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Attorneys for Defendants
POLYMER80, INC., DAVID BORGES, and
LORAN KELLEY

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

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

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

Defendants.

Case No.: 21STCV06257
[Related with Case No. 21STCV29196]

[*Assigned for all purposes to Honorable Daniel S. Murphy, Department 32*]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR JUDICIAL ABSTENTION AND DISMISSAL OR, IN THE ALTERNATIVE, FOR A STAY

Date: November 10, 2021
Time: 9:00 a.m.
Dept: 32

RESERVATION ID: 398351970811

Complaint Filed: February 17, 2021

INTRODUCTION

Defendants Polymer80, Inc. ("Polymer80" or "Company"), David Borges, and Loran Kelley respectfully submit the Memorandum of Points and Authorities in support of this, their motion ("Motion"), pursuant to Sections 128 and 1094 of the California Code of Civil Procedure, seeking this Court's abstention from adjudicating, and dismissal of this action. Alternatively, the Motion requests that the Court stay this case pending the conclusion of administrative and judicial proceedings related to the Notice Of Proposed Rulemaking And Request For Comment ("NPRM"), dated May 7, 2021, issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF" or "Agency"). For all of the reasons set forth below and in the remainder of the record of this matter, this Motion is meritorious, and the Court should wholly grant it.

PRELIMINARY STATEMENT

This pretextual action seeks to effect gun control by usurping the federal statutory authority of ATF to regulate firearms across the United States in an orderly, knowledgeable, and consistent manner. The Complaint propounds two backward-looking causes of action, both of which will require this Court to determine whether Polymer80's historical conduct with respect to its products has violated California's unfair competition and public nuisance laws. As the Complaint all but admits, those determinations cannot be made without the Court simultaneously deciding whether or not the Company's products are, each and all, "firearms" within the meaning of then-existing (and about to be eclipsed) federal law -- something that the federal Courts to this day have been unable to accomplish. Moreover, the remedies sought by plaintiff pursuant to those two causes of action are classic overreaches. For instance, plaintiff asks for the issuance of multiple injunctions "requiring [d]efendants to cease" selling all company products, "unless and until they are in compliance with State and federal laws." In other words, plaintiff wants this Court to make numerous technical determinations regarding the federal definition of a "firearm" and bar defendant Polymer80, Inc. from pursuing its lawful business, until (if ever) there is a judicial resolution of various vexing questions under federal firearms law in plaintiff's favor.

However, revealingly, and as noted already, that body of decisional law is nothing if not uncertain and unsettled, both generally and specifically as to Polymer80. Vividly demonstrating that overarching ambiguity is ATF's recently proposed NPRM -- expressly designed to rectify the vast murkiness of federal precedent -- and the NPRM's related effort to expand the definition of "firearm" to include, *inter alia*, "weapon parts kits," a "split or modular" frame or receiver, and a "partially complete" frame or receiver. Where, as here, federal authorities are in the process of resolving concededly nebulous, hotly contested, very complicated, *and* highly arcane factual and legal questions uniquely within their expertise, *and* the Court would be unduly burdened in attempting to enforce the blunderbuss relief this plaintiff seeks, the Court should invoke the doctrine of equitable abstention and decline to adjudicate this suit.

Nevertheless, plaintiff has seen fit to cast facile and undue aspersions on Polymer80. While ignored by plaintiff, it is noteworthy that ATF *has never* officially decided that any of the Company's products is a "firearm" under federal law *but has* concluded that several of its products are *not*. Upon this backdrop, the Company has never believed that any of the products conceivably challenged in this lawsuit have ever been, or are now, "firearms" under federal law, and for good reason. In any event, mandates from Congress and Attorney General of the United States have accorded the Agency the power to promulgate and implement rules and regulations, issue rulings, determinations, and classifications, investigate violations of the firearms laws, and award and revoke gun manufacturers' licenses. This is the same authority that ATF invoked when it recently issued the NPRM as to the definition of a "firearm." *See* Ex. 1 (ATF 2021R-05, 86 Fed. Reg. 27,720 (May 21, 2021)).[1] The NPRM, in its repeated acknowledgments of the exceedingly uncertain content and meaning of the federal judicial firearms rulings existing as of its issuance some four months ago, and in its upcoming determinations purportedly clarifying those rulings, will surely affect both of plaintiff's tortured, backward-looking theories of liability, as well and the overly broad and forward-looking remedies pursued in this action.

[1] Citations in the form "Ex." are to the exhibits to the concurrently-filed Declaration Of Germain D. Labat In Support Of Motion For Judicial Abstention, Or, In The Alternative, Stay, dated September 23, 2021, and Request For Judicial Notice In Support Of Motion For Judicial Abstention, Or, In The Alternative, Stay, dated September 23, 2021.

In fact, all of the applicable laws underpinning both of plaintiff's claims -- the (federal) Gun Control Act, (federal) 2005 Child Safety Lock Act, and California Assembly of Firearms Law[2] -- are predicated upon the federal definition of a "firearm." To begin with, in order to hold that defendants have run afoul of any of those statutes, the Court will be forced to interpret, apply, and implement the federal authorities, which are concededly so murky and contradictory that ATF has expressly issued the NPRM to rationalize it. Thus, in ruling on plaintiff's two backward-looking causes of action, the Court will need to determine, among many other things, whether or not the subject Polymer80 products were "firearms" under federal law at a point when the Agency has itself effectively admitted that that federal precedent cannot be deciphered and requires clarification and/or revision. This is an unfair "bridge too far" for this Court, particularly when federal bureaucrats are actively working to correct the extreme ambiguity giving rise in the first place to the NPRM and illustrating the propriety of abstention here.

By the same token, plaintiff's pursuit of a forward-looking injunction until Polymer80 is "in compliance with federal laws" -- in which compliance the Company asserts it is presently -- will necessarily turn on any new federal definition of a "firearm." Moreover, such relief would require the Court to ensure that every single Company product covered by its injunction has been manufactured and/or sold is in compliance with federal law. That is a massive and complex undertaking that, respectfully, this Court is ill-suited to carry out. Simply put, this lawsuit would effectively turn this Court into a specialized technocratic agency dispensing esoteric rulings in a narrow area. To do so, the Court, as has ATF, would need to perform such tasks as cutting the Company's products into "several pieces in order to observe the internal configuration" and measuring specific areas of a partial frame or receiver within hundredths of inches. Whereas this Court is not at all equipped to do so, there *is* an organization that is, ATF, thus giving rise to an archetypical setting for abstention.

[2] The pending Complaint also references the California Unsafe Handgun Act ("CUHA"). But, as will be explained *infra*, this law is facially inapplicable to Polymer80's business. Even if it were so applicable, this Court should still abstain from adjudicating all equitable claims concerning the federal definition of a "firearm."

Simply stated, plaintiff's requested relief would require the Court to become immersed in the functions of an administrative body better positioned to adjudge compliance with federal firearms law. *See, e.g.*, *Hambrick v. Healthcare Partners Med. Grp., Inc.*, 238 Cal. App. 4th 124, 151-52 (2015); *Acosta v. Brown*, 213 Cal. App. 4th 234, 252-58 (2013); *Alvarado v. Selma Convalescent Hosp.*, 153 Cal. App. 4th 1292, 1305 (2007). And, the issuance and oversight of such relief sought would be quite burdensome on California Courts, when juxtaposed against the availability of a more effective and expert federal review and action from ATF. *See, e.g.*, *People ex rel. Dep't of Transp. v. Naegele Outdoor Advert. Co.*, 38 Cal.3d 509, 511 (1985); *Acosta*, 213 Cal. App. 4th at 246-47; *Alvarado*, 153 Cal. App. 4th at 1298; *Larez v. Oberti*, 23 Cal. App. 3d 217, 222-23 (1972); *Diaz v. Kay–Dix Ranch*, 9 Cal. App. 3d 588, 598-600 (1970). These are textbook grounds for abstention here.

