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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

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

Defendants.

CASE NO.: 21STCV06257

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

PLAINTIFF THE PEOPLE OF THE STATE OF CALIFORNIA'S OPPOSITION TO DEFENDANTS POLYMER80, INC., DAVID BORGES, AND LORAN KELLEY'S MOTION FOR JUDICIAL ABSTENTION AND FOR DISMISSAL OR, IN THE ALTERNATIVE, FOR A STAY

Hearing Date: November 10, 2021
Time: 9:00 a.m.
Department: 32
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Complaint Filed: February 17, 2021

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INTRODUCTION

Having lost their demurrer and then their ex parte application for a stay, Defendants now move the Court to dismiss on the grounds that the California judiciary is unqualified and incapable of enforcing state laws designed to reduce gun violence. Alternatively, Defendants ask the Court to stay this case until some unknown time when the ATF may provide additional clarity Defendants purport to lack about their legal duties under federal law. Defendants' Motion is, in essence, an Op-Ed piece that California should have no role in regulating firearms. The Legislature, however, has expressed in clear terms that it views federal gun laws to be helpful but insufficient. For that reason, California has been at the vanguard of enacting more robust legislation, including the California Unsafe Handgun Act and the California Assembly of Firearms Law, which the People assert here as among the central grounds for their claims.

If anything, allowing this case to move forward—and to move forward expeditiously—has only become more urgent since this Court last considered and rejected Defendants' motion to have it dismissed. Just days ago, the LAPD issued a report declaring ghost guns to be "an epidemic" in Los Angeles—"contributing to more than 100 violent crimes this year" alone, and reporting that "[d]uring the first half of this year, the department confiscated 863 ghost guns, a nearly 300% increase over the 217 it seized during the same period last year."[1]

Beyond the public safety exigencies at the heart of this case, the Court should reject Defendants' Motion for multiple independent legal reasons. To begin, it is procedurally improper. Defendants already filed and lost their demurrer focused on alleged pleading deficiencies related to whether the products at issue are "firearms" under federal law. The only thing that has changed since the Court's denial of that motion is Defendants' counsel, who have attempted to dress up the same demurrer-type arguments in the garb of abstention. Because a change of counsel is no basis to revisit repackaged motions already denied, or to allow a second bite at the demurrer apple, the Court should deny this new take on the same issues.

[1] Kevin Rector, "LAPD declares 'ghost guns' an 'epidemic,' citing 400% increase in seizures," L.A. Times, Oct. 15, 2021 6:32 PM, https://www.latimes.com/california/story/2021-10-15/lapd-says-ghost-guns-an-epidemic-with-seizures-up-400-since-2017.

Second, beyond its procedural infirmity, Defendants' motion is based on misleading and flawed premises. Most fundamentally, it relies on the mischaracterization that the People's claims hinge largely, if not entirely, on interpretation and application of the federal definition of the word "firearm" in the Gun Control Act, 18 U.S.C. § 921(a)(3). But the Complaint is based as much if not more on violations of California law than on federal law. The only two causes of action alleged are for violation of California's public nuisance statute, which requires no proof of violation of any separate federal (or state) law, and for violations of California's Unfair Competition Law ("UCL"), which includes multiple theories of recovery where the federal definition of "firearm" is either irrelevant or only one of the ways Plaintiff has alleged Defendants violated the UCL. In other words, Plaintiff has alleged multiple state law theories of recovery that may be—and will have to be—decided independent of any application of the federal definition of "firearm," which provides an additional and sufficient reason to deny the abstention/dismissal request.

To be sure, Plaintiff's claims also include theories of recovery relating to whether Defendants' frame and receiver kits constitute "firearms" under the federal definition. But there is no merit to Defendants' contention that "this Court just does not have the requisite expertise to analyze whether a Polymer80 product meets" that definition. Mot. at 24. Although the ATF has proposed a new *regulatory rule* to clarify when unfinished frames and receivers qualify as "firearms" under federal law, the questions in this case turn on whether Polymer80's *kits* are "firearms" under the plain text of that law, 18 U.S.C. § 921(a)(3), requiring the application of an existing and unchanging *statutory definition* to a discrete set of facts, which is the customary province of a court. Defendants' motion discounts the Court's ability to interpret precedent, apply law to facts, determine penalties, and issue injunctions.

Defendants also contend that the Court should abstain and dismiss because the case will be overly challenging for the Court to enter and police injunctive relief, particularly vis-à-vis what Defendants describe as a changing federal definition of "firearm." Even if true, that would become an issue only after the federal rule changes and assuming it does so in a way that obviates the need for some or all injunctive relief, which the Court could address at that time, if needed.

