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7

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

10 THE PEOPLE OF THE STATE OF
11 CALIFORNIA,

12 Plaintiff,

13 v.

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

16 Defendants.
17

Case No.: 21STCV06257

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

**DEFENDANTS POLYMER80, INC.,
DAVID BORGES, AND LORAN
KELLEY’S NOTICE OF EX PARTE
APPLICATION AND EX PARTE
APPLICATION FOR ORDER STAYING
PROCEEDINGS; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

[Filed concurrently with Declaration of Sean A.
Brady, Request for Judicial Notice, and
[Proposed] Order]

Hearing Date: May 26, 2021
Hearing Time: 8:30 a.m.
Department: 32

Complaint Filed: February 17, 2021

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25 TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

26 PLEASE TAKE NOTICE that on Wednesday, May 26, 2021, at 8:30 a.m. in Department
27 32 of this Court located at 111 North Hill Street, Los Angeles, CA 90012, before Presiding Judge
28 Daniel S. Murphy, Defendants Polymer80, Inc., David Borges, and Loran Kelley will move for an

1 order to stay proceedings in this matter pending the resolution of the ATF’s rulemaking progress
2 on a newly-proposed regulation that would likely influence this litigation and potentially render
3 this matter moot. This Court has inherent powers to stay its proceedings to promote the efficiency
4 of its docket and the interests of justice. (*Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th
5 1484, 1489.) The State has stated that it will oppose this application.

6 This application is made pursuant to California Rule of Court 3.1200, et seq., Los Angeles
7 County Local Rules 3.5 and 3.670(d), and relevant precedent. This applications is supported by
8 the accompanying Memorandum of Points and Authorities, the accompanying declaration of Sean
9 A. Brady, the accompanying Request for Judicial Notice, the pleadings already filed in this
10 action, and any further evidence and argument that the Court may receive at or before the hearing.
11 This is the first ex parte application filed by Defendants in this matter.

12 On May 19, 2021, Sean A. Brady, conferred via electronic mail with Michael Bostrom,
13 counsel for the State, providing notice of Defendants’ intention to file this application and asking
14 whether the State would oppose it. (*See* Declaration of Sean A. Brady in Support of Defendants’
15 Ex Parte Application to Stay Proceedings (“Brady Decl.”), ¶3.) Mr. Bostrom stated that the State
16 would be opposing this application. Pursuant to Rule of Court 3.1202(a), Defendants state that
17 Mr. Bostrom’s email address is michael.bostrom@lacity.org, his office phone number is (213)
18 978-1867, and his office address is 200 North Spring Street, 14th Floor, Los Angeles, CA 90012.

19
20 Dated: May 20, 2021

MICHEL & ASSOCIATES, P.C.



21
22 Sean A. Brady
Attorneys for Defendants

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Plaintiff, Los Angeles City Attorney Michael N. Feuer, on behalf of the People of the
4 State of California (the “State”), has sued Polymer80, Inc. and two of its principals (collectively
5 “Defendants”), alleging violations of California’s Unfair Competition Law (“UCL”) and creation
6 of a public nuisance. The State’s central theory is that Defendants have manufactured and sold
7 items that meet the definition of “firearm” under federal law without having adhered to various
8 regulations imposed on “firearm” commerce. Defendants that Polymer80, Inc.’s products are
9 “firearms” and, as such, contend the State has no actionable grievance against them.

10 This case turns, therefore, on whether the State can meet its burden to show that
11 Defendant Polymer80, Inc.’s products are “firearms” as defined under federal law. The Bureau of
12 Alcohol, Tobacco, Firearms, and Explosives (“ATF”) is authorized to implement the federal
13 definition of “firearm” via regulation. On May 7, 2021, the ATF released a proposed rule that
14 would, among other things, amend the definition of “firearm” under federal law. Defendants now
15 move this Court to stay proceedings in this matter until that ATF rulemaking process has been
16 completed because its outcome may significantly impact the analysis of this case.

17 **FACTUAL BACKGROUND**

18 The State alleges that Defendant Polymer80, Inc. manufactures and sells items that meet
19 the federal law definition of “firearm” and that Defendants are liable under California law for
20 selling those items without adhering to California and federal regulations governing “firearm”
21 sales. (Complaint ¶¶ 39-82.) In response, Defendants have filed a demurrer, in part, on the ground
22 that the complaint fails to notify Defendants how their products meet any of the various technical
23 elements of the federal law “firearm” definition.

