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8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES**

11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA,

13 Plaintiff,

14 vs.

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

17 Defendants.

CASE NO.: 21STCV06257

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

**PLAINTIFF STATE OF CALIFORNIA'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANTS POLYMER80, INC.,
DAVID BORGES, AND LORAN
KELLEY'S EX PARTE APPLICATION
FOR AN ORDER STAYING
PROCEEDINGS**

Hearing Date: May 26, 2021
Time: 8:30 a.m.
Department: 32
Reservation ID: 799308383329

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Complaint Filed: February 17, 2021

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1 **INTRODUCTION**

2 Defendants invoke the extraordinary ex parte procedures of this Court to stay this case for
3 an unknown—but likely years-long—period while the ATF considers comments to and finalizes a
4 rule that would clarify the regulatory definition of “firearm frame and receiver” under federal law.
5 The proposed rule would not resolve this case or avoid the state law claims the People allege.
6 Defendants’ real purpose is not to narrow issues but to prevent an adjudication of their unlawful
7 conduct and the horrific gun violence it enables, while they continue to profit from it. The Court
8 should deny Defendants’ application.

9 To begin, the new proposed regulation, of course, cannot and does not change the federal
10 statute that defines a “firearm”—the Gun Control Act (“GCA), at 18 U.S.C. 921(a)(3). It is
11 pursuant to the plain meaning of *that* statute that the People allege that Defendants’ Buy Build
12 Shoot kit (which contains all the parts needed to finish and assemble an operable semi-automatic
13 handgun), as well as its frame and receiver kits, meet the federal definition of “firearm.” Even
14 before the ATF proposed the new regulation, it had already determined that Polymer80’s Buy
15 Build Shoot kits fit the definition of “firearm” under the federal statute. The proposed regulation
16 simply confirms that such kits meet that statutory definition. To the extent the new proposed
17 regulation goes further, and clarifies the circumstances under which unfinished *stand-alone* frames
18 and receivers—not sold as parts of kits—also meet the definition of “firearm” under federal law,¹
19 that is of no moment here, as the Complaint is does not attack these stand-alone parts.

20 For this very reason, the recently stayed Northern District of California case that
21 Defendants highlight poses very different questions from the issues to be decided here. That case
22 involves alleged violations under federal law only, and focuses on certain prior determinations by
23 ATF, including whether certain Polymer80 unfinished stand-alone frames and receivers constitute
24 “firearms.” The People’s case, in contrast, alleges violations of not only federal law, but of state
25 law as well, including California’s Unsafe Handgun Act and California’s prohibition on false and

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27 ¹ These unfinished frames and receivers are often referred to as 80% receivers and lowers, as the
28 manufacturers argue that they have not yet reached a stage of manufacture that meets the
definition of a firearm frame or receiver found in the Gun Control Act of 1968.

1 misleading advertising. Moreover, the People seek not just an injunction to stem the flow of so-
2 called “ghost guns” manufactured from kits that Defendants sell, but also monetary recovery in the
3 form of statutory penalties and an abatement fund to remediate the harms already caused.
4 Defendants argue that the new rule might provide the injunctive relief that the People seek. But it
5 would not provide the injunctive relief the People seek to obtain compliance with California’s
6 Unsafe Handgun Act, or the statutory penalties and abatement remedies the People seek.

7 Most important, millions of Californians would be prejudiced by a stay. The ATF’s rule-
8 making process will not last “merely a few months,” as Defendants assert. It will likely take years
9 if the Court takes into account not only publication of the rule, notice and comment period, any
10 revisions and possible subsequent notice and comment period, but also the challenges and appeals
11 that will undoubtedly ensue upon issuance of the final rule, likely by Defendants or their proxies.
12 During this time, Defendants will continue to violate federal and state law and to subject the
13 residents of California to the now well-documented flood of ghost gun-caused violence and public
14 nuisance propagated by Defendants’ business activities. The Court is equipped to address the
15 People’s case now, and should deny the stay.²