Should the Court not be inclined to abstain and dismiss this action, it should, alternatively, stay these proceedings under the doctrine of primary jurisdiction until a final Rule issues and ensuing litigation related thereto is finished, given that the question(s) of whether or not specific Company products constitute "firearms" have long been placed within the specialized purview of ATF. *See, e.g.*, *Farmers Ins. Exch. v. Sup. Ct.*, 2 Cal. 4th 377, 396-401 (1992); *Bradley v. CVS Pharmacy, Inc.*, 64 Cal. App. 5th 902 (2021); *Wise v. Pac. Gas & Elec. Co.* 77 Cal. App. 4th 287, 299-300 (1999).

Thus, for these and all of the other reasons set forth below, defendants respectfully request that the Court: (i) abstain from adjudicating this case or, alternatively, (ii) stay it pending resolution of all proceedings relating to and arising out of ATF's current rulemaking activities, and, in any event, (iii) grant such other relief as may be deemed just and proper.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. Congress And The U.S. Attorney General Delegated To ATF The Exclusive Authority To Adopt Regulations And Make Determinations Concerning Federal Firearms Law.

Two statutes primarily govern federal law concerning firearms ownership and manufacture. The first, the National Firearms Act of 1934 ("NFA"), requires registration of certain firearms and

imposes excise taxes on their manufacture and transfer. *See* 26 U.S.C. § 5801 *et seq.* The second, the Gun Control Act of 1968 ("GCA"), which replaced the Federal Firearms Act of 1938, regulates interstate transfer of firearms. *See* 18 U.S.C. § 921 *et seq.* The Attorney General of the United States is charged with administering both the GCA and NFA and has the power to promulgate regulations to enforce those Acts. *See* 86 Fed. Reg. at 27,720, citing 18 U.S.C. § 926(a); 26 U.S.C. §§ 7801(a)(2)(A), 7805(a). "Congress and the Attorney General have delegated the responsibility for administering and enforcing the GCA and NFA to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General." *Id.*, citing 28 U.S.C. § 599A(b)(1). *See also* 28 C.F.R. § 0.130(a)(1)–(2)). To be sure, the Department of Justice and "ATF have promulgated regulations implementing the GCA and NFA." *Id.*, citing 27 C.F.R. §§ 478-79.

Beyond promulgating regulations, ATF also provides written determinations, sometimes called "Classifications" or "Rulings," that serve as "official interpretation[s]" of the law. 27 C.F.R. § 70.701(d)(2). *See also* 86 Fed. Reg. at 27,733. These determinations often concern whether an item or product constitutes a "firearm" pursuant to the GCA. Tellingly, the GCA defines the term "firearm" to mean one of only four things: "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." 18 U.S.C. § 921(a)(3). The Agency will, upon request, evaluate a specific item or product to make a decision regarding whether or not it constitutes a "firearm" under that statutory definition. 27 C.F.R. § 70.471(c). *See also* 86 Fed. Reg. at 27,733 ("For many years, ATF has acted on voluntarily requests from persons, particularly manufacturers who are developing new products, by issuing determinations or 'classifications' whether an item is a 'firearm' or 'armor piercing ammunition' as defined in the GCA or NFA. This helps regulated industry members and the public determine what laws and regulations may be applicable to the product, and any steps that they may need to take to be compliant with those laws and regulations.").[3] Finally, the Agency is expressly

[3] Rulings do not have the force and effect of official regulations but "are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. No unpublished ruling or decision may be relied on, used, or cited by any officer or employee of the Bureau as a precedent in the disposition of other cases." 27 C.F.R. § 70.701(d)(2)(iii)(B).

“responsible for investigating . . . criminal and regulatory violations of the Federal firearms, explosives, arson, alcohol, and tobacco smuggling laws.” 28 U.S.C. § 599A(b)(1). In this connection, ATF is authorized to issue licenses to those in the business of manufacturing and selling firearms and suspend or revoke those licenses for certain violations. *See* 27 C.F.R. §§ 478.73-478.74.

B. Polymer80 Is A Manufacturer Of Gun-Related Products, Components, And Accessories And Throughout Its Cooperative Relationship With ATF Has Had Several Of Its Products Determined Not To Be Firearms.

Polymer80 is a Dayton, Nevada-based company that designs, develops, and manufactures innovative gun-related products, components, and aftermarket accessories. A core principle of Polymer80’s business is the empowerment of its customers to exercise their constitutional right to gun ownership and to enjoy lawful engagement with the Company’s products. A material part of the Company’s business is the manufacture of components “that provide ways for [its] customer[s] to participate in the build process, while expressing their right to bear arms,” as enshrined in the Second Amendment to the Constitution of the United States. *See* About Polymer80, https://www.polymer80.com/about-us (last accessed September 23, 2021).

As plaintiff must concede and should know, Polymer80 has *always* cooperated with ATF and *never* received any federal determination that one of its products is a “firearm” under federal law. Rather, “[t]he ATF has concluded” that “certain of Polymer80’s standalone unfinished frames and receivers” *do not* “meet the definition of a ‘firearm’ under the Gun Control Act.” Compl. ¶ 40 n. 26. *Accord*, *id.* ¶ 72 (discussing ATF determinations that frames and lower receivers “were not ‘sufficiently complete to be classified as the frame or receiver of a firearm.’”). As a consequence, it has always been, and is today, the Company’s view and belief that *none* of its products at issue in this action has ever been, or is today, a “firearm” under federal law. By way of example, on February 23, 2015, during the Administration of President Barack Obama, the Agency sent Polymer80 a Determination Letter concluding that its “AR-15 pattern receiver casting” “is NOT a firearm receiver, or a firearm.” *See* Ex. 2 (emphasis in original). Similarly, on November 2, 2015

and January 17, 2017, both dates again during the Obama Administration, ATF issued Polymer80 separate Determination Letters concluding that its "WARRHOGG BLANK," "GC9 Blank," and "two Glock-type 'PF940C Blank[s]" are "not a 'firearm' as defined in GCA, 18 U.S.C. 921(a)(3)(B)" and "therefore [are] not subject to GCA provisions and implementing regulations." *See* Exs. 3-4 (emphasis in original).

Notably, these determinations required significant expertise on behalf of the Agency concerning the design, function, and construction both of various firearms and of other products clearly *not* firearms. For instance, in its November 2015 and January 2017 Determination Letters, the ATF examined "machining operations or design features present or completed" versus "[m]achining operations or design features not yet present or completed" to conclude that the blanks were "not sufficiently complete to be classified as the frame or receiver of a firearm and thus [were] not a 'firearm' as defined in the GCA." Exs. 3-4. Similarly, in its February 2015 Determination Letter, the Agency concluded that the submitted item was "completely solid in the area of the trigger/hammer (fire-control) recess" after it was "cut into several pieces in order to observe the internal configuration" and therefore it was "NOT a firearm receiver, or a firearm." Ex. 2 (emphasis in original). And, in its November 2015 Determination Letter, ATF measured the Company's "submitted item" and "found that the most forward portion of the rear take down pin lug clearance area measures approximately 1.32 inches in length, less [than] the maximum allowable 1.60 inch threshold. As a result, the submitted item is not sufficiently complete to be classified as the frame or receiver of a firearm; and, is not a 'firearm' as defined in the GCA." Ex. 3 (emphasis in original).