24 At the heart of the State’s complaint is its desire to enjoin Defendants from engaging in
25 the sale of certain products “until they are in compliance with ... federal law.” (Complaint, Prayer
26 for Relief ¶2.) The State’s central allegation is that “Polymer80’s core products ... fall under the
27 definition of ‘firearm’ under federal law. And because these products are in fact ‘firearms’ under
28 federal law, Polymer80’s business practice of selling them . . . is illegal.” (Complaint ¶13.)

1 Yet, recently on May 7, 2021, the ATF announced proposed rule 2021R-05, in which the
2 ATF acknowledges that the State’s position has not been supported by the Courts, noting:

3 In the past few years, however, some courts have treated the regulatory
4 definition as exhaustive [C]ourts recently have read the regulatory
5 definition to mean that the lower portion of the AR-15 is not a “frame or
6 receiver” because it only provides housing for the hammer and firing
7 mechanism, but not the bolt or breechblock. *See United States v. Rowold*,
8 429 F. Supp. 3d 469, 475–77 (N.D. Ohio 2019) (“The language of the
9 regulatory definition in § 478.11 lends itself to only one interpretation:
10 namely, that under the GCA, the receiver of a firearm must be a single unit
11 that holds three, not two components: 1) the hammer, 2) the bolt or
breechblock, and 3) the firing mechanism.”); *United States v. Jimenez*, 191
F. Supp. 3d 1038, 1041 (N.D. Cal. 2016) (“[A] receiver must have the
housing for three elements: hammer, bolt or breechblock, and firing
mechanism.”); *United States v. Joseph Roh*, SACR 14-167-JV, Minute
Order p. 6 (C.D. Cal. July 27, 2020) (granting defendant’s post-trial motion
for acquittal for manufacturing AR-15 lower receivers without a license
because “[n]o reasonable person would understand that a part constitutes a
receiver where it lacks the components specified in regulation”).

12 (See Request for Judicial Notice in Support of Defendants’ Ex Parte Application to Stay
13 Proceedings (“RJN”), Exhibit A, p.9.)¹ As a result, ATF proposes amending the definition of
14 “firearm” to clarify that term’s meaning and to provide definitions for terms such as “complete
15 weapon.” (RJN, Exhibit A, p.1.) In its summary, the ATF writes that:

16 The new definition more broadly describes a “frame or receiver” as one that
17 provides housing or a structure designed to hold or integrate any fire control
18 component. Unlike the prior definitions of “frame or receiver” that were
19 rigidly tied to three specific fire control components (i.e., those necessary
for the firearm to initiate or complete the firing sequence), the new
regulatory definition is intended to be general enough to encompass changes
in technology and parts terminology.

20 (RJN, Exhibit A, p.26.) In essence, the proposed regulations seek to expand the definition of
21 “firearm” in order to overcome the multiple judicial decisions relating to the definition of
22 “firearm” that have struck down the ATF’s interpretations. As such, the proposed rule, if passed,
23 may change the classification of what is and is not a “firearm” and, in turn, alter the outcome of or

24 ¹ Federal law authorizes the U.S. Attorney General to promulgate regulations necessary to
25 enforce the Gun Control Act of 1968 (“GCA”) and the National Firearms Act of 1934 (“NFA”).
26 (See 18 U.S.C. 926(a); 26 U.S.C. 7801(a)(2)(A), 7805(a).) Responsibility for implementing the
27 GCA and NFA has been delegated to the Director of ATF, subject to the direction of the Attorney
28 General. (See 28 U.S.C. § 599A(b)(1); 28 CFR § 0.130(a)(1)–(2).) The ATF is authorized to
implement the federal definition of “firearm” found in section 921 of Title 18 of the United States
Code via regulation. Any duly enacted regulation by ATF governing the federal definition of
“firearm” is thus the controlling interpretation of 18 USC 921(a)(3) (assuming the regulation is
lawful).

1 relief available in this case.

2 ATF's rulemaking process is generally completed 30 days after a final rule is published in
3 the federal register. (5 U.S.C. § 553, subd. (d).) Currently, ATF has indicated it will soon publish
4 a proposed rule, which it must then allow members of the public to submit comments on. (5
5 U.S.C. § 553, subd. (b)-(c).) Only after considering these comments may ATF then proceed to
6 issue a final rule. (*Ibid.*) As such, a stay would likely remain in effect for merely a few months.