And if this Court did need to police the injunction (assuming Defendants failed to stop their unlawful conduct, even if ordered by the Court), the Court would also be monitoring violations of ***state*** law, which—as with federal law—it is fully capable of doing but—unlike federal law—is an area in which the ATF has no jurisdiction.[2]

Finally, and equally important, the People seek an abatement fund under their public nuisance claim and penalties and a remediation fund under their UCL claim, all based on Defendants' violations of the law as it is ***currently*** written, and not as it may come to be in the future. There is no legal basis to abstain or stay the proceeding as to those forms of relief, which the Court can, but the ATF cannot, grant.

For all of these reasons, the Court should deny Defendants' second attempt at a demurrer.

BACKGROUND

On February 17, 2021, Plaintiff sued Defendants for two state law violations, specifically, violations of California's UCL and public nuisance statutes. In support of the UCL claim, Plaintiff alleges, among other theories of recovery, that Defendants have violated and continue to violate the federal Gun Control Act ("GCA"), Compl. ¶¶ 39–43, the federal Child Safety Lock Act, *id*. ¶¶ 44–40, the California Unsafe Handgun Act, *id*. ¶¶ 50–58, and California's Assembly of Firearms Law, *id*. ¶¶ 59–61, 83, 86-87. The products at issue are limited to Polymer80's Buy Build Shoot kits, frame kits, and receiver kits, rather than stand-alone unfinished frames and receivers. *Id*. at ¶ 40 n.26. Plaintiff seeks an injunction prohibiting Defendants from continuing to violate California's UCL and public nuisance statute, and also monetary relief in the form of statutory penalties and the creation of an abatement fund. *Id.*, Prayer for Relief, ¶¶ 1–4.

On April 20, 2021, Defendants filed a Demurrer, which the Court overruled on June 7. On May 7, 2021, the ATF announced proposed rule 2021R-05. On May 20, Defendants filed an *ex parte* application to stay the case pending completion of ATF's rulemaking process, which the

[2] In addition, the State of California recently passed ghost gun laws (the "firearm precursor part" laws), Cal Penal Code §§ 30400 *et seq*. that will take effect as early as 2022 through 2024, and will resolve ***some*** (but not all) of the ***prospective*** relief sought here by requiring background checks on sales of firearm precursor parts and banning direct-to-consumer internet sales.

Court also denied. On July 22, 2021, Defendants filed a Complex Case Questionnaire and Request to Designate This Case as Complex to have the case transferred to another judge, which Plaintiff has opposed. On September 23, 2021, Defendants filed this Motion.

ARGUMENT

I. THIS MOTION IS PROCEDURALLY IMPROPER

Defendants have articulated no basis for filing what is essentially a second demurrer. The Court previously rejected the same arguments Defendants have recycled here. To avoid that bar, Defendants have repackaged their argument as a "motion for judicial abstention." But that is a demurrer by another name, and procedurally improper. Defendants have already taken their sole shot at a demurrer. They lost. Almost every case addressing the equitable abstention doctrine, including those Defendants cite, addressed this doctrine in the context of a demurrer—which this Court already denied. *See, e.g.*, *Alvarado v. Selma Convalescent Hosp.*, 153 Cal. App. 4th 1292 (2007); *People ex rel. Dep't of Transportation v. Naegele Outdoor Advert. Co*., 38 Cal. 3d 509 (1985); *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342 (2012), *as modified on denial of reh'g* (Feb. 24, 2012). Dismissal based on judicial abstention is a matter of discretion, which may be waived, rather than one of subject matter jurisdiction which may be raised at any time. *See Alvarado*, 153 Cal. App. 4th at 1297. Although Defendants move under Sections 128 ("Powers of courts; contempt orders; execution of sentence; stay pending appeal; orders affecting county") and 1094 ("Hearing") of the California Code of Civil Procedure, they failed to cite a single case in which a court invoked either code section to dismiss a case or revisit a prior decision after a change of counsel. The People are aware of no such case. The Court should deny Defendants' Motion for abstention/dismissal because it is brought through a procedurally impermissible vehicle and Defendants waived these arguments.

II. THE COURT SHOULD NOT DISMISS THE CASE

Defendants raise three principal arguments for dismissal: (1) they are already in compliance with the law and cooperating with the ATF; (2) the definition of "firearm" is too complex for the Court and will only become more difficult to interpret under a rule the ATF has proposed; and, principally, (3) this Court should abstain because the ATF is better equipped to

address the claims presented in Plaintiff's Complaint. As explained below, none of these arguments warrant dismissal.