As the Complaint points out, these "conclusion[s] are currently being challenged in two separate lawsuits." Compl. ¶ 40 n. 26 citing *State of California v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 3:20-cv-06761 (N.D. Cal. Sept. 29, 2020); *City of Syracuse v. Bureau*

of Alcohol, Tobacco, Firearms & Explosives, No. 1:20-cv-06885 (S.D.N.Y. Aug. 26, 2020).[4] In those cases, both commenced by gun control advocacy groups against ATF, the Department of Justice, and senior United States government officials, the Agency has vigorously stood behind the legal soundness and correctness of all three of the aforementioned Obama Administration Determination Letters in Polymer80's favor. Those actions essentially and almost identically have alleged that each and all of those Letters run afoul of the Administrative Procedure Act as being unlawful as well as arbitrary and capricious. During 2020-21 and not long after the commencement of both actions, all defendants together, including ATF, filed extensive dispositive motions seeking dismissal of both Complaints and with the full weight of the federal government advocated that all three Letters were entirely valid, lawful, and properly considered and issued. *See* Exs. 6–7. Both of these motions remain pending before the respective Courts, both of which have stayed the actions before them in the wake of the emergence of the NPRM and anticipated legal proceedings flowing therefrom. Meaningfully here, the Agency fully supported staying both of those proceedings pending NPRM developments. This unvarnished support bespeaks of none of the ambiguity, detailed below, that ATF has descried and is attempting to obviate in connection with its formulation of the NPRM.

In any event, the Complaint conveniently fails to mention the Company's long history of cooperating with ATF and other federal governmental bodies in connection with a panoply of criminal and regulatory investigations. Part of that cooperation has arisen over the past nine months as to a federal inquiry into Polymer80's "Buy Build Shoot" ("BBS") Kits and other Company products. In so doing, Polymer80 has produced to the government and ATF approximately 39,000

[4] The Complaint omits to inform the Court that a suit very similar to this one has already been brought against the Company by the Attorney General of the District of Columbia in its Superior Court. *See District of Columbia v. Polymer80, Inc.*, No. 20-002878-B (Super. Ct. D.C.). Now over fourteen (14) months old, that case remains in a posture where the Court has yet to finally determine whether or not it has personal jurisdiction over Polymer80, a Nevada corporation whose principal place of business is situated there as well.

pages of documents and materials. Furthermore and more to the point, when clearly notified of the federal government's concerns about the BBS Kits, the Company stopped making and selling them everywhere, *over eight months ago, and well before the commencement* of *this action*. *See* Compl. § 33 ("Polymer80 . . . [has] ceased sales" of BBS Kits.). To date, no federal (or State) criminal charge of any kind has been filed against the Company or any of its officials, and there has been no indication that any such charge will ever be filed.

C. ATF Recently Proposed A Rule Seeking To Expand The Definition Of A Firearm Under Federal Law To Encompass Split, Modular, And/Or Partially Complete Frames Or Receivers And Weapon Parts Kits.

Some four months ago, the Agency published its NPRM concerning the "Definition of 'Frame or Receiver' and Identification of Firearms." Ex. 1 (ATF 2021R-05, 86 Fed. Reg. at 27,720). This NRPM is a highly technical, thirty-four (34)-page document explicitly acknowledging the difficulty of determining whether an item is a "firearm" under the GCA. Among the provisions relevant to Polymer80's products, the NPRM seeks to expand the definition of "the frame or receiver" under the GCA to: (i) include split, modular, and partially complete frames or receivers, and (ii) encompass a "weapon parts kit." *See, e.g.*, *id.*, 86 Fed. Reg. at 27,736, 27,441-46. Both of these proposed augmented definitions apply to Company's products at issue in this litigation, including the BBS Kits.

In the NPRM, ATF recognizes that the question of whether or not a part constitutes a "frame or receiver" is a challenging one that has bedeviled Courts, manufacturers, and the public.[5] The NPRM notes that the term "frame or receiver" was "defined in regulations several decades ago as that part of a firearm that provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its portion to receive the barrel." 86 Fed. Reg. at

[5] It should come as no surprise then, that on July 16, 2021, upon motion by Polymer80, the Third Judicial District Court of Lyon County, Nevada issued a Preliminary Injunction in favor of not just the Company but all Nevadans, banning enforcement of a new State gun control enactment, Assembly Bill 286, specifically targeting the Company and its products. As Polymer80 advocated, the Court expressly found that settled Nevada Due Process principles had been ignored and violated, in that AB 286 did not and does not clearly define the term "unfinished frame or receiver," thus leaving the public in the dark about the meaning and ambit of the new law. This very recent Nevada Court decision, a copy of which is annexed as Exhibit 8, underscores the ongoing problems that Courts across the country have had in defining and understanding technical concepts employed in federal firearms law, such as "unfinished frame or receiver," and the wisdom of this State Court abstaining in the premises.

27,721. This definition was and is consistent with ATF's three (2015/2017) Determination Letters, stating that several of Polymer80's products were and are not firearms. *Id. See also* Exs. 2-4.

In fact, the NPRM straightforwardly summarizes the clarification of federal decisional law that ATF believes is needed, as follows:

> In the past few years, however, some courts have treated the regulatory definition as exhaustive …. [C]ourts recently have read the regulatory definition to mean that the lower portion of the AR-15 is not a "frame or receiver" because it only provides housing for the hammer and firing mechanism, but not the bolt or breechblock. *See United States v. Rowold*, 429 F. Supp. 3d 469, 475–77 (N.D. Ohio 2019) ("The language of the regulatory definition in § 478.11 lends itself to only one interpretation: namely, that under the GCA, the receiver of a firearm must be a single unit 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").

86 Fed. Reg. at 27,722. Moreover, the NPRM laments that "[t]hese courts' interpretation of ATF's regulations, if broadly followed, could mean that as many as 90 percent of all firearms now in the United States would not have any frame or receiver subject to regulation." 86 Fed. Reg. at 27,722. The ambiguities and infirmities of the existing federal framework for defining a "firearm" -- the very problems the NPRM is expressly designed and intended to ameliorate -- could hardly be clearer.

The NPRM's quoted language is far from the sole passage in which the agency has forthrightly acknowledged the substantial and disabling vagueness and uncertainty that has existed for many years (and exists as of the filing of this paper) in federal firearms law. Several other such portions of the thirty-four (34) page text of the NPRM are set forth below:

> Due to judicial developments as well as continued technological advancements in firearms manufacturing, maintaining the current definitions negatively affects both public safety and the regulated firearms industry. For these reasons, the Department proposes

> amending ATF's regulations to clarify the definition of "firearm" and to provide a more comprehensive definition of "frame or receiver" so that those definitions more accurately reflect firearm configurations not explicitly captured under the existing definitions in 27 CFR 478.11 and 479.11.

86 Fed. Reg. at 27,225.

* * * * * * *

> This supplement addresses another core challenge of the existing, definition of firearm "frame or receiver;" namely, that it does not address the question when an object becomes a frame or receiver. While the GCA and implementing regulations define a "firearm" to include the "frame or receiver," neither delineates when a frame or receiver is created. The crucial inquiry, then, is the point at which an unregulated piece of metal, plastic, or other material becomes a regulated item under Federal law. ATF has long held that a piece of metal, plastic, or other material becomes a frame or receiver when it has reached a critical stage of manufacture. This is the point at which a substantial step has been taken, or a critical line crossed, so that the item in question may be so classified under the law. This "critical stage of manufacture" is when the article becomes sufficiently complete to function as a frame or receiver, or may readily be completed, assembled, converted, or restored to accept the parts it is intended to house or hold. [(53)] … Clarifying this issue is needed to deter the increased sale or distribution of unlicensed and unregulated partially complete or unassembled frames or receivers often sold within parts kits that can readily be completed or assembled to a functional state.

