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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

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

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER 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 this Reply Memorandum of Points and Authorities in further support of their motion ("Motion"), pursuant to Sections 128 and 1094 of the California Code of Civil Procedure, seeking the Court's abstention from adjudicating, and dismissal of, this action. Alternatively, the Motion requests that the Court stay this case pending 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

In opposing the instant Motion, plaintiff lodges a scattered panoply of arguments. As demonstrated below, all, in the end, lack merit and disregard the following demonstrable and dispositive points:

- Defendants have properly made this Motion here and now in the precise manner made.
- A declination to abstain in the premises would amount to an unfortunate usurpation by this Court of ATF's traditional role as the dominant expert regulator of "firearms" nationwide.
- The vast, overarching, and (by ATF) acknowledged ambiguity of current federal law has exacerbated the need for ATF's expertise and regulatory efforts regarding "firearms," as well as the wisdom of the Court abstaining from adjudicating this action.
- Likewise, absent abstention, this Court will undoubtedly be saddled with and burdened by voluminous highly technical issues tied to literally dozens of Polymer80 gun-related products and arising from the inevitable need for the Court to oversee and police the overly broad injunctive relief that plaintiff is pursuing.
- Moreover, plaintiff's applicable State claims herein, as pleaded, are entirely predicated upon nebulous federal firearms law, further enhancing the propriety and soundness of abstention.

- And finally, abstention is also appropriate, given that all of the relief sought by plaintiff is essentially equitable in nature.

Therefore, the Court should not hesitate to grant defendants' Motion, abstain from hearing this case, and dismiss it. Alternatively, should the Court decide to adjudicate matters, it should stay this action under the "primary jurisdiction" doctrine in the fashion described and for the reasons explicated in defendants' opening submissions.

ARGUMENT

I

THIS MOTION IS PROCEDURALLY SOUND.

Plaintiff's sparse, one-paragraph procedural argument deploys finely selected language to avoid the inexorable conclusion that defendants have properly tendered this Motion. Plaintiff does not contend, or cite any case law or other authority standing for the proposition, that an abstention motion *must* be made upon demurrer. *See* 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 ("Opposition") at 4. Instead, plaintiff avers that "*[a]lmost* every case addressing the equitable abstention doctrine, including those [d]efendants cite, addressed this doctrine in the context of a demurrer." *Id.* The word "*[a]lmost*" is key and reveals that defendants can, in fact, raise the doctrine of equitable abstention outside of a demurrer. And, contrary to plaintiff's averment, defendants *have* cited a case so establishing. *See* Motion at 5, 20-24, 26, citing *Acosta v. Brown*, 213 Cal. App. 4th 234 (2013) (involving a motion for Judgment on the Writ pursuant to Code Civ. Proc. § 1094). To the same effect, plaintiff itself has cited a case in which abstention was sought upon a "motion for judgment on the pleadings." *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1349 (2012).[1] In that vein, it is noteworthy that defendants' Notice Of Motion has expressly invoked the doctrine of judicial abstention.

[1] Indeed, a motion for judgment on the pleadings may be made where, as here, the "moving party did not demur to the complaint . . . on the same grounds as is the basis for the motion [for judgment on the pleadings]." Code Civ. Proc. § 438(g)(2).

In any event, a California Court "ha[s] the power" to "provide for the orderly conduct of proceedings before it" and to "amend and control its process and orders so as to make them conform to law and justice." Code Civ. Pro §§ 128(a)(3), (8).[2] Additionally, a recent decision confirms that California Courts will "exercise [their] discretion" in unique circumstances such as determining the propriety of the denial of a preliminary injunction "under the continuing public importance exception because [their] application of the judicial abstention doctrine may affect future proceedings between the parties, will have some precedential consequence in future litigation generally and may provide much-needed guidance for the orderly administration of justice." *Olson v. Hornbrook Cmty. Servs. Dist.*, 283 Cal. Rptr. 3d 401, 407 (2021) (internal citations and quotation marks omitted).