A. Defendants Are Not Complying with the Law Or Cooperating with the ATF

Defendants argue first that Polymer80 has "always" cooperated with the ATF and that ATF has "never" officially decided that any of its products is a "firearm" under federal law but has concluded that several of its products are not. Based on this, Defendants claim that Polymer80 "has never believed that any of the products conceivably challenged in this lawsuit have ever been, or are now, 'firearms' under federal law." Mot. at 3

These claims are misleading and irrelevant. As an initial matter, Defendants obfuscate the issue by relying on the ATF's determinations regarding unfinished standalone frames and receivers that are explicitly not at issue in this suit (Compl. ¶ 40, n.26) and ignore that the ATF has already stated in a sworn filing to a federal court that its Chief Counsel has determined that Defendants' Buy Build Shoot kits—which are at issue in this suit—***are*** firearms and handguns under federal law (which means that selling them without serial numbers and background checks and without safety locks, as Defendants have done, was illegal, and is the reason Defendants are currently under federal criminal investigation).[3] *See* Affidavit of ATF Special Agent Tolliver Hart, *In the matter of the Search of the business and Federal Firearms Licensee known as Polymer80, which is located at 134 Lakes Blvd., Dayton, NV 89403*, 3:20-mj-123-WGC, ¶ 65, note 6 (D. Nev. Dec. 9, 2020). In addition, in this same federal court filing, ATF has stated its conclusion that "[c]urrently, manufacturing or assembling a firearm made with POLYMER80 pistol frames is unlawful in California." *Id.* ¶ 87 & note 11.

Moreover, the only reason the ATF has not made such an "official" determination as to whether Polymer80's pistol frame kits are firearms under federal law is because—as alleged in the

[3] As to Buy Build Shoot kits, Defendants continue to argue that "the Company stopped making and selling them everywhere, *over eight months ago, and well before the commencement of this action*." Mot. at 10 (emphasis in original). If Defendants have no plans to continue selling these products, then the injunction sought should be of no moment to them. But as alleged in the Complaint, "[t]here is nothing that would stop Polymer80 from re-introducing these kits into the market," and these products are "still being offered for sale by resellers." Compl. ¶ 33.

Complaint—Polymer80 refused to submit a sample pistol frame kit to the ATF after the ATF expressly warned Polymer80 back in 2018 that it could not provide an official determination without seeing the full kit that the pistol frame was being sold as part of. Compl. ¶ 73–74. Instead, as alleged, Polymer80 recklessly and consciously avoided the risk that ATF would later conclude—as it now has—that it was engaged in the illegal sale of firearm kits. Polymer80 thus manufactured the lack of the determination it claims it needs.

Additionally, notwithstanding the fact that it is under criminal investigation and is the subject of multiple lawsuits including this one, Polymer80 continues to this day to (falsely) represent on its website that "the PF940C™ 80% Pistol Frame *Kits* were classified by the Bureau of Alcohol, Tobacco, Firearms and Explosives as not falling within the federal definition of 'firearm' or 'frame or receiver,'"[4] when in fact ATF never issued a classification letter as to any Polymer80 pistol frame *kits*. As noted above, Polymer80 refused to submit a full frame *kit* after ATF expressly advised the company that it needed to see the full kit to issue a classification, and ATF has since made clear its position that Buy Build Shoot pistol-building kits featuring the PF940C unfinished frame are indeed firearms under the federal definition.[5]

In sum, Defendants' attempt to portray themselves as responsible citizens who have always cooperated with the ATF is belied by a record showing just the opposite. And far from providing a basis to dismiss this action, this record of deliberate ignorance, misrepresentation, and illegality—based on well-pleaded allegations that must be accepted as true at this juncture—weighs heavily in favor of allowing this action to continue.

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[4] FAQs, Polymer80.com, https://www.polymer80.com/faqs (last visited October 18, 2021) (emphasis added).

[5] Although not directly relevant to this motion, Defendants' assertion that it has "never received any federal determination that one of its products is a 'firearm' under federal law," Mot. at 7, is also false. As the record shows in the federal lawsuit in New York relating to three of the determination letters ATF issued to Polymer80, and as Defendants well know, in 2015 the ATF *did* "officially" determine that two of Polymer80's unfinished AR-15 products—one of which was a receiver *kit*—were firearms under federal law. *City of Syracuse, et al. v. Bureau of Alcohol, Tobacco and Explosives*, 1:20-cv-06885 (S.D.N.Y. Aug. 26, 2020), Docket No. 62 (Dec. 9, 2020) at 13 n.9. Plaintiff's Exhibit 1.