86 Fed. Reg. at 27,229.

* * * * * * *

> This proposed rule would update the existing definition of frame or receiver to account for the majority of technological advances in the industry and ensure that these firearms continue to remain under the regulatory regime as intended by the enactment of the GCA, including accounting for manufacturing of firearms using multiple manufacturers. In light of recent court cases, the majority of regulated firearms may not meet the existing definition of firearm frame or receiver. This may result in no part of a firearm being regulated as a "frame or receiver" contrary to the requirements in the GCA that ensure tracing to solve crime and help prevent prohibited persons from coming into possession of weapons.

86 Fed. Reg. at 27,238.

For these and other reasons, the NPRM seeks to change and refashion the definition of "the frame or receiver" to encompass both: (i) a "[s]plit or modular frame or receiver," which means a frame or receiver that consists of more than one part, and (ii) a "[p]artially complete, disassembled, or inoperable frame or receiver," which means, among other things, "a frame or receiver that has reached a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state." 86 Fed. Reg. at 27,743, 27,746. To determine whether or not a part qualifies as a "split or modular frame or receiver," the Agency proposes an unweighted, seven-factor balancing test addressing, among other things, "[w]hich component the firearms industry commonly considers to be the frame or receiver with respect to the same or similar firearms"; "[h]ow the component fits within the overall design of the firearm when assembled"; and "[t]he design and function of the fire control components to be housed or integrated." 86 Fed. Reg. at 27,743. Further, "[i]n determining whether a partially complete, disassembled, or inoperable frame or receiver may *readily* be assembled, completed, converted, or restored to a functional state, the Director [of ATF] may consider any available instructions, guides, templates, jigs, equipment, tools, or marketing materials." 86 Fed. Reg. at 27,746 (emphasis supplied). In addition, the NPRM appears to require that the legislative intent of Congress with respect to the 1968 GCA and that of ATF be divined in order to understand and determine what a "split or modular frame or receiver" is. *See id.* at 27,743 (discussing factor of "[w]hether classifying the particular component is consistent with the legislative intent of the Act and this part").

Enhancing the complexity, to ascertain the meaning of "readily" in this context, ATF has proposed yet another, (this time) eight-factor, balancing calculus, "with no single [factor] controlling," that includes the following:

- Time, *i.e.*, how long it takes to finish the process;
- Ease, *i.e.*, how difficult it is to do so;
- Expertise, *i.e.*, what knowledge and skills are required;
- Equipment, *i.e.*, what tools are required;
- Availability, *i.e.*, whether additional parts are required, and how easily they can be obtained;

- Expense, *i.e.*, how much it costs;
- Scope, *i.e.*, the extent to which the subject of the process must be changed to finish it; and
- Feasibility, *i.e.*, whether the process would damage or destroy the subject of the process, or cause it to malfunction.

86 Fed. Reg. at 27,747.

The NPRM also seeks to rejigger the term "firearm" to "include a weapon parts kit that is designed to or may readily be assembled, completed, converted, or restored to expel a projectile by the action of an explosive." 86 Fed. Reg. at 27,741. ATF claims that this change merely "reflect[s] existing case decision." 86 Fed. Reg. at 27,726. But, the Agency seeks to add the same eight-factor balancing test to define "readily," which is not found (as ATF concedes) anywhere in relevant case law. Instead, the Agency acknowledges that "defining the term 'readily' is necessary to provide further clarity in determining when incomplete weapons or configurations of parts become a 'firearm' regulated under the GCA and NFA." 86 Fed. Reg. at 27,730. In sum and critically, the Agency acknowledges that there is no consensus on *which* weapon parts kits qualify as firearms under the current state of the law, *and* that "ATF has not previously issued a rule specifically addressing whether frame and receiver kits constitute 'firearms.'" Ex. 9 at 5.

Comments on the NPRM, including those of Polymer80, a copy of which is annexed as Exhibit 5, were submitted to the Agency on or about August 19, 2021. We understand that ATF has received such Comments from many thousands of sources. The Agency must now give them due "consideration." *See* 5 U.S.C. § 553. It is unclear exactly when ATF will promulgate an official Rule and what it will say and/or entail. Even so, if a new Rule does ensue, litigation challenging it will undoubtedly follow.

D. The Complaint's Causes Of Action Are Wholly Predicated Upon Highly Ambiguous Federal Law Or Inapplicable California Law.

As an initial matter, the Complaint's ambiguous factual allegations render it unclear exactly which Polymer80 products that pleading is addressing, which therefore makes it impossible to determine what relief is actually being sought. The Complaint avers that "the People's claims under

the Gun Control Act in this Complaint are limited to Polymer80's sale of Buy Build Shoot, frame, and receiver kits." Compl. ¶ 40 n.26. If the City Attorney is merely suing over the BBS Kits, then this suit is a backward-looking restitutionary action, as Polymer80 stopped selling the BBS Kits long before the initiation of this action (as the Complaint generally acknowledges). *See id.* ¶ 33 & nn. 18-20. But, the Complaint also contemplates that this case turns on more than just BBS Kits. It alleges, for example, that "*[i]n addition to the full Buy Build Shoot kits*, Polymer80 advertises and sells frame kits for handguns and lower receiver kits for AR-15 and AR-10 style rifles" and "sells other components to enable a customer to assemble a complete handgun, including pistol barrels, slides, and trigger assemblies." *Id.* at ¶¶ 35-36 (emphasis supplied). If this action encompasses all of the Company's "frame kits," "receiver kits," and "components," then plaintiff is unquestionably asking this Court to make forward-looking determinations of federal firearms law concerning the majority of Polymer80's products, dozens of which currently exist and have never been expressly vetted by ATF. *See id.* Prayer For Relief ¶ 2 (seeking "[i]njunctive relief, requiring Defendants to cease . . . sale of Ghost Gun kits, *frames, and receivers* to California consumers *unless and until they are in compliance with* state and *federal laws*" (emphasis supplied)).

In addition, the Complaint putatively asserts two State law causes of action -- one for purported violation of California's Unfair Competition Law ("UCL") (Bus. & Prof. Code §§ 17200-17210) and the other sounding in "Public Nuisance" (Cal. Civ. Code § 3480). *See, e.g.*, Compl. ¶¶ 39-102. Yet, close scrutiny reveals that both are entirely based upon federal firearms law, with the sole exception of a California law facially inapplicable to averments concerning Polymer80 and its products. To be specific, the Complaint alleges that "[d]efendants have been violating the UCL by engaging in: (1) unlawful business activities; (2) fraudulent, deceptive, and misleading advertising; and (3) unfair competition." Compl. ¶ 64. Plaintiff maintains that the "unlawful prong of section 17200" "borrows violations of other laws and treats them as independently actionable." *Id.* ¶ 66 (citations omitted). The Complaint further states that Polymer80 has purportedly violated four different statutes, the: (i) (federal) GCA; (ii) (federal) 2005 Child Safety Lock Act ("CSLA"); (iii) California Assembly of Firearms Law; and (iv) California Unsafe Handgun Act ("CUHA"). Complaint ¶¶ 39-61, 67. The first two such statutes -- the GCA and CSLA -- are undeniably

creatures of federal law. As explained above, ATF comprehensively regulates matters pursuant to the GCA. And, the CSLA is codified at 18 U.S.C. ¶ 922(z) and so also comes under ATF's jurisdictional umbrella.

