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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

vs.

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

Defendants.

Case No. 21STCV06257

[Related to Case No. 21STCV29196]

[Assigned for all purposes to the Hon. Daniel S. Murphy, Department 32]

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR A STAY

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INTRODUCTION

Defendants Polymer80, Inc., David Borges, and Loran Kelley submit this memorandum of points and authorities in support of their motion for judgment on the pleadings under Code of Civil Procedure § 438 and California common law or, in the alternative, for a stay. Plaintiff, the People of the State of California, brings claims under California's Unfair Competition Law ("UCL") and public nuisance law. (Compl. ¶¶ 84, 97). Plaintiff alleges that Defendants are liable for Los Angeles' tragic plague of violent crime. Those allegations flout controlling statutory and common law, both of which shield Defendants from liability for the effects of violent crime in Los Angeles.

This lawsuit must fail as a matter of law, and this Court should grant Defendants' motion for judgment on the pleadings, for two reasons. First, the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901 *et seq.*, preempts this lawsuit and compels immediate dismissal. Second, Plaintiff's public nuisance claim fails for lack of a public right.

Alternatively, this Court should stay proceedings pending the Ninth Circuit's resolution of the constitutionality of California firearms provisions that Plaintiff seeks to enforce. Two California federal district courts recently held that the California Unsafe Handgun Act's ("CUHA") chamber load indicator, magazine disconnect mechanism, and microstamping provisions violate the Second Amendment. *Renna v. Bonta* (S.D. Cal. Apr. 3, 2023) No. 3:20-cv-02190-DMS-DEB, 2023 WL 2846937, *appeal noticed* (S.D. Cal. Apr. 14, 2023); *Boland v. Bonta* (C.D. Cal. Mar. 20, 2023) No. 8:22-cv-1421-CJC-ADS, 2023 WL 2588565, *appeal docketed*, No. 23-55276 (9th Cir. Mar. 27, 2023). (Request for Judicial Notice in Support of Motion for Judgment on the Pleadings or, in the alternative, for a Stay ("RJN"), Exs. A–D). Plaintiff relies on the chamber load indicator and magazine disconnect mechanism provisions, "among others." (Compl. ¶¶ 53–54, 78, 87, 90; *but see id.* (microstamping not raised in Complaint)). Another federal court recently enjoined federal government defendants from enforcing agency actions that sought to regulate Polymer80 products in violation of "the plain language of the [Gun Control Act]." ECF No. 27, *Polymer80 v. Garland* (N.D. Tex. Mar. 19, 2023), No. 4:23-cv-00029-O, at *10. (RJN, Ex. E at 10). To "accommodate the ends of justice," *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Corp.* (2022) 80 Cal.App.5th 1, 7–8, this Court should stay proceedings or exercise its authority to strike Plaintiff's reliance on those statutory provisions.

FACTUAL BACKGROUND

Polymer80 manufactures, markets, and distributes "firearm kits and components." (Compl. ¶ 5). The Complaint references four kinds of Polymer80 products. First, Polymer80 sells unfinished frames and receivers, which lack "drilling or machining" in certain areas necessary for proper functioning. (*Id.* ¶ 32 n.17). Second, it sells "frame kits for handguns and lower receiver kits for . . . rifles," which include an unfinished frame or receiver and other components, and with additional tools and workmanship can be used to build a functional frame or receiver. (*Id.* ¶¶ 35–36, 40). Third, it formerly sold "Buy Build Shoot" kits, which included an unfinished frame or receiver kit and additional components, and with additional tools and workmanship can be used to build a functional weapon. (*Id.* ¶¶ 33, 34, 40). Fourth, it sells various other "components." (*Id.* ¶ 5).