Plaintiff's references to "change of counsel" are a red herring. Opposition at 1, 4. Defendants nowhere have asserted that they should be afforded a second demurrer owing to the appearance of new counsel. And, this Motion is not made by way of demurrer, nor is it required to be made in that fashion. Indeed, plaintiff forgets that prior counsel to defendants informed the Court and opposing counsel that a proper *motion for abstention would be forthcoming* following the Court's overruling of defendants' demurrer. *See* Defendants' Complex Civil Case Questionnaire dated July 22, 2021, Ex. B.

At bottom and in all the circumstances, defendants' motion is appropriately before the Court at this juncture.

II

THE COURT SHOULD DECLINE PLAINTIFF'S INVITATION TO USURP ATF'S AUTHORITY TO REGULATE FIREARMS, ABSTAIN FROM ADJUDICATING THIS ACTION, AND DISMISS IT.

Abstention is appropriate, where, as here, 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 controlling federal

[2] Defendants further note that their demurrer was filed on April 20, 2021, *before* ATF's NPRM, which was issued on May 7, 2021, and published in the Federal Register on May 21, 2021, and under these circumstances reconsideration of the Court's ruling on the demurrer is available. *See* Code Civ. Proc. §§ 1008(b)-(c).

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). That outcome is also "appropriate in cases," such as this one, "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. Here, abstention and dismissal are warranted for both reasons.

A. Plaintiff's Opposition Mischaracterizes The Company's Dealings With ATF And Underscores That That Agency Is Expressly Charged With Regulating Firearms Federally.

Abstention is proper when 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 law, and, therefore, defendants in this case must, in the first place, show that ATF has the subject regulatory responsibility. Motion at 21. Defendants indisputably have done so, as there is no question that ATF has regulatory responsibility. *See id.* at 21-22. Yet puzzlingly, plaintiff maintains that one of defendants' "principal arguments for dismissal" is the fact that "they are already in compliance with the law and cooperating with ATF." Opposition at 4. Simply put, defendants have never advanced that or any other such argument. In reality, this straw man is a transparent attempt to distract the Court and rehash over multiple pages fanciful allegations concerning Polymer80's dealings with ATF, despite plaintiff twice conceding that those allegations are "irrelevant" and "not directly relevant to this motion." Opposition at 5-6 & n.5. That "irrelevant" argument nevertheless reinforces that ATF is the appropriate regulator of federal firearms law.

B. Abstention Is Warranted, Because ATF Is Best Equipped To Assess Compliance With Complex Firearms Law At The Heart Of This Action.

(i) Plaintiff Grossly Mischaracterizes The Extent To Which Federal Law Relating To The Products At Issue In This Case Is Unsettled.

Plaintiff has grossly misrepresented that "existing law" is settled "as to the gun-building kits at issue in this case." Opposition at 7. Tellingly, plaintiff cites only the ATF's NPRM for this

contention, in a setting in which ATF is the very Agency trying to justify its statutory authority to implement rules that rewrite or redefine firearms-related laws and regulations. *See id.* There are no cases addressing Polymer80's products. Indeed, in an entirely factually distinct case, a federal District Court in Montana stated that there exists a "dearth of case law on this exact issue," namely, whether the federal "'firearm' definition . . . contemplate[s] pieces of weapons, frames, or receivers," which in that action involved "Uzi receivers cut into pieces." *United States v. Wick*, 2016 WL 10637098, at *1 (D. Mont. July 1, 2016), *aff'd*, 697 F. App'x 507 (9th Cir. 2017) (mem.). The Ninth Circuit, affirming in a non-published and non-precedential decision, clearly and decidedly declined to reach the question of whether "demilled receivers" constituted "firearms" and instead upheld a conviction on the ground that the defendant there was selling "complete Uzi parts kits" that "contained all the necessary components to assemble a fully functioning firearm with relative ease." *Wick*, 697 F. App'x at 508. The dozens of Polymer80 kits and frames in question here do not contain all of the necessary components or tools needed to assemble a fully functioning firearm. Rather, the Complaint merely alleges that the Company "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.[3] Accordingly, plaintiff does *not* allege that Polymer80 has contravened any well-hewn "existing law."