The Complaint alleges that Polymer80 has contravened the GCA, because the Company supposedly "knowingly sold firearms in the form of . . .kits and components without serial numbers and without conducting background checks"; "shipped kits directly to purchasers, and sold to purchasers who did not either appear in person or submit an affidavit as to the legality of the purchase along with a copy of notification to local law enforcement"; and "knowingly sold and delivered firearms to purchasers residing in another state." Compl. ¶ 42. *All* of these supposed contraventions can only be soundly established, if the partial frames and kits of Polymer80 qualify as "firearms" under federal law, which, of course, the Company denies. Yet, as explained above, ATF is not at all certain about that question and currently seeking to make a Rule clarifying and expanding the definition of "firearm" under federal law.

Remarkably, the City Attorney cannot and does not muster even a single factual allegation concerning Polymer80 purportedly contravening the CSLA. He merely avers that *"[o]n information and belief*, Polymer80 violated [its] requirements by failing to provide any supplemental or external locking device or gun storage container with the [so-called] ghost gun kits sold to California purchasers." Compl. ¶ 40 (emphasis supplied). This is no accident. No such contravention has occurred.

The Complaint's allegations concerning the third such enactment, California's Assembly of Firearms Law, are likewise completely founded upon federal firearms law. In this regard, the Complaint alleges as follows:

> Under California's Assembly of Firearms Law, any firearm "manufactured or assembled from polymer plastic" must contain "3.7 ounces of material type 17-4 PH stainless steel . . . embedded within the plastic upon fabrication or construction with the unique serial number engraved or otherwise permanently affixed in a manner that meets or exceeds the requirements imposed on licensed importers and licensed manufacturers of firearms pursuant to subsection (i) of Section 923 of Title 18 of the United States Code and regulations issued pursuant thereto."

Compl. ¶ 59.

According to plaintiff, "[d]efendants' [sic] knowingly sell unfinished pistol frames that do not contain either 3.7 ounces of the type of stainless steel embedded in it or a unique serial number engraved or permanently affixed pursuant to Section 923 of the Gun Control Act, as required under California law." *Id.* ¶ 60. Plainly, this supposed violation of California law is and must be derivative of an interpretation of the (federal) GCA, as regulated by ATF, for the elementary reasons that if an entity does not violate the GCA, it has not run afoul of this California law. Put another way, if Polymer80's products are not "firearms" under the GCA (and they surely are not), the Company cannot have violated this State's Assembly of Firearms Law.

That leaves the fourth cited provision, CUHA. In this respect, the Complaint asserts that Polymer80 "sold . . . kits and unfinished frames [that] do not comply with CUHA because, among other reasons, they do not meet CUHA's chamber load indicator and magazine disconnect mechanism requirements."[6] Compl. ¶ 54. Plaintiff further alleges that the "kits sold by Defendants intended to be assembled into handguns are not listed on the Roster of Certified Handguns maintained by the State of California," and that defendants supposedly "knowingly aided and abetted the manufacture of handguns that do not meet the safety requirements of CUHA by marketing, selling, and transferring all of the components, parts, materials, tools and instructional videos needed to build an unsafe handgun in the state." *Id*. ¶¶ 56-57.

However and significantly, *none* of the statutory provisions cited by plaintiff -- Cal. Penal Code §§ 31910, 32000(a), 32005(b), and 32015 – applies to "frames" or "kits." In fact, Cal. Penal Code § 16520 is entitled "Firearm Defined" and states that that term "includes the frame or receiver of the weapon" "[a]s used in the following provisions," none of which are set forth in the Complaint. Cal. Penal Code § 16520(b). Moreover, that same provision states that "[a]s used in Sections 29010 to 29150, inclusive, 'firearm' includes the unfinished frame or receiver of a weapon that can be readily converted to the functional condition of a finished frame or receiver." Cal. Penal Code §

[6] Indeed, these requirements are also tethered to federal law, as they only apply to "firearms manufactured after a certain date and *not already listed on the roster of handguns tested and determined by the Department of Justice not to be unsafe*." Compl. ¶ 53 (emphasis supplied).

16520(g). Again, this language can only mean that unfinished frames or receivers do *not* constitute "firearms" under the statutory provisions that Polymer80 -- supposedly -- violated. Therefore, none of the supposed conduct highlighted in the Complaint could possibly have violated CUHA, where the Complaint only makes allegations concerning frames and kits. Again, it is no coincidence that Polymer80 has never been charged with violating any of CUHA's criminal provisions.[7]

The remainder of the Complaint's allegations regarding purported violations of the UCL are either completely coextensive with federal firearms law or premised upon the inapplicable CUHA. For the "second… fraudulent prong of section 17200," the Complaint avers as follows:

> In advertising and selling its Buy Build Shoot and frame and receiver kits to California residents while representing that ATF determination letters classified those kits as not being firearms, Defendants expressly and by implication represent that these products are legal, which they are not, and that ATF has said so with respect to Polymer80's kits, which it has not.

Compl. ¶ 70. All of the supporting allegations relate to Polymer80's dealings with ATF under federal law. *See* Compl. ¶¶ 71-75 (discussing "ATF determination letters").

As to the third "unfair prong of section 17200," the Complaint merely re-launders the aforementioned purported statutory violations from the first one. *See* Compl. ¶¶ 76-79. Plaintiff posits that "Polymer80's sales of unserialized firearm kits in violation of state and federal law constitutes [SIC] unfair competition to licensed gun dealers in California who abide by the applicable state and federal laws and regulations." Compl. ¶ 78. And, the Complaint goes on to allege as follows:

> Defendants also engage in and have engaged in business activity that is unfair to the residents of California, because the combination of Polymer80's sale of Buy Build Shoot kits, frame and receiver kits, and unfinished frames and receivers with component parts in contravention of state and federal law is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" . . . .

[7] Additionally, Section 32000(a) is facially inapplicable to all defendants, as it only applies to "*[a] person in this state* who manufactures or causes to be manufactured, imports into the state for sale, keeps for sale, offers or exposes for sale, gives, or lends an unsafe handgun." Cal. Penal Code §§ 31910, 32000(a) (emphasis supplied). There are no allegations that any defendant took any action as "a person in" California. And so, plaintiff is left to rely upon an aiding-and-abetting theory for an inapplicable statute.

Id. ¶ 79 (citation omitted). Consequently, the entirety of the Complaint's averments regarding violations of the UCL are premised on federal firearms law or the inapplicable CUHA.

The Complaint's second and sparse Public Nuisance cause of action is likewise inextricably intertwined with federal firearms law. That cause alleges that Polymer80 "created a public nuisance by marketing, selling and distributing . . . gun kits to California residents without serial numbers, without background checks, and without appropriate safety features." Compl. ¶ 81. *Accord, id.* ¶¶ 96-102. As explained above, these allegations involve the interpretation of federal firearms law. In actuality, as to the purported Public Nuisance, "[p]laintiff requests that a mandatory and/or prohibitory injunction be issued requiring the Defendants to enjoin and abate the nuisance by . . . complying with other requirements set forth by state and federal law." *Id*. ¶ 101.

Finally, the Complaint's Prayer For Relief further confirms plaintiff's efforts to enforce federal firearms law and seeks "[i]njunctive relief, preventing Defendants from violating California's Unfair Competition Law, as described above"—which is only predicated on applicable federal firearms law. Compl. Prayer For Relief ¶ 1. The Prayer also asks for: "[i]njunctive relief, requiring Defendants to cease the public nuisance they have created . . . by ceasing sale of . . . kits, frames, and receivers to California consumers unless and until they are in compliance with state and *federal laws*." *Id*. ¶ 2 (emphasis supplied).