7 Counsel for Defendants contacted counsel for the State to see if they would be willing to
8 stipulate to stay this matter pending resolution of the ATF rulemaking process in lieu of
9 Defendants filing a motion to stay this matter. Counsel for the State replied that they would not so
10 stipulate and would oppose any such request. (Brady Decl., ¶¶ 2-3.)

11 ARGUMENT

12 "Trial courts generally have the inherent power to stay proceedings in the interests of
13 justice and to promote judicial efficiency." (*Freiberg v. City of Mission Viejo* (1995) 33
14 Cal.App.4th 1484, 1489.) Here, the State's action turns on its theory that Defendant Polymer80,
15 Inc.'s products are "firearms" under federal law. (Complaint, ¶13.) ATF's proposed regulation
16 seeks to change the federal definition of "firearm." (RJN, Exhibit A, p. 21-24.) That puts the
17 applicable law that is at the center of this matter in a state of flux. Courts have held that staying
18 matters pending resolution of administrative actions is appropriate. (*See, e.g., Farmers Ins.*
19 *Exchange v. Superior Court* (1992) 2 Cal.4th 377, 389, fn. 8, quoting *General American Tank*
20 *Car Corp. v. El Dorado Terminal Co.* (1940) 308 U.S. 422 ["When it appeared in the course of
21 the litigation that an administrative problem, committed to the Commission, was involved, the
22 court should have stayed its hand pending the Commission's determination of the lawfulness and
23 reasonableness of the practices under the terms of the Act."].) Thus, in the interest of justice and
24 to promote judicial efficiency, the proceedings should be stayed until ATF completes its
25 rulemaking process.

26 Notably, the Northern District of California has sua sponte temporarily stayed a matter
27 involving several plaintiffs, including the State of California, challenging ATF's determination
28 that certain of Defendant Polymer80's products are "firearms" under federal law, in anticipation

1 of ATF’s proposed rule change of the “firearm” definition. (*State of California, et al. v. Bureau of*
2 *Alcohol, Tobacco, Firearms, and Explosives, et al.*, Federal Case No. 20-cv-06761-EMC; RJN,
3 Exhibits B, C.) This Court should likewise exercise its discretion to stay this matter pending the
4 resolution of ATF’s proposed regulation.

5 This Court should also note that a stay would cause no harm to the State. The State has
6 made no indication that it will seek a preliminary injunction. And the primary relief it seeks is
7 injunctive. (*See* Complaint, Prayer for Relief 1 and 2.) Significantly, the State has admitted that
8 Defendant Polymer80, Inc. has already voluntarily ceased selling its “Buy Build Shoot” kits to
9 California residents before this lawsuit had even been filed. (Complaint ¶33). Thus, there is no
10 basis to believe Defendant Polymer80, Inc. would resume selling that product during the next few
11 months just because this case is stayed or that staying these proceedings pending regulatory
12 clarification on the central question raised in this matter would harm the State.

13 **CONCLUSION**

14 With the underlying federal law that is the basis for the State’s action currently in flux, it
15 is practical and equitable for this Court to exercise its discretion, as at least one federal court has
16 already done, to stay this matter until the ATF completes its rulemaking process.

17 Dated: May 20, 2021

MICHEL & ASSOCIATES, P.C.

18 

19 _____
20 Sean A. Brady
21 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 May 20, 2021, I served the foregoing document(s) described as

8 **DEFENDANTS POLYMER80, INC., DAVID BORGES, AND LORAN KELLEY'S**
9 **NOTICE OF EX PARTE APPLICATION AND EX PARTE APPLICATION FOR**
10 **ORDER STAYING PROCEEDINGS; MEMORANDUM OF POINTS AND**
11 **AUTHORITIES IN SUPPORT THEREOF**

12 on the interested parties in this action by placing

13 [] the original
14 [X] a true and correct copy

15 thereof by the following means, addressed as follows:

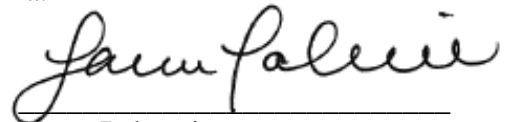
16 See attached Service List.

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

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

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

28 Executed on May 20, 2021, at Long Beach, California.



Laura Palmerin

1 **SERVICE LIST**

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