B. The Court Can Interpret the Definition of "Firearm."

1. The Definition of "Firearm" Is Not Too Complex

Defendants argue that, although other courts have addressed the federal "firearms" issue now before this Court, the federal authorities interpreting the definition of "firearm" in the federal Gun Control Act are "so murky and contradictory that ATF has expressly issued the NPRM to rationalize it." Mot. at 4. The People disagree with Defendants' characterizations. Regardless, however, none of the cited cases addressed whether Defendants' *kits*, which are the only products at issue in this lawsuit, fall within the federal definition of "firearm"—a factual and legal question this Court is well-equipped to answer. Rather, the cited cases have addressed only the regulatory definition of "frame or receiver" as applied to standalone parts.[6]

Critically, the ATF's proposed rule (2021R-05), announced on May 7, 2021, does not change existing law regarding the gun-building kits at issue in this case. The rule seeks instead, among other things, "to clarify the definition of 'firearm' and to provide a more comprehensive definition of 'frame or receiver.'" Defendants' Exhibit 1. But as to the gun-building kits at issue here, the proposed rule makes clear that it is simply confirming what is already the case—i.e., that "[w]eapon parts kits such as these are 'firearms' under the GCA because they are *designed to* or *may readily be* converted to expel a projectile by the action of an explosive." *Id.* at 23 (emphasis in original). Accordingly, "to reflect *existing case law*," the proposed rule adds a sentence saying this. *Id.* at 23-24 (emphasis added). And the proposed rule further confirms that, "[w]hen a

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[6] Defendants note that enforcement of a Nevada gun control law—defining "unfinished frame or receiver," was found to be vague and its enforcement was banned as to certain provisions through the grant of a preliminary injunction. Again, the People have not put unfinished frames or receivers at issue in this suit. And the Nevada definition has nothing to do with the claims in Plaintiff's Complaint. What ***is*** relevant is the nearly identical lawsuit brought against Polymer80 by the Attorney General of the District of Columbia. *See District of Columbia v. Polymer80, Inc.*, No. 20-CA-002878-B (D.C. Super. Ct.). That court has not abstained, nor stayed the case pending finalization of the ATF's proposed rule. The court there did decide the issue of personal jurisdiction on September 29, 2021, and did so in denying Polymer80's motion to reconsider the order denying their motion to dismiss. *Id.* Plaintiff's Exhibit 2. The Court took so long to reach this issue not because of the complexity of the question, but because, as the Attorney General noted in its opposition to Polymer80's motion to reconsider, Polymer80 filed *seven* pre-discovery motions as part of a similar stalling tactic. *Id.* Plaintiff's Exhibit 3.

partially complete frame or receiver parts kit reaches a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state, it would be considered a firearm 'frame or receiver' that must be marked" with a serial number. *Id.* at 60.

The proposed rule also addresses "partially complete" but unfinished frames and receivers, clarifying "when an object becomes a frame or receiver" such that it qualifies as a "firearm" under the GCA. *Id.* at 33-35. That clarification does not affect Plaintiff's claims here—which, as noted above, are not based on (and expressly exclude) partially complete frames and receivers sold on their own, and rely instead on the existing federal statute, 18 U.S.C. § 921(a)(3), which remains unchanged by the proposed regulation.

Finally, the proposed rule alters the current regulation defining frame or receiver to be "general enough to encompass changes in technology and parts terminology," shifting away from a definition "rigidly tied to three specific fire control components." Defendants' Exhibit 1. Instead, it would define "frame or receiver" as "[a] part of a firearm that, when the complete weapon is assembled, is visible from the exterior and provides housing or a structure designed to hold or integrate one or more fire control components, even if pins or other attachments are required to connect those components to the housing or structure." *Id.* at 81. As above, however, this aspect of the revised regulation does not alter the questions presented by the People's federal law-based claims here—which, again, turn on whether the frame and receiver kits sold by Polymer80 were "designed" or "may readily be converted" into operable weapons under the GCA's statutory definition, 18 U.S.C. § 921(a)(3).

2. Most of Plaintiff's Claims Do Not Turn on the Federal Definition of "Firearm"

Defendants argue in the alternative that "the Complaint's causes of action are wholly predicated upon highly ambiguous federal law or inapplicable California law." Mot. at 14. That is not true, for the reasons explained above, including that the public nuisance claim does not require a showing of an independent violation of federal (or state) law, and the UCL claims include multiple theories of recovery independent of the federal definition of firearm under 18 U.S.C. § 921(a)(3).

For example, one basis for the UCL claim is violation of the 2005 Child Safety Lock Act. That statute involves the federal definition of "handgun" under 18 U.S.C. § 921(a)(29), which reads: "(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and (B) any combination of parts from which a firearm described in subparagraph (A) can be assembled." Although the word "firearm" appears in the definition of "handgun," there is no dispute that, once assembled, Polymer80's products are firearms, and that its Buy Build Shoot kits provide a "combination of parts" that "can be assembled" into a firearm.