At bottom, the Complaint (assuming that it deliberately extends beyond BBS Kits) essentially asks this Court to make technical decisions on complicated questions arising under federal firearms law, nothing more, nothing less. The Court should not honor that request.

E. Relevant Procedural History

On February 17, 2021, plaintiff filed the pending unverified Complaint. On April 20, 2021, defendants filed a Demurrer, which the Court ultimately overruled on June 7, 2021. On May 20, 2021, defendants filed an *ex parte* application to stay this case, which the Court also eventually denied on May 27, 2021. On June 7, 2021, the Court issued a Case Management Order. On June 17, 2021, defendants filed their Answer. On or about July 22, 2021, Defendants filed their Complex

Case Questionnaire and Request to Designate This Case As Complex, and on July 27, 2021, Plaintiff filed an Opposition to that Request.

ARGUMENT

"Gun sales are already heavily regulated at federal, State, and local levels. California regulates gun sales and use more extensively than many states. ***The fact of such extensive existing regulation counsels caution before imposing an additional layer of judicial requirements.***" *In re Firearm Cases*, 126 Cal. App. 4th 959, 986 n.18 (2005) (citations omitted) (emphasis supplied). As illustrated below and based upon entrenched principles of equitable abstention, the Court should decline to hear this action, insofar as the requested injunction would: (i) interfere with functions of ATF, which has significantly more expertise as to guns and firearms than does the Court, and (ii) unnecessarily and substantially burden this and other California Courts. Alternatively, the Court should stay this action, until the current NPRM proceedings and the inevitable resulting litigation have finished.

I

THE COURT SHOULD ABSTAIN FROM ADJUDICATING, AND DISMISS, THIS ACTION.

"It is well established that a court of equity will abstain from employing the remedies available under the unfair competition law in appropriate cases . . . . 'Where [an unfair competition law] action would drag a court of equity into an area of complex economic [or similar] policy, equitable abstention is appropriate.'" *Willard v. AT&T Commc'ns of Cal., Inc.*, 204 Cal. App. 4th 53, 59 (2012) (alteration in original, quoting *Desert Healthcare Dist. v. PacifiCare, FHP, Inc.*, 94 Cal. App. 4th 781 (2001), rejected on other grounds, *Centinela Freeman Emergency Med. Assocs. v. Health Net of Cal., Inc.*, 1 Cal. 5th 994 (2016) (collecting cases)).[8] Here, the Court should abstain from hearing this action for two interlocking reasons.

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[8] Equitable abstention applies with equal force to non-UCL claims. *See Acosta v. Brown*, 213 Cal. App. 4th 234, 249 (2013) ("[O]ur conclusion is not altered by the fact that, unlike *Alvarado* and many other abstention cases, there is no claim in this case under the UCL . . . . The absence of such a claim does not diminish the force of the principles upon which *Alvarado* rests because, like the relief sought in *Alvarado* under the UCL, the relief sought in this case -- enjoining compliance with the federal timeliness requirement -- is in the nature of equitable relief."). All of the

First, the "requested relief would require [the] trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency" that is "better equipped to determine compliance" with the controlling federal laws. *Hambrick v. Healthcare Partners Med. Grp., Inc.*, 238 Cal. App. 4th 124, 148 (2015) (citation omitted); *Alvarado v. Selma Convalescent Hosp.*, 153 Cal. App. 4th 1292, 1305 (2007). *Second*, "[j]udicial abstention is appropriate in cases where granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress," such as "federal enforcement of the subject law." *Alvarado*, 153 Cal. App. 4th at 1298. Both reasons are prudent and sound, and they both militate in favor of abstention and a concomitant dismissal here.

A. Abstention Is Warranted, Since The Requested Injunctive Relief Would Cause This Court To Assume And Interfere With ATF's Expertise In Determining And Enforcing Federal Firearms Law.

A Court assumes, or interferes with, the functions of an agency making abstention appropriate, where: (i) plaintiffs "are asking the trial court to replicate administrative responsibilities imposed by law on the [agency]" and (ii) "the [agency] is better equipped to determine compliance with the statute" than the Court. *Acosta*, 213 Cal. App. 4th at 252. Each of these scenarios is present upon the instant motion.

1. Congress Conferred On ATF The Regulation Of Federal Firearms Law.

It cannot reasonably be disputed that Congress intended ATF (through the U.S. Attorney General) to have responsibility for enforcing federal firearms laws. In analyzing whether an agency bears responsibility for regulating a certain law, Courts look to indicia such as "regulations authorizing [the agency] to monitor and enforce . . . compliance with the . . . provisions of [the statute]" and the "statute . . . direct[ing] the [agency] . . . [to] adopt new regulations or standards, enforce regulations, or ensure that certain . . . providers operate in compliance with appropriate license requirements and agency rules and regulations." *Acosta*, 213 Cal. App. 4th at 250; *Alvarado*, 153 Cal. App. 4th at 1304.

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enumerated relief that the Complaint seeks can be considered equitable in nature.

To be sure, the Agency is authorized to perform all of these functions. Pursuant to Congressional statute, the agency is expressly "responsible for investigating . . . criminal and regulatory violations of the Federal firearms, explosives, arson, alcohol, and tobacco smuggling laws." 28 U.S.C. § 599A(b)(1). Furthermore, ATF has authority to promulgate and enforce regulations implementing the GCA and NFA. *See* Ex. 1 (86 Fed. Reg. at 27,720). In addition, the Agency issues and revokes license to gun manufacturers pursuant to these statutes. *See* 27 C.F.R. §§ 478.73-478.74. ATF is, in short, responsible for regulating federal firearms law. And as such, plaintiff is effectively asking this Court to "replicate [ATF's] administrative responsibilities."

2. ATF Is Better Equipped To Decide Compliance With Federal Firearm Laws Than This Court, Which Lacks The Requisite Expertise, Experience, and Resources.

Acosta holds that California Courts should abstain from adjudicating lawsuits in favor of federal agencies owing to the judiciary's lack of pertinent background and technical ability. In that case, unemployed California residents sought a warrant directing the California Unemployment Insurance Appeals Board ("CUIAB") to comply with "[United States Department of Labor] DOL regulations prescribing the timely processing of [unemployment insurance] claims." *Acosta*, 213 Cal. App. 4th at 237-43. As a result, the Court abstained, as it did not have the requisite expertise or technical ability, reasoning as follows:

> ***Unlike DOL, the court lacks the expertise and resources necessary*** to evaluate CUIAB's benefit payment processes and performance, to analyze the reasons for the state's failure to meet the federal timeliness standards, and to recommend appropriate remedial action. ***Nor can the court furnish CUIAB any technical assistance it may need comparable to that DOL is authorized to provide.*** Clearly, the record provides a basis for concluding that ***the trial court lacked the knowledge and resources necessary to perform the administrative responsibilities appellants ask us to impose on it.***

Id. at 252-53 (emphasis supplied) (citation omitted). Additionally, the *Acosta* Court cautioned that the "relief sought essentially transfers to the trial court the administrative responsibilities of DOL under [relevant regulations]" and "would unquestionably require 'technical or policy determinations usually reserved to an administrative agency.'" *Id.* at 255, quoting *Shuts v. Covenant Holdco LLC*, 208 Cal. App. 4th 609 (2012). That caution applies with similar force here.