To be sure, there is a significant dispute concerning ATF's statutory authority to define, as plaintiff attempts to do, kits with "unfinished" frames or receivers and other components as "firearms" under the guise that they "are designed to or may readily be converted to expel a projectile by the action of an explosive." Opposition at 7. The GCA's definition of a "firearm" is

[3] For this same reason, plaintiff's argument concerning the Child Safety Lock Act ("CSLA") is unavailing. *See* Opposition at 9. Plaintiff correctly observes that CSLA applies to a "handgun," which under the federal Gun Control Act ("GCA") is defined as: "(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." Opposition at 9, citing 18 U.S.C. § 921(a)(29). Plaintiff emphasizes subpart (B), "any combination of parts," but the Complaint fails to allege that Polymer80's kits do contain all the relevant parts from which a firearm "can be assembled." Once subpart (B) does not apply, the definition of handgun in subpart (A) patently incorporates the unclear definition of "firearm" from 18 U.S.C. § 921(a)(3). Finally, plaintiff's defense of its pleading practices on information and belief ignores the procedural posture at hand. Defendants do not seek dismissal for failure to state a claim but pursue abstention and dismissal, because the Court's adjudication of plaintiff's CSLA claims will involve complicated determinations on murky federal law.

circumscribed, given the demonstrable fact that Congress did not want that definition to apply to components and unenumerated parts. The precursor to the GCA -- the Federal Firearms Act of 1938 -- defined "firearm" to "mean[] any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, *or any part or parts of such weapon."* Pub. L. No. 75–785, 52 Stat. 1250 (1938) (repealed 1968) (emphasis supplied). With passage of the GCA, Congress resolved to remove "part or parts" from the definition of a "firearm," as follows:

> During debate on the GCA and related bills introduced to address firearms trafficking, Congress recognized that regulation of all firearm parts was impractical. Senator Dodd explained that "[t]he present definition of this term includes 'any part or parts' of a firearm. It has been impractical to treat each small part of a firearm as if it were a weapon. The revised definition substitutes the words 'frame or receiver' for the words 'any part or parts.'" *See* 111 Cong. Rec. 5527 (March 22, 1965).

Ex. 1 (NPRM, 86 Fed. Reg. at 27,720).

Thus, as it stands now, the GCA's definition of a "firearm" applies to 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). Said definition does *not* include an "unfinished frame or receiver," nor does it include any "kits" containing undefined "parts." And so, the GCA does not -- and cannot be said to -- cover these items. *See United States v. Vonn,* 535 U.S. 55, 65 (2002) ("expressing one item of [an] associated group or series excludes another left unmentioned."). *See also Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers,* 414 U.S. 453, 458 (1974) ("'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. . . . .' This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius."),* quoting *Botany Worsted Mills v. United States,* 278 U.S. 282, 289 (1929).

Consequently, it is of no moment that plaintiff alleges that Polymer80's "kits contain[ed] an unfinished frame or receiver along with jigs and drill bits that enable a customer to complete the

frame or receiver," because Congress purposely left such components *out* of the GCA's definition of "firearm." *See Am. for Clean Energy v. Envtl. Prot. Agency*, 864 F.3d 691, 713 (D.C. Cir. 2017) (Kavanaugh, J.) ("Congress's decision to drop the 'distribution capacity' language counsels against EPA's reading in this case, which in effect would add that kind of language back into the waiver provision . . . ."). As a result, the entire present legal basis of the pending Complaint may be exposed as infirm.

Nonetheless, even if plaintiff could get past this unsettled statutory hurdle and an "unfinished" frame or receiver kit could, under certain circumstances, tenably be called a "firearm," there are still major, foundational issues extant as to the definitions of "frame," receiver," and "readily be converted." That is the actual and nebulous backdrop upon which ATF issued the pending NPRM. In fact, ATF has candidly acknowledged the difficulty in determining when, if ever, a so-called "unfinished" frame or receiver becomes complete, stating as follows:

> 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.… 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.