16 BACKGROUND

17 Los Angeles City Attorney Michael N. Feuer, on behalf of the People of the State of
18 California (the “People”), has sued Polymer80 and two of its principals, alleging violations of
19 California’s Unfair Competition Law (“UCL”) and California’s public nuisance statute.
20 Violations of federal and state law serve as the bases for these claims. The People allege that
21 Defendants have violated and continue to violate the Federal Gun Control Act, Complaint at
22 ¶¶ 39-43, The 2005 Child Safety Lock Act, *id.* at ¶¶ 44-49, the California Unsafe Handgun Act, *id.*
23 at ¶¶ 50-58; California’s Assembly of Firearms Law, *id.* at ¶¶ 59-61, California’s UCL, *id.* at ¶¶
24 62-80, and California’s Public Nuisance Law. *Id.* at ¶ 81-82. As the Complaint makes clear, the
25 firearms at issue are so-called “ghost guns,” referring to “a firearm that (a) started off as an

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27 ² The People address the *substance* of Defendants’ application rather than the defects in
28 *procedure*, such as whether the stay of a case can be requested on an ex parte basis and whether
Defendants have shown any need for relief before a regularly-noticed motion could be heard.

1 unfinished lower receiver or frame purchased in a kit or separately along with other necessary
2 parts and (b) was assembled by the purchaser into a completed and functional firearm that has no
3 serial number.” *Id.* at ¶¶ 24. It even more specifically alleges that the “firearms” are limited to
4 Polymer80’s Buy Build Shoot, frame, and receiver kits, rather than stand-alone unfinished frames
5 and receivers. *Id.* at ¶ 40 n.26. The People seek the relief of an injunction prohibiting Defendants
6 from continuing to violate California’s UCL and public nuisance statute, and also monetary relief
7 in the form of statutory penalties and an abatement fund. *Id.*, Prayer for Relief, ¶¶ 1-4.

8 On May 7, 2021, the ATF announced proposed rule 201R-05. The new rule seeks, among
9 other things, “to clarify the definition of ‘firearm’ and to provide a more comprehensive definition
10 of ‘frame or receiver.’” Exhibit A at 21. With respect to gun-building kits at issue in this case, the
11 proposed rulemaking makes clear that it is simply confirming what was already the case—i.e., that
12 “[w]eapon parts kits such as these are ‘firearms’ under the GCA because they are *designed to* or
13 *may readily be* converted to expel a projectile by the action of an explosive.” *Id.* at 23 (emphasis
14 in original). Accordingly, “to reflect *existing case law*,” the proposed regulation adds a sentence
15 saying this expressly. *Id.* at 23-24 (emphasis added). As the proposed rulemaking later confirms,
16 “[w]hen a partially complete frame or receiver parts kit reaches a stage in manufacture where it
17 may readily be completed, assembled, converted, or restored to a functional state, it would be
18 considered a firearm ‘frame or receiver’ that must be marked” with a serial number. *Id.* at 60.

19 The new proposed regulation also addresses “partially complete” but unfinished frames
20 and receivers, clarifying “when an object becomes a frame or receiver” such that it qualifies as a
21 “firearm” under the GCA. *Id.* at 33-35. But that clarified definition does not affect the People’s
22 claims here—which, as noted above, are not based on (and expressly exclude) partially complete
23 frames and receivers sold on their own, and rely instead on the controlling federal statute, 18
24 U.S.C. 921(a)(3), which of course has not changed.

25 Finally, as Defendants note, the new rule alters the current regulation defining frame or
26 receiver to be “general enough to encompass changes in technology and parts terminology,”
27 shifting away from a definition “rigidly tied to three specific fire control components.” Exhibit A
28 at 26. Instead, it would define “frame or receiver” as “[a] part of a firearm that, when the

1 complete weapon is assembled, is visible from the exterior and provides housing or a structure
2 designed to hold or integrate one or more fire control components, even if pins or other
3 attachments are required to connect those components to the housing or structure.” *Id.* at 81. As
4 above, however, this aspect of the revised regulation does not alter the questions presented by the
5 People’s federal law-based claims here—which, again, turn on whether the frame and receiver kits
6 sold by Polymer80 were “designed” or “readily may be converted” into operable weapons under
7 the GCA’s statutory definition, 18 U.S.C. 921(a)(3).³ On May 20, 2021, days before the People’s
8 opposition to Defendants’ demurrer was due, Defendants filed this ex parte application for a stay.