Plaintiff alleges incorrectly that Polymer80 sells or markets products in violation of federal and state laws. Plaintiff alleges that distribution of unfinished frame kits, unfinished receiver kits, and Buy Build Shoot kits violates the federal Gun Control Act ("GCA"), 18 U.S.C. § 921 *et seq.* (Compl. ¶¶ 39–43). Plaintiff alleges that Polymer80's discontinued distribution of Buy Build Shoot kits violates the federal Child Safety Lock Act ("CSLA"), 18 U.S.C. § 922(z). (Compl. ¶¶ 44–49). Plaintiff alleges that Defendants have aided and abetted violations of CUHA through unspecified sales to unnamed purchasers. Penal Code § 31900 *et seq.* (Compl. ¶¶ 50–58). Plaintiff alleges that Defendants' "actions [of] selling and aiding and abetting the manufacture and assembly of firearms" violate California's Assembly of Firearms Law ("CAFL"). Penal Code § 29180. (Compl. ¶¶ 59–61). And Plaintiff alleges that Polymer80's business practices violate California's UCL. Bus. & Prof. Code § 17200 *et seq.* (Compl. ¶¶ 62–80). As set forth below, none of these theories survives PLCAA scrutiny.

Plaintiff vaguely speculates that Defendants' conduct caused an "increase in ghost-gun related violence and illegal activity in Los Angeles," "a threat to the safety and well-being of the people of Los Angeles," "the perpetration of crime less easily combatable," and "an increase in investigative costs and expenditure of law enforcement resources." (*Id.* ¶¶ 43, 58, 61, 80, 81, 101, 102). The Complaint, contrary to controlling statutory and common law, impermissibly seeks to hold Defendants liable for the effects of violent crime in Los Angeles involving the criminal misuse of Polymer80 products.

PROCEDURAL BACKGROUND

The Complaint asserts two claims. Count One is a UCL claim alleging that Defendants engaged in unlawful, fraudulent, and unfair business practices. (Compl. ¶¶ 83–95). Count Two is for public nuisance based on an alleged interference with "the public right of health and safety." (*Id.* ¶¶ 96–102).

Defendants demurred on April 20, 2021. (RJN, Ex. F). Defendants demonstrated that the Complaint was impermissibly uncertain; inadequately alleged how Polymer80's products are "firearms" or "handguns" under federal law; failed to plead a UCL violation under the unlawful, fraudulent, and unfair prongs; and failed to state a claim for public nuisance. This Court overruled that demurrer on June 7, 2021, after concluding that Plaintiff "alleged sufficient facts to state a cause of action for Violation of Unfair Competition Laws" and "for Public Nuisance." (RJN, Ex. G at 4–5).

Recent federal court decisions confirm that Plaintiff's legal theories cannot withstand judicial review. Two California district courts have held that multiple CUHA provisions are unconstitutional. *Renna*, 2023 WL 2846937, at *6; *Boland*, 2023 WL 2588565, at *4. (RJN, Exs. A at 12, C at 8). Another district court held that "the plain language of the GCA" precluded regulation of relevant Polymer80 products. ECF No. 27, *Polymer80*, No. 4:23-cv-00029-O, at *10 (RJN, Ex. E at 10).

STANDARD OF REVIEW

"A motion for judgment on the pleadings is the functional equivalent of a general demurrer." *Fire Ins. Exch. v. Superior Ct.* (2004) 116 Cal.App.4th 446, 452. The moving party is entitled to judgment "if the complaint does not state facts sufficient to state a cause of action." *Spencer v. City of Palos Verdes Estates* (2023) 88 Cal.App.5th 849, 862. "The court accepts as true all material factual allegations [and matters subject to judicial notice], giving them a liberal construction, but it does not consider conclusions of fact or law, opinions, speculation, or allegations contrary to law or judicially noticed facts." *Id.* The Court also accepts "facts that reasonably can be inferred from those expressly pleaded." *Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 111.

This motion raises one point that Defendants pressed in their demurrer: the insufficiency of Plaintiff's aiding-and-abetting allegations. (RJN, Ex. F at 5–7). Although a statutory motion for judgment on the pleadings usually cannot lie on "on the same grounds as" an overruled demurrer, Civ. Proc. Code § 438(g)(1), that does not apply to a common law motion. WEIL & BROWN, *ET AL.*, CAL.

PRAC. GUIDE CIV. PRO. BEFORE TRIAL (THE RUTTER GROUP) § 7:277. And recent decisions holdings CUHA provisions unconstitutional and Plaintiff's GCA theories untenable are "material change[s] in applicable case law." Civ. Proc. Code § 438(g)(1). *Renna*, 2023 WL 2846937, at *6; *Boland*, 2023 WL 2588565, at *4; ECF No. 27, *Polymer80*, 4:23-cv-00029-O, at *10. (RJN, Exs. A, C, E).