Alvarado is also instructive, given that plaintiffs lodged UCL claims "seeking restitution and injunctive relief to require owners and operators of skilled nursing and intermediate care facilities to comply with certain nursing hour requirements set forth in [a] Health and Safety Code [statute]." *Alvarado*, 153 Cal. App. 4th at 1295. That statute "included a complicated definition of 'nursing hours'—i.e., 'the number of hours of work performed per patient day'—that differed according to the type of provider (registered nurses, licensed vocational nurses, licensed psychiatric technicians, aides, nursing assistants, orderlies) and type of facility in which care was provided." *Acosta*, 213 Cal. App. 4th at 247, quoting and explaining *Alvarado*. Consequently, the *Alvarado* Court concluded that this arduous and highly technical process of classifying types of providers and facilities "is a task better accomplished by an administrative agency than trial courts." *Alvarado*, 153 Cal. App. 4th at 1305-06.

In this action, this Court likewise lacks the expertise, resources, and technical skills needed to enforce the two injunctions plaintiff requests, as follows:

- "Injunctive relief, preventing Defendants from violating California's Unfair Competition Law"; and
- "Injunctive relief, requiring Defendants to cease the public nuisance they have created . . . by ceasing sale of . . . kits, frames, and receivers to California consumers *unless and until they are in compliance with* state and *federal laws*."

Compl. Prayer For Relief ¶¶ 1-2 (emphasis supplied).

As elucidated above, the requested injunctive relief is, in all applicable instances, founded upon federal firearms law and its definition of a "firearm." Since that relief would apply "unless and until [Defendants] are in compliance with . . . federal laws," the Court would be saddled with ensuring that all of Polymer80's products are "firearms" under the GCA and regulations promulgated thereunder. Even assuming, *arguendo*, that federal firearms law was completely settled, the Court would not have the technical expertise to determine if a particular Polymer80 product were a firearm and, for example, distinguish between a partially complete and complete receiver. And, the spectre of the looming NPRM exacerbates the burdens on the Court in performing such technical assignments.

At bottom and respectfully, this Court just does not have the requisite expertise to analyze whether a Polymer80 product meets the definition of a "firearm" under the existing GCA and/or emerging regulatory framework. ATF's three Determination Letters to the Company are illustrative of this point. In one, the Agency took a sample from Polymer80 and "cut [it] into several pieces in order to observe the internal configuration" to determine that it was "completely solid in the area of the trigger/hammer (fire-control) recess" and thereafter concluded it was "NOT a firearm receiver, or a firearm." Ex. 2 (emphasis in original). In another, ATF measured the Company's "submitted item" and "found that the most forward portion of the rear take down pin lug clearance area measures approximately 1.32 inches in length, less [than] the maximum allowable 1.60 inch threshold. As a result, the submitted item is not sufficiently complete to be classified as the frame or receiver of a firearm; and thus, is <u>not</u> a 'firearm' as defined in the GCA." Ex. 3 (emphasis in original). We do not believe that the Court can well or easily perform such analyses. *See Acosta*, 213 Cal. App. 4th at 252-53; *Alvarado*, 153 Cal. App. 4th at 1305-06. Without them, full, proper, and fair adjudication of important issues would be close to impossible.

The NPRM itself makes it even more onerous for the Court to enforce plaintiff's proposed injunctions. The NPRM has proposed a novel, eight-factor test for the term "readily" that informs both its proposed definitions of "weapon parts kit" and "partially complete . . . frame or receiver." 86 Fed. Reg. at 27,747. Furthermore, to determine whether a part qualifies as a "split or modular frame or receiver," the agency proposes an unweighted, seven-factor balancing test addressing, among other things, "[w]hich component the firearms industry commonly considers to be the frame or receiver with respect to the same or similar firearms"; "[h]ow the component fits within the overall design of the firearm when assembled"; and "[t]he design and function of the fire control components to be housed or integrated." 86 Fed. Reg. at 27,743. This Court does not have the "knowledge" or "expertise" to well or easily analyze such factors. *Acosta*, 213 Cal. App. 4th at 252-53. Likewise, this Court is not as well situated as ATF to carry out the requisite examination of the Agency's intent (and that of Congress) in connection with the drafting and passage of the GCA in 1968 pursuant to the NPRM. *See id.*

The manner in which the Complaint is pleaded further compounds the problems that the existing federal firearms law and the NPRM engender for this Court. To begin with, both of the Complaint's causes of action require the Court to look backward to determine whether or not in the period prior to commencement of this action (and even up to today, long after Polymer80 has ceased selling and distributing BBS Kits) the Company's conduct violated either the UCL or the "Public Nuisance" provisions of the California Code. The NPRM itself, as expansively quoted above, has conceded and highlighted that the federal firearms decisions with which this Court would be saddled in that endeavor is unclear, contradictory, and essentially ineffable, so much so that a new Rule and related regulations are needed to rectify and clarify matters. How can (and why should) this Court be engaged in attempting to decipher and apply that law to historical events, while at the same time carrying out such typical and technical ATF functions as cutting Company products into pieces, measuring specific areas of a partial frame or a partial receiver (whatever, in actuality, such items might be or mean) within hundredths of inches, and analyzing machining operations leading to the creation of certain of the many and varied components of a gun. In plain English, this Court was not set up to be a gunsmithing shop.

On the other hand, to the extent that the Court will need to study and understand whatever new federal regulatory provisions eventually emanate from the NPRM, how and why should this Court sensibly do so, when there will undoubtedly be litigation in federal Courts challenging and seeking clarity as to those provisions? Abstention (and dismissal) is certainly a rational and the correct outcome in the premises.

Sensing the glaring shortcomings plaguing the Complaint, plaintiff argues that it "is of no moment" that the NPRM expands "the circumstances under which unfinished *stand-alone* frames and receivers—not sold as parts of kits—also meet the definition of 'firearm' under federal law." Ex. 9 at 1. And, plaintiff appears to relatedly contend that the Complaint only applies to BBS Kits, which they believe are *de facto* firearms under federal law. *Id.* Plaintiff is incorrect in both regards. As an initial matter, plaintiff overlooks the fact that the proposed injunctive relief asks the Court to analyze, *going forward*, *not just BBS Kits but all of Polymer80's products* and determine whether "they are in compliance with state and federal laws." Compl. Prayer For Relief ¶ 2. More

fundamentally, plaintiff is wrong about the BBS Kits and whether or not they necessarily constitute "firearms" under federal law. There has *never* been any such federal Court ruling or agency decision, and the Company has *never* harbored any such belief. In other words, plaintiff has no basis for claiming that the BBS Kits definitively "fit the definition of 'firearm' under the federal statute." Ex. 9 at 1. Since plaintiff cannot prove that the BBS Kits are "weapon parts kits," plaintiff is left with the argument that it is the parts thereof that actually constitute frames or receivers. Accordingly, the NPRM's definitions concerning unfinished frames and receivers will have a significant impact on the outcome of this case.

B. Abstention Is Warranted, Since Court Oversight Of The Injunctive Relief Sought Would Be Needlessly Burdensome, Rendering ATF Enforcement More Effective.

California Courts have frequently abstained from suits and "declined to grant injunctive relief . . . because a more effective federal remedy was available from the federal [agency] which comprehensively controls the [subject law]." *Acosta,* 213 Cal. App. 4th at 246-47. *See also Desert Healthcare Dist. v. PacifiCare, FHP, Inc.*, 94 Cal. App. 4th 781, 794 (2001) (collecting cases for "[t]he notion of abstention in the context of the UCL originally arose in cases involving the intersection of federal and state law."). More to the point at hand, the California Supreme Court has held that in situations like this where a party's conduct is "violative of federal law, State Court injunctive relief under the theory of unfair competition is inappropriate." *People ex rel. Dep't of Transp. v. Naegele Outdoor Advert. Co.*, 38 Cal.3d 509, 523 (1985). The reason is simple. "[F]ederal action through the authority of the [relevant agency] would be more efficacious," as "'[i]t is more orderly, more effectual, ***less burdensome*** to the affected interests, that the national government redeem its interests. Thus the court of equity withholds its aid.'" *Id.* (emphasis supplied), quoting *Diaz v. Kay–Dix Ranch*, 9 Cal. App. 3d 588, 599 (1970) ("*Diaz*"). And, as *Alvarado* has made crystalline, Courts should consider whether "granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress," such as "federal enforcement of the subject law." *Alvarado*, 153 Cal. App. 4th at 1298.