9 **THE COURT SHOULD DENY THE STAY**

10 Defendants ground their request on the “primary jurisdiction doctrine,” which permits a
11 trial court to stay a matter where “enforcement of the claim requires the resolution of issues which,
12 under a regulatory scheme, have been placed within the special competence of an administrative
13 body.” *Farmers Ins. Exch. v. Superior Ct.*, 2 Cal. 4th 377, 390-91 (1992). The doctrine applies
14 where staying the case would “enhance[] court decisionmaking and efficiency by allowing courts
15 to take advantage of administrative expertise,” and “assure uniform application of regulatory
16 laws.” *Id.* at 391. But the doctrine is not properly invoked in connection with claims ““within the
17 conventional competence of the courts.”” *S. Bay Creditors Tr. v. Gen. Motors Acceptance Corp.*
18 69 Cal. App. 4th 1068, 1083 (1999) (quoting *Farmer Ins. Exch.*, 2 Cal. 4th at 390). “No rigid
19 formula exists for applying the primary jurisdiction doctrine.” *Farmers Ins. Exch.*, 2 Cal. 4th at
20 391. “Instead, resolution generally hinges on a court’s determination of the extent to which the
21 policies noted above are implicated in a given case.” *Id.* “This discretionary approach leaves
22 courts with considerable flexibility to avoid application of the doctrine in appropriate situations, as
23 required by the interests of justice.” *Id.* at 391-92.

24 ³ Defendants assert that in the proposed rule 2021R-05, “the ATF acknowledges that the State’s
25 position has not been supported by the Courts.” Motion to Stay at 4. Those judicial opinions
26 address the outdated regulatory definition of a “frame or receiver,” which the ATF notes has been
27 interpreted far too narrowly, so as to exclude from the definition of “firearm” a wide range of
28 common firearms such as Glock-type and Sig Sauer P320 pistols—the official side-arm of the
U.S. Military Services. Exhibit A at 10. The cited cases do not address the type of frame or
receiver kits at issue here.

1 Here, the proposed rule has little bearing on the claims at issue, which arise out of alleged
2 violations of federal and California statutes, which the ATF’s proposed rulemaking cannot and
3 does not change. The People’s Complaint alleges that Defendants’ Buy Build Shoot, frame, and
4 receiver kits—rather than standalone frames and receivers—are “firearms” under the controlling
5 federal statute, alleges state law as well as federal law violations, and seeks statutory penalties and
6 monetary abatement relief as well as injunctive relief. In addition, a stay would cause substantial
7 prejudice to the People in that it would allow Defendants to continue selling their products, which
8 have been directly linked to an increase in violent crime in Los Angeles and throughout
9 California—particularly given how long the stay would last, through the conclusion of the ATF’s
10 rulemaking process and the certain subsequent challenges to the promulgated rule.

11 **A. A stay would not serve the interests of judicial efficiency.**

12 As explained above, “the People’s claims under the Gun Control Act in this Complaint are
13 limited to Polymer80’s sale of Buy Build Shoot, frame, and receiver *kits*.” Complaint ¶ 40 n.26
14 (emphasis added). The ATF’s position on gun-building kits has not changed. Notably, although
15 the ATF has not previously issued a rule specifically addressing whether frame and receiver kits
16 constitute “firearms,” the ATF has already concluded that Polymer80’s Buy Build Shoot kits *are*
17 firearms. In a December 2020 affidavit supporting an application for a search warrant for
18 Polymer80’s Nevada headquarters, and as referred to in paragraph 40 & fn. 54 of the Complaint,
19 the ATF represented to a federal judge that “ATF Chief Counsel has [] determined that the Buy
20 Build Shoot kits are, as a matter of law, firearms pursuant to 18 U.S.C. § 921(a) (3).”⁴ As also
21 explained above, the new proposed regulation is clear on this point, expressly stating that such kits
22 are firearms under federal law—*which has not changed*—and adding language to that effect “to
23 reflect existing case law.” Exhibit A at 22-24. Accordingly, because resolution of the People’s