As to Plaintiff's CSLA allegations, Defendants complain that "the City Attorney cannot and does not muster even a single factual allegation concerning P80 purportedly contravening the CSLA. He merely avers that '*on information and belief,* P80 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." Mot. at 16 (emphasis in original). But, at the pleading stage, an allegation is not accorded less weight because it is based on "information and belief." *See* C.C.P. Section 446; *Pridonoff v. Balokovich*, 36 Cal. 2d 788, 792 (1951) ("Plaintiff may allege on information and belief any matters that are not within his personal knowledge"). This is Defendants' sole "attack" on the CSLA claim, which alone can sustain this lawsuit. This claim does not rely on the federal definition of "firearm" under 18 U.S.C. 921(a)(3) or at least the clause at issue ("designed to or may readily be converted") because it requires merely that the kit parts "*can* be assembled" into a firearm, which is, again, indisputably true (and is precisely what led ATF to advise a federal court that it had so concluded). Notably, Defendants do not deny that allegation. Nor do they claim that they sell supplemental or external locking devices or gun storage containers.

As to California's Assembly of Firearms Law, Defendants argue that a violation of this California law is derivative of an interpretation of the federal firearm definition in 18 U.S.C. § 921(a)(3), and that if P80's products are not "firearms" under the federal definition the Company cannot have violated the Assembly of Firearms law. Mot. at 17. Defendants' argument is wrong for two reasons. First, California's Assembly of Firearms Law, Cal. Penal Code § 29180, does not rely on the federal definition of "firearm," but rather the California definition, set forth in Cal.

Penal Code § 16520. Section 29180 *does* rely on and incorporate federal law for the serialization requirement—but it relies on 18 U.S.C. § 923(i)—which is *not* the federal definition of "firearm" (18 U.S.C. § 923(a)(3)). Second, Defendants' argument ignores that for this allegation, the Complaint relies on an "aiding and abetting" theory. Compl. ¶ 61. Thus, it does not matter whether the kits are "firearms" under either federal *or* state law; rather, the question is whether Defendants are aiding and abetting the manufacture of *completed* firearms that do not contain the requisite 3.7 ounces of steel—a claim that Plaintiff has clearly and adequately alleged.

As to the CUHA, Defendants rehash their argument that the statute does not apply to "frames" or "receivers." Mot. at 17–18. They also argue that the statute is "facially inapplicable to all defendants." *Id*. at 18 n.7. This Court rejected these arguments in overruling Defendants' demurrer and need not revisit that ruling. The CUHA, as is evident in its title, applies to the manufacture of "unsafe handguns," and Plaintiff alleges that Defendants are aiding and abetting "[a] person in this state who … causes to be manufactured … an unsafe handgun." Cal. Penal Code § 32000(a).

As to the claim that Defendants have violated the UCL's fraudulent prong, Defendants argue: "All of the supporting allegations relate to Polymer80's dealings with ATF under federal law." Mot. at 18. But "relate to" does not mean that claim necessarily "turns on" the federal firearms definition. For example, one of Plaintiff's allegations under the fraudulent prong is that Polymer80 "expressly and by implication represent[ed] that these products are legal, which they are not, *and that the ATF has said so with respect to Polymer80's kits*, which it has not." Compl. ¶ 70 (emphasis added). Thus, Plaintiff can prevail on this theory of UCL fraud simply by showing Defendants falsely and misleadingly represented that the ATF had approved its kits, when the ATF had not done so.

As to the UCL's unfair prong, Defendants argue that "the entirety of the Complaint's averments regarding violations of the UCL are premised on federal firearms law or the inapplicable CUHA." Mot. at 19. For a business practice to be "unfair" under the UCL, however, there does not have to be a separate violation of the law. *See Smith v. State Farm Mutual Automobile Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001) ("The 'unfair' standard … provides an

independent basis for relief"). This argument therefore fails, as Plaintiff alleges that Defendants' conduct is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," Compl. ¶ 79, and that Defendants' conduct "threatens an incipient violation of [a law], or violates the policy or spirit of [a law] because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id.* at ¶ 77A.

Finally, Defendants argue that "[t]he Complaint's second and sparse public nuisance cause of action is likewise inextricably intertwined with federal firearms law." Mot. at 19. But Plaintiff has not specifically alleged any statutory violations in this cause of action, Compl. ¶ 81–82, which is not required for a public nuisance claim, California Civil Code § 3480, as this Court has already held in denying Defendants' first demurrer seeking dismissal of the public nuisance claim (June 7 Order at 4-5).