Diaz and its progeny concretize that abstention is warranted where the injunctive relief sought would be unduly burdensome on and for a California Court. In *Diaz*, migratory farmworkers brought an unfair competition claim for an injunction prohibiting "the owner-operators of three separate ranches" from employing undocumented workers in derogation of the federal immigration laws. *Diaz*, 9 Cal. App. 3d at 590-91. Even though those plaintiffs sued but three ranches, the Court concluded that abstention was fitting and necessary, given that federal enforcement would be "more orderly, more effectual, [and] less burdensome" in light of the potential burden upon California Courts. To this end, the *Diaz* Court stated as follows:

> If defendants are to be enjoined, other California farm operators may be similarly enjoined. A network of these injunctions may cover growers in rural counties. A single superior court may be called upon to issue dozens of these injunctions. . . . At peak employment seasons the superior courts in rural counties would sit in judgment over charges of contempt and over the form and adequacy of investigations. Multiple injunctions covering a wide segment of California agriculture would have the cumulative effect of a statutory regulation, administered by the superior courts through the medium of contempt hearings. The injunctive relief sought by plaintiffs would subject farm operators to burdensome, if bearable, regulation, and the courts to burdensome, if bearable, enforcement responsibilities.

Id. at 598-99.

Subsequent decisions have reached the same conclusion, namely, that it is correct for a Court to abstain owing to "the impracticability of drafting, supervising and enforcing an injunctive order in this case and the plethora of cases it would undoubtedly spawn," as "[t]he courts are ill-equipped to deal with that task." *Larez v. Oberti*, 23 Cal. App. 3d 217, 222-23 (1972); *see Cobos v. Mello-Dy Ranch*, 20 Cal. App. 3d 947, 950 (1971) (following *Diaz*). The Supreme Court of California later recognized that the "sound counsel of the *Diaz* decision . . . mandates abstention in reliance on federal enforcement." *Naegele*, 38 Cal.3d at 523; *see Congress of Cal. Seniors v. Catholic Healthcare W.*, 87 Cal. App. 4th 491, 510-11 (2001) (expressly following *Naegele*).

The same "burden" concern is evident here. Plaintiff has *admitted* that if an injunctive order is granted, a "plethora of cases . . . would undoubtedly spawn." *Larez*, 23 Cal. App. 3d at 222-23. Indeed, "[p]laintiff's counsel expects that others may sue Defendants for their involvement in the

use of [so-called] ghost guns in the commission of crimes." Ex. 10 at 6. Otherwise put, plaintiff believes that other potential complainants are lurking in the shadows waiting for an injunction to issue, so that they can create a "network of . . . injunctions" that "would have the cumulative effect of a statutory regulation." *Diaz*, 9 Cal. App. 3d at 598-99. This Court should not subject California Courts to such an unnecessary (and a litigation-driven) onus, when there is a much "more effective means of redress" -- ATF's "enforcement of the subject law." *Alvarado*, 153 Cal. App. 4th at 1298.

II

IN THE ALTERNATIVE, THE COURT SHOULD STAY THIS ACTION PENDING CONCLUSION OF THE ENTIRE NPRM PROCESS PURSUANT TO THE DOCTRINE OF PRIMARY JURISDICTION.

Even if the Court declines to abstain from adjudicating this action, it nevertheless should still stay these proceedings under the doctrine of "primary jurisdiction." This doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *Wise v. Pac. Gas & Elec. Co.,* 77 Cal. App. 4th 287, 295-96 (1999), quoting *Farmers Ins. Exch. v. Sup.Ct.*, 2 Cal. 4th 377, 390-92 (1992). The "primary jurisdiction doctrine advances two related policies: it enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws." *Farmers*, 2 Cal. 4th at 391. Moreover, primary jurisdiction "promotes comity between courts and agencies." *Bradley v. CVS Pharmacy, Inc.*, 64 Cal. App. 5th 902 (2021) (citations omitted). "[T]he appropriate procedure for a court that applies the primary jurisdiction doctrine is to stay the lawsuit pending a decision by the administrative agency." *Id.* Indeed, "[c]ourts have frequently applied the primary jurisdiction doctrine and stayed actions where the issues raised in the trial court action were pending before an administrative agency." *Wise*, 77 Cal. App. 4th at 295-96.

Once more, this case presents a blueprint for the application of a longstanding California jurisprudential doctrine. "Primary jurisdiction," in short, counsels for a stay of this action, should

1 the Court not abstain from adjudicating, and decline to dismiss, it.
2
CONCLUSION
3 For all of the foregoing reasons and those arising from the remainder of the record of this
4 matter, the Court should grant the instant motion, abstain from adjudicating this case, and order
5 dismissal, because: (i) the Court lacks the expertise and technical abilities to determine if
6 Polymer80's various products qualify as "firearms" under federal law; (ii) the spectre of the
7 forthcoming new federal Rules and regulations arising from the NPRM makes it -- and will make
8 it -- even more arduous for the Court to resolve whether or not a Company product is a "firearm";
9 and (iii) plaintiff's proposed injunction would be unnecessarily burdensome on this and other
10 California Courts, given that ATF is and would be a more effective vehicle for oversight and
11 redress. Absent abstention and in the alternative, the Court should stay these proceedings under the
12 doctrine of primary jurisdiction to allow ATF to apply its "special competence" and "administrative
13 expertise" during the ongoing NPRM process and ensure federal resolution of the judicial
14 challenges to any new provisions that the agency wishes to implement and enforce.
15 DATED: September 23, 2021 GREENSPOON MARDER LLP
16

17 By:____________________
GERMAIN D. LABAT
18 Attorney for Defendants POLYMER80, INC.,
19 DAVID BORGES and LORAN KELLEY
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PROOF OF SERVICE

The People Of The State Of California vs. Polymer80, Inc., David Borges, Loran Kelley
Case No. 21STCV06257

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the action. My business address is 1875 Century Park East, Suite 1900, Los Angeles, CA 90067. On September 23, 2021, I served the document(s) on the interested parties in this action as follows:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR JUDICIAL ABSTENTION AND DISMISSAL OR, IN THE ALTERNATIVE, FOR A STAY

By placing ☐ the original ☒ a true copy thereof enclosed in a sealed envelope addressed as follows:

(SEE ATTACHED SERVICE LIST)

☒ **BY ELECTRONIC MAIL-** I caused the foregoing document(s) to be served on all parties at the e-mail addresses listed herein.

☐ **BY MAIL**: The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

☐ **BY OVERNIGHT DELIVERY**: By causing such envelope to be deposited or delivered in a box or other facility regularly maintained by Federal Express authorized to receive documents, or delivering to a courier or driver authorized by said express service carrier to receive documents, the copy of the foregoing document in a sealed envelope designated by the express service carrier, addressed as stated above, with fees for overnight (next business day) delivery paid or provided for and causing such envelope to be delivered by said express service carrier.

☑ I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 23, 2021, at Los Angeles, California.

Lorraine Corrales

SERVICE LIST

The People Of The State Of California vs. Polymer80, Inc., David Borges, Loran Kelley
Case No. 21STCV06257

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