Ex. 1 (NPRM, 86 Fed. Reg. at 27,720).

In other words, ATF in the NPRM has explicitly recognized that it is hard for anyone to discern whether an item is a "frame" or "receiver" and resultingly a "firearm" pursuant to the GCA.

See 18 U.S.C. § 921(a)(3)(B). In an attempt to ameliorate this considerable uncertainty, ATF has endeavored to define a "[p]artially complete, disassembled, or inoperable frame or receiver," as, 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." *Id.* (NPRM, 86 Fed. Reg. at 27,743, 27,746). 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." *Id.* (NPRM, 86 Fed. Reg. at 27,746 (emphasis supplied)).

Moreover, ATF proposes to define "readily" through implementation an eight-factor balancing test "with no single [factor] controlling" and involving consideration of 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.

Id. (86 Fed. Reg. at 27,747).

Notably, ATF has made clear that the definition of "readily" will be of paramount importance with respect to the claims against Polymer80 in this action by explaining 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." *Id.* (86 Fed. Reg. at 27,747

(emphasis supplied)). Therefore, ATF's forthcoming Rule will undoubtedly alter the landscape of the already opaque federal law concerning the kits at issue in this proceeding.

(ii) ATF Is Better Equipped To Decide Compliance With Federal Law Than This Court, Given That Highly Technical Factual Determinations Relating To Dozens Of Gun-Related Products Will Surely Be Needed.

Plaintiff's Opposition fails by its own terms, as it is entirely premised upon the assertion that all of Polymer80 kits at-issue "already meet"… the GCA's statutory definition of a 'firearm'… "under existing law." Opposition at 12-13. As demonstrated above, that assertion is misguided and fatally defective. While defendants do agree that this Court is capable of engaging in sound and sage "statutory interpretation," the issue of whether or not the dozens of kits at issue here are "firearms" under the GCA turns on the application of incontestably unsettled law to very complicated and highly technical facts.[4] As elucidated in defendants' opening submissions, the Court cannot easily cut gun components into pieces or measure specific clearances of items to hundredths of inches. *See* Motion at 24-25. Moreover, ATF admits that, as currently constituted, "*neither* [the GCA [nor] implementing regulations] delineates when a frame or receiver is created," and that its new Rule is "necessary to provide further clarity in determining when incomplete weapons or configurations of parts become a 'firearm' regulated under the GCA." Ex. 1 (NPRM, 86 Fed. Reg. at 27,720, 27,747 (emphasis supplied)). As such, any "expert" hired by the Court would have immense difficulty determining in the period before any new Rule is issued whether or not each of Polymer80's kits is a federal "firearm." And, any such expert certainly will not be able to do so as well as ATF in the wake of the implementation of any new Rule. Such efforts are "a task better accomplished by an administrative agency than trial courts," *Alvarado*, 153 Cal. App. 4th at 1305-06, especially considering that ATF "has an interest in securing uniformity in

[4] As a consequence, plaintiff's reliance on *Arce v. Kaiser Foundation Health Plan, Inc.*, 181 Cal. App. 4th 471 (2010), is misplaced. *See* Opposition at 11-12. In that case (involving medical underwriting practices under the Knox-Keene Act), "resolution of the UCL claim would not call upon the court to engage in individualized determinations of medical necessity for each putative class member, but rather to perform the basic judicial functions of contractual and statutory interpretation" and "the trial court would need to interpret the relevant terms of the contract, and decide whether the therapies are or are not covered services." *Id*. at 499-500. Here, by contrast, the Court would need to analyze dozens of kits and weigh, make, and apply highly technical determinations. Furthermore, in *Arce*, the relevant administrative agency was *not*, as ATF is here and now, already actively engaged in rulemaking. *See id.* at 502.

determinations," *Olson*, 283 Cal. Rptr. 3d at 412. Indeed, since the "relief sought essentially transfers to the trial court the administrative responsibilities of" ATF and "would unquestionably require 'technical or policy determinations usually reserved to an administrative agency,'" this Court should abstain. *Acosta*, 213 Cal. App. 4th at 252-58, quoting *Shuts v. Covenant Holdco LLC*, 208 Cal. App. 4th 609 (2012).