Defendants devote substantial space to re-arguing their demurrer, based in large part by misleadingly arguing that each and every one of Plaintiff's claims are intertwined with what Defendants view as an ambiguous and unwieldy federal definition of "firearm." However, as set forth above, there is no ambiguity in the federal definition of firearm as it is applied to frame and receiver kits, and, in any event, Plaintiff's claims include and reflect multiple theories of recovery that do not rely on the federal definition of firearm. Thus, the Court should again reject this unfounded basis to dismiss these claims.

C. Abstention Is Not Warranted

Defendants base their claim for abstention on two arguments. First, Defendants claim that "the requested injunctive relief would cause this Court to assume and interfere with ATF's expertise in determining and enforcing federal firearm laws." Second, Defendants claim that "Court oversight of the injunctive relief sought would be needlessly burdensome, rendering the ATF enforcement more effective." Mot. at 20–28. Defendants are wrong on both.

1. The Court Has the Requisite Expertise to Assess Liability

"Issues of statutory interpretation clearly are questions of law for the courts." *Arce v. Kaiser Found. Health Plan, Inc.*, 181 Cal. App. 4th 471, 500 (2010). Where "[t]he Legislature has already made the relevant policy determinations …. [t]he court is, in the main, merely [] called

upon to enforce those statutory prohibitions." *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal. App. 4th 1237, 1259 (2009). "[T]he fact that an administrative agency may, at some future time, adopt new regulations bearing on pending legal issues does not mean that a court should abstain from adjudicating a presently justiciable controversy." *Arce*, 181 Cal. App. 4th at 502. As explained above, most of Plaintiff's claims are not based on the federal definition of "firearm," are backward-looking, and/or rely on already defined terms.

Defendants conjure a wild scenario in which the Court might need to cut metal to see if a particular product meets the definition of a firearm, which they argue the ATF is better suited to do. Mot. at 24. But no one expects the trial judge to assume the role of a metallurgist; that work would be done, if necessary, by an expert. Further, Plaintiff's claims concern frame and receiver kits, including Buy Build Shoot kits—rather than standalone unfinished frames or receivers. As noted above, the ATF's proposed rule makes clear that such kits are firearms under existing law:

> In recent years, individuals have been purchasing firearm parts kits with incomplete frames or receivers, commonly called "80% receivers," [] either directly from manufacturers of the kits or retailers, without background checks or recordkeeping. Some of these parts kits contain most or all of the components (finished or unfinished) necessary to complete a functional weapon within a short period of time. Some of them include jigs, templates, instructions, drill bits, and tools that allow the purchaser to complete the weapon to a functional state with minimal effort, expertise, or equipment. Weapon parts kits such as these are "firearms" under the GCA because they are *designed to* or *may readily be converted* to expel a projectile by the action of an explosive. Manufacturers of such parts kits must be licensed, abide by the marking and recordkeeping requirements, and pay Federal Firearms Excise Tax on their sales price.[] Any Federal firearms licensee that sells such kits to unlicensed individuals would need to complete ATF Forms 4473, conduct NICS background checks, and abide by the recordkeeping requirements applicable to fully completed and assembled firearms.[] Therefore, to reflect existing case law, this proposed rule would add a sentence at the end of the definition of "firearm" in 27 CFR 478.11 providing that "[t]he term shall 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."

Defendants' Exhibit 1.

As alleged in the Complaint, "Polymer80 sold Buy Build Shoot kits consisting of all component parts of a firearm, including handgun frames, which are 'designed to' be and 'may readily be converted' into an operable weapon. Polymer80 also currently sells frame and receiver kits containing an unfinished frame or receiver along with jigs and drill bits that enable a customer

to complete the frame or receiver." Compl. ¶ 40. Thus, the Court will need to determine only whether these kits fall under the GCA's ***current*** statutory definition of a "firearm." The proposed regulation—consistent with the ATF's search warrant application for Polymer80 and the conclusion of its Chief Counsel—confirms that such kits already meet the statutory definition. To the extent the proposed new rule goes further, and clarifies the circumstances under which unfinished standalone frames and receivers, not sold as parts of kits, also meet the definition of "firearm," that is irrelevant because Plaintiff's Complaint does not challenge Defendants' sales of those standalone components on their own.

2. The Court Is Equipped to Oversee Enforcement of an Injunction

Relying principally on *Alvarado*, 153 Cal. App. 4th 1292, and *Acosta v. Brown*, 213 Cal. App. 4th 234 (2013), Defendants argue that this court should abstain from adjudicating this lawsuit in favor of the ATF due to the Court's "lack of pertinent background and technical ability." Mot. at 22. As set forth below, the courts in those cases determined that abstention was proper because enforcement of the requested injunctions would have required them to get involved in the administration of complex economic issues, rather than simply ordering the defendants to not violate specific laws, as is requested here.