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25 ⁴ Affidavit of ATF Special Agent Tolliver Hart, *In the Matter of the Search of the business and*
26 *Federal Firearms Licensee known as Polymer80, which is located at 134 Lakes Blvd., Dayton, NV*
27 *89403*, 3:20-mj-123-WGC, ¶ 65, note 6 (D. Nev. Dec. 9, 2020),
28 <https://s.wsj.net/public/resources/documents/ghostraid-121420-warrant.pdf>; *see also id.* ¶ 9
 (“Despite Polymer80’s sales of items meeting the federal definition of a firearm, Polymer80
 appears not to abide by the rules and regulations governing the sale and disposition of firearms.”).

1 federal law claims turns on interpretation of a federal statute and not the ATF’s new proposed rule,
2 awaiting that rule’s finalization does not serve any interest of judicial efficiency; to the contrary, it
3 simply delays the case for no reason.

4 Defendants point to the stay granted in the Northern District of California case as
5 justification for a stay of this case. But that case is completely different from this one. There,
6 plaintiffs assert against the ATF violations of the Administrative Procedure Act and seek
7 declaratory and injunctive relief, alleging that certain of the ATF’s determinations that standalone
8 unfinished frames and receivers are not “firearms” were arbitrary and capricious and not in
9 accordance with the law. Complaint for Declaratory and Injunctive Relief at 4-5, 51-55, *State of*
10 *California, et al. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, et al.*, No. 20-CV-
11 06761 (N.D. Cal. Sept. 29, 2020), ECF No. 1. Because proposed rule 201R-05 appears to address
12 those issues on a going forward basis once it is finalized and takes effect, a stay made sense. *See*
13 *Stipulation; [Proposed] Order at 3-4, State of California, et al. v. Bureau of Alcohol, Tobacco,*
14 *Firearms and Explosives, et al.*, No. 20-CV-06761 (N.D. Cal. Sept. 29, 2020), ECF No. 86
15 (requesting a stay and observing that the proposed rule’s “definition of ‘firearms frame or
16 receiver’ would explain when a partially complete frame or receiver becomes an actual frame or
17 receiver under the GCA—specifically, when it crosses the line from an unregulated piece of metal
18 (or other substance) to a regulated frame or receiver”).

19 In contrast, here the People are not bringing suit against the ATF, and therefore the ATF’s
20 commencement of rulemaking does not provide anything close to the entirety of the relief the
21 People seek. The People allege violations of both federal *and* state law stemming from
22 Defendants’ sale of Buy Build Shoot, frame, and receiver kits, as well as Defendants’ false and
23 misleading advertising to California residents through their website. Moreover, the People seek
24 not only injunctive relief requiring defendants to comply with both federal and California law
25 (including California’s Unsafe Handgun Act and California’s prohibition on false and misleading
26 advertising), but, equally important, statutory penalties and abatement relief. Evaluating the
27 People’s state law claims and what remedies should issue as a result of any proven violations are
28 matters within the conventional competence of *this* Court, and not the ATF. In fact, the ATF’s

1 rulemaking will not even address the People’s UCL claims predicated on past violations of federal
2 laws. Even accepting Defendants’ mistaken arguments about its impact, the proposed rule could
3 therefore grant at most only partial relief here, in contrast to the full relief it may well provide in
4 the Northern District of California case.