Defendants bring this motion for judgment on the pleadings under section 438 and California common law. This Court has discretion to permit a late-filed statutory motion, and a common law motion is not subject to timing limitations. *Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1063 (holding court has discretion to permit late-filed statutory motion); *Stoops v. Abbassi* (2002) 100 Cal.App.4th 644, 650 (explaining nonstatutory motion may be made at any time prior to trial or at trial); *Tarin v. Lind* (2020) 47 Cal.App.5th 395, 402 (reviewing nonstatutory motion).

Counsel for all parties met and conferred about the bases for this motion on April 25, 2023.

ARGUMENT

I. MOTION FOR JUDGMENT ON THE PLEADINGS

A. The Protection of Lawful Commerce in Arms Act preempts this lawsuit

Federal law preempts state laws and causes of action "that conflict with the federal law." *Murphy v. Nat'l Collegiate Athletic Ass'n* (2018) 138 S. Ct. 1461, 1480 (statute); *Mut. Pharm. Co., Inc. v. Bartlett* (2013) 570 U.S. 472, 488–89 (cause of action). "PLCAA generally preempts claims against manufacturers and sellers of firearms and ammunition resulting from the criminal misuse of those products." *Ileto v. Glock, Inc.* (9th Cir. 2009) 565 F.3d 1126, 1131 (affirming judgment on the pleadings). PLCAA preempts this suit and compels "immediate[] dismiss[al]." 15 U.S.C. § 7902(b).

1. This lawsuit is a "qualified civil liability action" under PLCAA

PLCAA compels state and federal courts to "immediately dismiss[]" any pending "qualified civil liability action." 15 U.S.C. § 7902(b). A "qualified civil liability action" includes "a civil action . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include [actions satisfying certain exceptions]." *Id.* § 7903(5)(A).

This lawsuit fits squarely within PLCAA's scope. It is a "civil action" that seeks covered relief. It is "brought by any person" because that term includes government entities. *Id.* § 7903(3). This case involves "qualified product[s]" because that term includes any "firearm" or "component part" shipped in interstate commerce. *Id.* § 7903(4). (Compl. ¶¶ 5, 18, 21). Defendants are "manufacturer[s]" or "seller[s]" of qualified products. 15 U.S.C. § 7903(2), (6). (Compl. ¶ 41 n.28). And each alleged harm flows directly from independent actors' "criminal or unlawful misuse[s]" of Polymer80's products, 15 U.S.C. § 7903(5)(A), or as Plaintiff puts it: from "ghost gun-related violence and illegal activity." (Compl. ¶¶ 43, 58, 61, 80). Lastly, as set forth below, no PLCAA exceptions applies.

2. No PLCAA exception saves this lawsuit from preemption

Six narrow exceptions limit PLCAA's preemptive reach. 15 U.S.C. § 7903(5)(A)(i)–(vi). The only exception possibly implicated here is the "predicate exception," which permits claims that rely on knowing violations of a federal or state statute governing the sale or marketing of firearms if that violation was a proximate cause of the alleged injury. *Ileto*, 565 F.3d at 1132 (discussing 15 U.S.C. § 7903(5)(A)(iii)). None of PLCAA's five other exceptions even arguably applies to Plaintiff's claims. 15 U.S.C. § 7903(5)(A).[1] As discussed below, the predicate exception does not apply, either.

a. PLCAA preempts individual causes of action and claims

As an initial matter, PLCAA requires a claim-by-claim analysis and dismissal of any claim for which the underlying legal theory does not satisfy an exception. PLCAA's operative provision and exceptions use the word "action," 15 U.S.C. § 7903(5)(A), but that term "is sometimes used . . . as a shorthand for a single 'cause of action.'" *Ramos v. Wal-Mart Stores, Inc.* (E.D. Penn. 2016) 202 F. Supp. 3d 457, 466. Here, action should be read to refer to individual claims.