In *Alvarado*, the plaintiff sued under the UCL as a private attorney general, seeking restitution and injunctive relief to require owners and operators of skilled nursing and intermediate care facilities to comply with nursing hour requirements in the Health and Safety Code and enforced by the Department of Health Care Services (DHCS). *See* 153 Cal. App. 4th at 1295–96. The trial court sustained a demurrer and the Court of Appeal affirmed, finding abstention proper. *Id.* at 1296-97. The Court noted that some complex economic policies and issues should be handled by the Legislature or Administrative agencies and that Courts may abstain from granting injunctive relief when doing so would place an unnecessary burden on the Court due to the availability of other more effective remedies. *See id.* at 1298, 1302–04. Here, however, Defendants have failed to explain what remedies would necessarily flow from the ATF rule-making process, much less that those remedies would be more effective than those sought here. And given Defendant's unwillingness to agree to be bound by the ATF's proposed new rule (*see*

Plaintiff's Exhibit 4), which it has argued is "unlawful under the governing statutory regime, arbitrary and capricious, and unconstitutional" (*see* Defendants' Exhibit 5 at 1), Defendants here are just playing games to delay their day of reckoning.

In *Acosta*, unemployed California farmworkers experienced significant delays in receiving benefits due them under the California unemployment compensation program. 213 Cal. App. 4th at 237. They sought a writ of mandate from the Superior Court directing the Governor and other state officials to ensure they received the benefits due them within the time periods specified in federal regulations. *Id*. at 237–38.

The chief issue in *Acosta* was not whether respondents had complied with the payment requirements for unemployment benefits—clearly, they had not. Rather, as the Court noted, the question was whether the remedy for respondents' failure to comply with those requirements should be devised, monitored, and enforced administratively by the federal Department of Labor or judicially by a California court. The *Acosta* court determined that "Appellants are not merely asking the court to compel [respondents] to comply with the mandate of the Social Security Act to pay [unemployment insurance] compensation 'when due.' In reality they are asking the trial court to replicate administrative responsibilities imposed by law on the DOL." 213 Cal. App. 4th at 251. The Court noted that the requested injunctive relief required the trial court to impose on respondents the duty to periodically submit the functional equivalent of "benefit payment performance plans" explaining the "corrective actions" it planned to take to come into compliance. Abstention was appropriate because "[t]he record provides no reason to think the trial court is in a better position than DOL to bring [respondents] into compliance." *Acosta*, 213 Cal. App. 4th at 252.

None of the concerns raised in *Acosta* or *Alvarado* are present here. Upon concluding that the sale of Buy Build Shoot kits and frame and receiver kits are illegal, the Court here would simply identify those products and enjoin their sale. Such injunctions are appropriate under California law. *See City of Redlands v. Cty. of San Bernardino*, 96 Cal. App. 4th 398, 416 (2002) ("[w]hile a court may not issue a broad injunction to simply obey the law, thereby subjecting a person to contempt proceedings for committing at any time in the future some new violation

unrelated to the original allegations, the court is entitled to restrain the person from committing similar or related unlawful activity"). Alternatively, Defendants could comply by stopping any such illegal sales—which they are capable of doing, as evidenced by their voluntary decision to stop selling Buy Build Shoot kits.

At any rate, much of the Complaint hinges on California law, which the California Legislature has deemed necessary to protect Californians, and which, again, the ATF has no jurisdiction to enforce. Furthermore, California's Attorney General appears to agree that superior courts are the appropriate venue for enforcement of California's unique gun laws, as just last week the Attorney General announced he was joining an action in San Francisco against several ghost gun manufacturers, based upon claims that mirror those Plaintiff here asserts against Defendants.[7]

3. Plaintiff Seeks More than Injunctive Relief

"[A]bstention is generally appropriate only if there is an alternative means of resolving the issues raised in the plaintiff's complaint." *Klein*, 202 Cal. App. 4th at 1369. Defendants urge this Court to abstain from deciding the case because they claim there is a more effective federal remedy. Defendants never identify that supposedly alternative remedy; and, given that the ATF is not authorized to enforce violations of state law, it is difficult to conceive of how Plaintiff's claims could be resolved by the ATF. More importantly, the Complaint seeks statutory penalties and the establishment of an abatement fund—remedies that are clearly beyond the ATF's power to grant. *See Blue Cross of California, Inc.*, 180 Cal. App. 4th at 1259 ("Moreover, all of those arguments relate only to the injunctive relief sought in the complaint, but the complaint does not seek only injunctive relief. Rather, it also seeks restitution and civil penalties."). The Court should not abstain or stay this case and should address Plaintiff's additional forms of relief that the ATF cannot grant.