(iii) Contrary To Plaintiff's Assertions, Its State Law Causes Of Action Are Either Entirely Premised Upon Federal Law Or Inapplicable.

Plaintiff repeatedly contends that the demurrer as to its State causes of action is being "re-argu[ed]." *See, e.g.*, Opposition at 10-11. Yet, plaintiff misapprehends that defendants are not arguing upon this Motion that the Complaint is insufficiently specific or fails to state a claim. Instead, defendants are asking this Court to abstain, insofar as its adjudication of the issues will be inextricably intertwined with ambiguous federal law that needs the clarity that ATF's expertise might best bring, as explained above.

To ultimately prevail in this proceeding, plaintiff will need to prove that defendants have violated federal law, when, in actuality, they have not. The Complaint alleges "two state law violations, specifically, violations of California's UCL and public nuisance statutes." Opposition at 3. In these premises, plaintiff's public nuisance claim rises and falls on the existence of a violation of law pursuant to *In re Firearms Cases*, 126 Cal. App. 4th 959 (2005). Plaintiffs there, as with the plaintiff here, "alleged that defendants' conduct constitutes a public nuisance because it results in supplying handguns to the criminal market that remain in the hands of criminals for years and causes death and injury to the public." *Id*. at 986. The Court rejected that theory of nuisance, since "[d]efendants manufacture guns according to federal law and guidelines," and "there is no causal connection between any conduct of the defendants and any incident of illegal acquisition of firearms or criminal acts or accidental injury by a firearm." *Id.* at 989. Accordingly, plaintiff will have to prove something it simply cannot -- that defendants "manufactured guns" in contravention of federal law.

Similarly, plaintiff effectively concedes that a California Unfair Competition Law ("CUCL") cause *must* generally be tethered to some contravention of federal law or authority. In

this regard, plaintiff's contention concerning the "unfair prong" of the CUCL expressly references the averment that defendants' conduct purportedly "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." Opposition at 11, quoting Compl. ¶ 79. In addition, the California Court of Appeals, First District, has stated that "[p]laintiffs have cited no cases finding a manufacturer has engaged in an unfair practice solely by legally selling a non-defective product based on actions taken by entities further along the chain of distribution." *In re Firearms Cases*, 126 Cal. App. 4th at 980-85 (2005) (explaining that "the definition of unfairness to competitors under" the CUCL "must be "'tethered to some legislatively declared policy or proof of some actual or threatened impact on competition'" and "to specific constitutional, statutory, or regulatory provisions").[5] And, the Complaint's "allegations under the fraudulent prong" expressly relate to the Company's statements regarding ATF's determinations regarding the legality of its products -- *under federal law*. Opposition at 10; Compl. ¶¶ 69-75.

Furthermore, the two California State criminal statutes (CUHA and CAFL) referenced in the Complaint are inapplicable to plaintiff and so cannot buttress its CUCL and public nuisance claims. In brief, CUHA's provisions do not apply to *any* frames or receivers, whether finished or "unfinished." *See* Motion at 17-18. Likewise, CAFL does not extend to cover Polymer80's kits, insofar as that statute does not apply to "unfinished" frames or receivers. Although under Penal Code § 29180 an *entire* frame or receiver qualifies as a "firearm," the "unfinished frame or receiver of a weapon that can be readily converted to the functional condition of a finished frame or receiver" does not. *Compare* Penal Code § 16520(b), citing Penal Code § 29180 as one of the "provisions" in which "'firearm' includes the frame or receiver of the weapon", *with* Penal Code § 16520(b), not including Penal Code § 29180 as a provision in which "'firearm' includes the unfinished frame or