5 **B. The People will be prejudiced by delay.**

6 Defendants are wrong in claiming that a stay would not harm the People. Defendants fail
7 to acknowledge or address that the proliferation of their “ghost guns” throughout California has
8 contributed to a wave of gun violence and death. Complaint at ¶¶ 1-2, 4-17, 29. Because
9 Defendants’ unserialized weapons are rarely traceable, they make it difficult for law enforcement
10 to solve crimes, and “have resulted in an increase in investigative costs and expenditure of law
11 enforcement resources.” *Id.* at ¶¶ 102, 25-28. Indeed, the ATF notes in its proposed rule the
12 dramatic increase of “ghost guns” recovered from crime scenes. Exhibit A at 11-20.

13 Contrary to Defendants’ unsubstantiated assertion that “a stay would likely remain in
14 effect for merely a few months,” Motion for Stay at 5, there is no way to know how long the ATF
15 will take to review public comments and issue a final rule. The published notice of proposed
16 rulemaking set August 19, 2021, as the deadline for submitting comments. Definition of “Frame
17 or Receiver” and Identification of Firearms, 86 Fed. Reg. 27,720 (May 21, 2021). It then has to
18 review all of those comments, decide whether to amend the proposed rule, and ultimately issue a
19 final rule. That could easily taking many additional months, if not longer.

20 Moreover, given the number of parties invested in this rulemaking, especially Defendants,
21 there will all but certainly be a court challenge to the final rulemaking. In fact, Defendants
22 themselves are likely to be among the challengers, as they moved to intervene on the side of
23 firearms manufacturers in the *California v. ATF* Case. As Defendants know, “[i]f a court sets
24 aside (vacates) all or part of a rule, it usually sends the rule back to the agency to correct the
25 deficiencies. The agency may have to reopen the comment period, publish a new statement of
26 basis and purpose in the Federal Register to explain and justify its decisions, or re-start the
27 rulemaking process from the beginning by issuing a new proposed rule.” *A Guide to the*
28 *Rulemaking Process*, Office of the Federal Register, *available at*

1 https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf. That is not a risk;
2 that is what Defendants intend. The stay they seek could drag on for years. The prejudice to the
3 People, in terms of lives lost, crimes unsolved, and those committing crimes escaping justice,
4 would be significant.⁵ Given further that the People’s claims here will not be affected by the
5 ATF’s proposed rule, that the Complaint alleges violations of state as well as federal law, and that
6 the relief sought is not just injunctive, but also statutory damages and an abatement fund, a stay
7 offers no judicial efficiencies and threatens an open-ended period of prejudice to the People.

8 **CONCLUSION**

9 For the foregoing reasons, the People respectfully request that the Court deny Defendants’
10 application for stay.

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12 DATED: May 25, 2021

Respectfully submitted,

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24 ⁵ That the People have not sought a preliminary injunction does not mean that years could pass
25 without significant harm. There is urgency in resolving the harm from Defendants’ products.
26 Defendants also insinuate that any injunctive relief would be minimal because Polymer80 “has
27 already voluntarily ceased selling its ‘Buy Build Shoot’ kits to California residents.” Motion to
28 Stay at 6. That has yet to be tested in discovery. Even if true, and as the Complaint alleges,
“[t]here is nothing that would stop Polymer80 from re-introducing these kits into the market,” and
these kits “are still being advertised for sale on some resellers’ websites.” Complaint at ¶ 33 n.19.

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PROOF OF SERVICE

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 within action. My business address is 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017-2543.

On May 25, 2021, I served true copies of the following document(s) described as

PLAINTIFF STATE OF CALIFORNIA’S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS POLYMER80, INC., DAVID BORGES, AND LORAN KELLEY’S EX PARTE APPLICATION FOR AN ORDER STAYING PROCEEDINGS


on the parties in this action as follows:

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X BY ELECTRONIC TRANSMISSION: By electronic service transmission via First Legal. The document(s) was/were transmitted by electronic transmission and such transmission was reported as complete and without error.

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

Executed on May 25, 2021, at Los Angeles, California.



Andrew M. Brayton