The Supreme Court of the United States has interpreted "action" to refer to claims in other federal statutory law. *Jones v. Bock* (2007) 549 U.S. 199, 220–22 (interpreting "[n]o action shall be brought" to require claim-by-claim analysis). Further, "[t]he purpose of Congress is the ultimate

[1] PLCAA's other five exceptions are for an action against a convicted firearm transferor "by a party directly harmed by the conduct of which the transferee is so convicted," 15 U.S.C. § 7903(5)(A)(i); "an action against a seller for negligent entrustment or negligence per se," *id.* § 7903(5)(A)(ii); certain actions "for breach of contract or warranty," *id.* § 7903(5)(A)(iv); certain products liability actions, *id.* § 7903(5)(A)(v); and "an action or proceedings commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26," *id.* § 7903(5)(A)(vi).

touchstone in every pre-emption case." *Altria Grp., Inc. v. Good* (2008) 555 U.S. 70, 76. Congress's express purpose for PLCAA was "[t]o prohibit *causes of action*" that seek to blame firearms-industry companies for harms caused by the criminal misuse of their products. 15 U.S.C. § 7901(b)(1) (emphasis added). This Court should favor "the textually permissible interpretation that furthers rather than obstructs" Congress's purposes. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 63 (2012). Accordingly, "action" must be read to mean individual claims. This Court therefore should dismiss any claim or underlying theory that does not satisfy a PLCAA exception.

b. The predicate exception does not apply

The predicate exception permits claims where the defendant "knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii). Plaintiff's reliance on the predicate exception here fails for three reasons. First, the UCL and nuisance laws are not predicate statutes. Second, Plaintiff has not adequately alleged a knowing predicate statute violation. Third, Plaintiff has not adequately alleged proximate causation.

***i.* The UCL and nuisance laws are not predicate statutes**

The UCL and nuisance laws are not "statute[s] applicable to the sale or marketing" of firearms and cannot be predicates. 15 U.S.C. § 7903(5)(A)(iii). "Applicable" has two possible meanings: a statute "capable of being applied" to firearms or "a statute that pertain[s] *exclusively* to the sale or marketing of firearms." *Ileto,* 565 F.3d at 1133. Interpretive tools confirm that the term refers to statutes that specifically regulate firearms.

Congress statutorily provides examples of predicates, and each specifically regulates firearms. 15 U.S.C. § 7903(5)(A)(iii)(I)–(II). The meaning of "applicable" thus should be "given more precise content by the neighboring words with which it is associated," *i.e.,* statutes that specifically regulate firearms. *United States v. Williams* (2008) 553 U.S. 285, 294.

When "a general statement of policy is qualified by an exception, [courts] usually read the exception narrowly in order to preserve the primary operation of the provision." *Comm'r v. Clark* (1989) 489 U.S. 726, 739. PLCAA's preemptive grant is a broad and general statement of policy, *see* 15 U.S.C. §§ 7901–03, and the predicate exception must therefore be narrowly construed.

A broad reading "would frustrate Congress' manifest purpose[s]," *United States v. Hayes* (2009) 555 U.S. 415, 427, to bar suits that seek to blame a firearms-industry company for harm caused by the criminal misuse of their products, 15 U.S.C. § 7901(b)(1), and to preserve the right of such companies "to speak freely," *id.* § 7901(b)(5). Reading the exception to cover any statute capable of application to firearms would eviscerate PLCAA's protections and scorn Congress's purposes. It would also violate the canon against superfluity. *Nat'l Ass'n of Mfrs. v. Dep't of Def.* (2018) 138 S. Ct. 617, 632. "Indeed, if *any* statute that 'could be applied' to the sales and manufacturing of firearms qualified as a predicate statute, there would be no need to list examples at all." *Ileto*, 565 F.3d at 1134.

These interpretive tools confirm that the only permissible reading of the exception is that it applies to violations of statutes that specifically regulate firearms. Any other reading "would allow the predicate exception to swallow the statute." *City of New York v. Beretta U.S.A. Corp.* (2d Cir. 2008) 524 F.3d 384, 403.[2] Plaintiff cannot rely on the UCL or nuisance laws to avoid PLCAA preemption.

ii. Plaintiff has not alleged a predicate statute violation

Plaintiff has not adequately alleged a knowing violation of the GCA, CSLA, CUHA, or CAFL.

