27 CFR
8 70.701(d)(2)(iii)(B) (“No unpublished ruling or decision may be relied on, used, or cited by any
9 officer or employee of [ATF] as precedent in the disposition of other cases”).) The State does not
10 allege that any such writing has been issued concerning the BBS kit (or any of Defendants’ other
11 products); because none has. While ATF’s (unidentified) “Chief Counsel” has allegedly taken that
12 position, even if that were true, it would have no legal effect. In other words, at most, that is
13 merely ATF counsel’s personal opinion, not ATF’s official determination. Yet, the State here
14 purports to do what not even the ATF is allowed to do, rely on an unpublished statement of an
15 ATF employee to decide the issue of whether something is a “firearm” in another case.

16 Contrary to the State’s claims, Defendants do not argue that there is a “heightened
17 pleading requirement” here. (Opp., p. 5.) Nor do they demand that the State allege “each
18 evidentiary fact that might eventually form part of the [State’s] proof . . .” (*Ibid.*) Rather,
19 Defendants merely ask that the State allege which specific attributes of Defendants’ products
20 satisfy each element of the federal law “firearm” definition on which the State bases its entire case
21 and why they satisfy them. Otherwise, the State has not sufficiently pled that any of Polymer80’s
22 products are “firearms” and thus cannot satisfy the requisite predicate for alleging a UCL or
23 nuisance cause of action.

24 Moreover, without more specific pleading, Defendants will not be able to adequately
25 evaluate which of its products are or are not at issue here. Merely describing the products it
26 contends to be “firearms” as “kits” leaves Defendants unclear as to what the universe of products
27 the State contends are “firearms” is. The identification of some specific products does not resolve
28 this problem. To the contrary, it *increases* the uncertainty of the State’s allegations. Because

1 Polymer80 sells various “kits” with varying parts, without the State specifying which attributes
2 are the ones that supposedly satisfy the federal definition’s elements and why, the identification of
3 some leaves in doubt whether other “kits” not expressly identified by the State are included.
4 Further exacerbating the uncertainty are the State’s suggestions that mere parts can constitute a
5 “firearm.” While the State says in one place that its allegations “are limited to Polymer80’s Buy
6 Build Shoot, frame, and receiver kits,” (Complaint, ¶ 40 n.26; State's Opp. to Defendants' Ex
7 Parte App. for Stay, p. 3), it simultaneously alleges that “Polymer80 sells *other components* to
8 enable a customer to assemble a complete handgun, *including pistol barrels, slides, and trigger*
9 *assemblies*” and that “Polymer80’s sale of Buy Build Shoot kits, frame and receiver kits, *and*
10 *unfinished frames and receivers with component parts* in contravention of state and federal law”
11 is an unfair business activity. (Complaint, ¶¶ 36, 79.) These seemingly contradictory allegations
12 further warrant clarification from the State on what precisely it contends meets the relevant
13 “firearm” definition. Defendants are entitled to know at the pleading stage what specifically they
14 are being sued for. The State must address the vagueness of these critical allegations.

15 In sum, short of conclusory statements, the Complaint is devoid of explanation as to how
16 or which of Polymer80’s products can be deemed “firearms” under federal law. Merely reciting
17 the elements of the federal “firearm” definition and claiming that the kits meet them, as the State
18 does here, is insufficient. Because both of the State’s causes of action are predicated on
19 Defendants’ products meeting the definition of “firearm” under the federal law and the State has
20 failed to sufficiently allege that they do, the complaint is too uncertain to state either of those
21 causes of action. For these reasons, and those previously made, the Court should sustain the
22 demurrer.

23
24 Dated: May 28, 2021

MICHEL & ASSOCIATES, P.C.



Sean A. Brady
Attorneys for Defendants

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA
3 COUNTY OF LOS ANGELES

4 I, Tiffany Harber, 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 May 28, 2021, I served the foregoing document(s) described as

8 **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEMURRER**

9 on the interested parties in this action by placing

- 10 [] the original
11 [X] a true and correct copy

12 thereof by the following means, addressed as follows:


13 See attached Service List.

14 — (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and
15 processing correspondence for mailing. Under the practice it would be deposited with the
16 U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach,
17 California, in the ordinary course of business. I am aware that on motion of the party
18 served, service is presumed invalid if postal cancellation date is more than one day after
19 date of deposit for mailing an affidavit.

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

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

25 Executed on May 28, 2021, at Long Beach, California.

26 
27 _____
28 Tiffany Harber

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