[5] *See also Graham v. Bank of Am., N.A.*, 226 Cal. App. 4th 594, 613 ("appl[ying] a more rigorous test for unfairness in consumer UCL actions . . . requir[ing] that the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory, or regulatory provisions"). *But see Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394, 1402 (2006) ("We do not think . . . that the finding, in a consumer case, that the practice is unfair must be 'tethered' to specific constitutional, statutory, or regulatory provisions.") In any event, the Complaint has not alleged that any *consumer* of Polymer80's products lost money or property caused by a purported "unfair business practice" such that the *consumer* suffered an injury in fact therefrom. *See Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310 (2011).

receiver." Further and as plaintiff concedes, CAFL mandates serialization of certain firearms that "meet[] or exceed[] 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." Revealingly, the analysis of whether or not those "requirements" are satisfied turns on 18 U.S.C. 923 -- the federal GCA.

In addition, it bears mentioning what plaintiff attempts to bury in a footnote -- that "the State of California recently passed . . . 'firearm precursor part' laws . . . requiring background checks on sales of firearm precursor parts and banning direct-to-consumer internet sales." Opposition at 3, citing Cal. Penal Code §§ 30400 *et seq*. A "firearm precursor part means a component of a firearm that is necessary to build or assemble a firearm" and expressly includes "[a]n unfinished receiver" and "[a]n unfinished handgun frame." Cal. Penal Code §§ 16532(a)(1)-(2). Thus, the Penal Code states in crystalline fashion that "[a] firearm precursor part is not a firearm or the frame or receiver thereof." § 16532(a). Clearly then, CUHA and CAFL do *not* apply to Polymer80's products (and accordingly plaintiff's aiding and abetting theories also must fail).

C. The Court Should Abstain And Dismiss, Because Oversight Of The Injunctions Sought Would Needlessly Burden The Court.

Plaintiff is aware, as it must be, that a Court "'may not issue a broad injunction to simply obey the law.'" Opposition at 14, quoting *City of Redlands v. County of San Bernardino*, 96 Cal. App. 4th 398, 416 (2002). But, that is exactly what plaintiff is asking the Court to do in pursuing the following remedies:

> - "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).[6]

[6] By contrast, in *City of Redlands*, the Court issued an injunction "precluding the County from adopting any 'similar' amendments" to its land use plan "without preparing an EIR [environmental impact report]." 96 Cal. App. 4th at 403. It did not broadly enjoin the defendant "from violating [the] Law." Compl. Prayer For

Plaintiff tries to obviate the import of the request for such relief by downplaying the Court's almost inevitable role in overseeing and policing that relief. Relatedly, plaintiff claims that after hypothetically "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." Opposition at 14. By so claiming, plaintiff assumes that all of these kits are the same (and they assuredly are not), and that determinations as to their legality are straightforward (and they definitely are not). In short, plaintiff disregards the near-certainty of the Court's extensive role in continued monitoring of all future Polymer80 products, should this action persist. As explained in defendants' opening submissions, a decision on whether or not an item constitutes a "frame" or "receiver" can come down to the measurement of specific components within 0.28 inches. *See, e.g.*, Motion at 8. Does plaintiff favor the Company imposing upon the Court its resubmissions (designed to avoid a contempt citation) of products every time Polymer80 slightly changes manufacturing specifications? As in *Acosta,* "[t]he record provides no reason to think the trial court is in a better position than" ATF to make determinations regarding the Company's "compliance" with these exacting technical requirements. *Acosta*, 213 Cal. App. 4th at 252; *Diaz v. Kay-Dix Ranch*, 9 Cal. App. 3d 588 (1970).

At bottom, plaintiff has not even tried to address the concerns articulated in *Diaz* and emphasized upon this Motion regarding the enormous breadth of the injunctive relief sought. *See* Motion at 27-28. If the Court were to issue such an injunction, a "plethora of cases . . . would undoubtedly spawn" and "[m]ultiple injunctions covering a wide segment" of the firearms industry "would have the cumulative effect of a statutory regulation, administered by the superior courts through the medium of contempt hearings." *See id.*, quoting *Larez v. Oberti*, 23 Cal. App. 3d 217, 222-23 (1972). *See also Diaz,* 9 Cal. App. 3d at 599. Perhaps, the reason that plaintiff has not addressed this point is that that same result is precisely what plaintiff intends and wants.