[7] Daisy Nguyen, "California Atty. Gen. Rob Bonta joins suit against 'ghost gun' sellers," L.A Times, Oct. 13, 2021 6:19 PM, https://www.latimes.com/california/story/2021-10-13/california-attorney-general-rob-bonta-joins-suit-against-ghost-gun-sellers#:~:text=SAN%20FRANCISCO%20%E2%80%94-,California%20Atty.,being%20used%20in%20violent%20crimes.

III. THE COURT SHOULD NOT STAY THE CASE

In asking that the Court stay the case, Defendants again ground their request on the "primary jurisdiction doctrine," and rely on the very same line of case law cited in their prior motion for a stay. *Compare* Mot. at 28 (citing, among other cases, *Farmers Ins. Exch. v. Sup. Ct.*, 2 Cal. 4th, 377 (1992)) *with* Plaintiff's Exhibit 5 at 5 (May 20, 2021) (citing same case). This time, however, Defendants do not present the Court with substantive argument. They assert only that "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 the Court not abstain from adjudicating, and decline to dismiss, it." Mot. at 28–29. The Court should reject Defendants' cursory, recycled request for a stay based on primary jurisdiction.

Moreover, the prejudice that would result from a stay has not changed. Defendants continue to refuse to acknowledge or address that the proliferation of their "ghost guns" throughout California has contributed to a wave of gun violence and death. Complaint at ¶¶ 1-2, 4-17, 29. As alleged, these unserialized, no-background-check kits have become the weapon of choice for those who engage in criminal activity. Complaint pars. 8-9. And because Defendants' unserialized weapons are rarely traceable, they make it difficult for law enforcement to solve crimes, and "have resulted in an increase in investigative costs and expenditure of law enforcement resources." *Id*. at ¶¶ 102, 25-28. Indeed, the ATF notes in its proposed rule the dramatic increase of "ghost guns" recovered from crime scenes, including especially those made from Polymer80 kits. Defendants' Exhibit 1.

There is no way to know how long the ATF will take to review public comments and issue a final rule.[8] The published notice of proposed rulemaking set August 19, 2021, as the deadline for submitting comments. Definition of "Frame or Receiver" and Identification of Firearms, 86

[8] Defendants have reversed position from their previous request for a stay in one regard. In that brief, they pressed that a stay was appropriate because "a stay would likely remain in effect for merely a few months." They have since acknowledged, in their application to designate the case as complex, that "the proposed new Rule could become law and, if so, will likely be challenged in further litigation." Plaintiff's Exhibit 5.

Fed. Reg. 27,720 (May 21, 2021). It then has to review those comments, decide whether to amend the proposed rule, and issue a final rule. That could easily take many months, if not longer.

Moreover, given the number of parties invested in this rulemaking, especially Defendants, there will all but certainly be a court challenge to the final rulemaking. In fact, Defendants themselves are almost certain to be among the challengers. As Defendants know, "[i]f a court sets aside (vacates) all or part of a rule, it usually sends the rule back to the agency to correct the deficiencies. The agency may have to reopen the comment period, publish a new statement of basis and purpose in the *Federal Register* to explain and justify its decisions, or re-start the rulemaking process from the beginning by issuing a new proposed rule." *A Guide to the Rulemaking Process*, Office of the Federal Register, *available at* https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf. That is not a risk; it is what Defendants intend. The stay they seek here could therefore drag on for years. The prejudice to the People, in terms of lives lost, crimes unsolved, and perpetrators escaping justice, would be significant. Given also that the People's claims here will not be affected by the ATF's proposed rule, that the Complaint alleges violations of state as well as federal law, and that the relief sought is not just injunctive, but also statutory damages and an abatement fund, a stay offers no judicial efficiencies and threatens an open-ended period of prejudice to the People.

CONCLUSION

For the foregoing reasons, the People respectfully request that the Court deny Defendants' Motion.

DATED: October 21, 2021

Respectfully submitted,

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PROOF OF SERVICE

I am employed at the law firm of Quinn Emanuel Urquhart & Sullivan, LLP in the County of Los Angeles, State of California. I am over 18 years old and not a party to the within action. My business address is 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017.

On October 21, 2021, I served a true and correct copy of the documents described as PLAINTIFF STATE OF CALIFORNIA'S OPPOSITION TO DEFENDANTS POLYMER80, INC., DAVID BORGES, AND LORAN KELLEY'S MOTION FOR JUDICIAL ABSTENTION AND DISMISSAL OR, IN THE ALTERNATIVE, FOR A STAY on the parties in this action via e-mail to the attached service list

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

Executed on October 21, 2021, at Los Angeles, California.

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