Relief ¶ 1.

D. Abstention Is Appropriate Here, Because All Of The Remedies Requested Are Equitable In Nature.

Contrary to plaintiff's contention, the Court is not required to deny an abstention application simply because the requested relief seeks "statutory penalties and the establishment of an abatement fund." Opposition at 15. Courts often grant abstention motions regarding CUCL claims seeking restitution and have the ability to abstain from any causes seeking equitable relief. *See Willard v. AT&T Commc'ns of Cal., Inc.*, 204 Cal. App. 4th 53, 59 (2012) ("Because the remedies of declaratory judgment, injunction, and restitution 'are equitable in nature, courts have the discretion to abstain from employing them.'"); *Alvarado*, 153 Cal. App. 4th at 1297 ("Plaintiff seeks relief under the UCL. In California, the remedies available for alleged violations of the UCL include injunctions and restitution. Because these remedies are equitable in nature, under the doctrine of judicial abstention, courts have the discretion to abstain from employing them."); *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) ("[B]ecause the remedies available under the UCL, namely injunctions and restitution, are equitable in nature, courts have the discretion to abstain from employing them.").[7] An abatement fund is indubitably "an equitable remedy, while damages are a legal remedy." *See People v. ConAgra Grocery Prod. Co.*, 17 Cal. App. 5th 51, 132 (2017) (explaining that "[t]he distinction between an abatement order and a damages award is stark. . . . An equitable remedy's sole purpose is to eliminate the hazard that is causing prospective harm to the plaintiff. An equitable remedy provides no compensation to a plaintiff for prior harm. Damages, on the other hand, are directed at compensating the plaintiff for prior accrued harm that has resulted from the defendant's wrongful conduct."). The truth is that plaintiff is unable to proffer a single case holding that a Court should decline to abstain on the sole ground that the equitable remedy sought in the action involves an

[7] *Klein* is inapposite, because there "the Legislature or other government entity" had not "attempted to remedy the issues raised in plaintiffs' complaint or provided an alternative means of addressing such issues" where it merely "required an agency to investigate remedies to a potentially problematic business practice" and "prepare a cost benefit analysis." 202 Cal. App. 4th at 1369-70. Here, ATF is actively engaged in the rulemaking process and, as plaintiff admits, "the State of California recently passed ghost gun laws." Opposition at 3 n.2. Moreover, the Court, in *Blue Cross of Cal., Inc. v. Super. Ct.*, 180 Cal. App. 4th 1237, 1259 (2009), did not hold that abstention is necessarily inappropriate where a plaintiff seeks restitution.

exchange of money. Therefore, plaintiff's Opposition should be rejected, and the Court should abstain and dismiss this case.

III

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

For all of the reasons set forth in defendants' opening papers, should the Court not abstain, the doctrine of primary jurisdiction militates in favor of a stay, while the NPRM process continues. The Court's earlier Order denying a stay was made *without* prejudice. *See* Minute Order, dated May 26, 2021. If plaintiff really wants "***prospective***" relief regarding federal law, the Court needs to know what the law *is*. Opposition at 3 n.2 (emphasis in original). Accordingly, if federal law remains at the center of this proceeding, the Court should order a stay.

CONCLUSION

For all of the foregoing reasons and those arising from the remainder of the record of this matter, the Court should grant the instant Motion, abstain from adjudicating this case, and order dismissal. Absent abstention and in the alternative, the Court should stay these proceedings under the doctrine of primary jurisdiction to allow ATF to apply its "special competence" and "administrative expertise" during the ongoing NPRM process to ensure federal resolution of the judicial challenges to any new provisions that the Agency wishes to implement and enforce.

Dated: November 4, 2021

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

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