1. The Gun Control Act

Polymer80's products fall outside the scope of the GCA as a matter of law. The GCA's provisions apply to "firearm[s]," defined as "(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). Polymer80's products satisfy none of these.[3]

Section 921(a)(3)(A) does not cover Polymer80's products because neither individual components nor unfinished weapon parts kits is a "weapon," which is an antecedent condition to

[2] Some courts have decided this issue differently. A divided Connecticut Supreme Court held that its consumer-protection statute was a predicate "at least to the extent that it prohibits the unethical advertising of dangerous products for illegal purposes." *Soto v. Bushmaster Firearms Int'l, LLC* (Conn. 2019) 202 A.3d 262, 325; *see Prescott v. Slide Fire Sols., LP* (D. Nev. 2019) 410 F. Supp. 3d 1123, 1138–39 (following *Soto*); *cf. City of New York*, 524 F.3d at 403 (declining "to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of"). These few decisions are not persuasive authority.

[3] It is beyond dispute that Polymer80's products do not satisfy Subsection (C) or Subsection (D) of 18 U.S.C. § 921(a)(3). Defendants therefore address only Subsection (A) and Subsection (B).

satisfying this definition. Congress regulated *finished* frames and receivers in Subsection (B), demonstrating that components are not covered by Subsection (A). Congress also used "combination of parts" elsewhere in the GCA but omitted it from Subsection (A). 18 U.S.C. § 921(a)(4)(C); *id.* § 921(a)(24) (incorporating 26 U.S.C. § 5845(b)). Congress thus "intentionally and purposely" excluded combination of parts from 18 U.S.C. § 921(a)(3)(A). *Collins v. Yellen* (2021) 141 S. Ct. 1761, 1782. Finally, weapon must mean something different than combination of parts so to "give effect, if possible, to every word Congress used," *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 632, and the word weapon does not encompass a combination of parts because Congress used both terms in the same sentence of a provision incorporated into the GCA. 18 U.S.C. § 921(a)(24) (incorporating 26 U.S.C. § 5845(b)). The Complaint concedes that these products require additional "drilling or machining" workmanship and "assembly." (Compl. ¶¶ 32–40 & n.17). That concession is fatal to reliance on Subsection (A). And because components and parts kits are not "weapon[s]," it does not matter whether that product "will or is designed to or may readily be converted to expel a projectile." 18 U.S.C. § 921(a)(3)(A). Polymer80's frames and kits cannot satisfy Subsection (A).

Section 921(a)(3)(B) covers only *finished* frames and receivers. Congress included "conver[sion]" in Subsection (A) but omitted that language from Subsection (B), meaning Congress "intentionally and purposely" excluded unfinished frames and receivers from Subsection (B). *Collins*, 141 S. Ct. at 1782. "That which *may become* a receiver is not itself a receiver," *VanDerStok v. Garland* (N.D. Tex. Sept. 2, 2022) No. 4:22-cv-00691-O, 2022 WL 4009048, at *4, and that which may become a frame is not a frame. The Complaint concedes that none of Polymer80's products includes a finished frame, (Compl. ¶¶ 32–40 & n.17), which forecloses reliance on Subsection (B).

A federal court recently confirmed that Polymer80's products fall outside the scope of the GCA. ECF No. 27, *Polymer80*, 4:23-cv-00029-O. (RJN, Ex. E). The Court held that "weapon parts . . . are not 'weapons'" under Subsection (A), that "[a] weapon parts kit is not a firearm" under Subsection (A) or Subsection (B), and that an unfinished frame or receiver is not covered by Subsection (B). (*Id.* at 11–16). This reasoning, faithful to plain meaning, is strong authority for the conclusion that Polymer80's products are not subject to the GCA. It also aligns with legislative history, which reveals that Congress enacted the GCA specifically to stop regulating firearms parts other than

frames and receivers. H.R. Rep. No. 90-1577, at 4416 (June 21, 1968) ("Under former definitions of 'firearm,' any part or parts of such a weapon were included. It was found impractical to have controls over each small part of a firearm. Thus, this definition includes only the major parts of the firearm, that is, the frame or receiver."); S. Rep. No. 90-1097, at 2200 (Apr. 29, 1968) (materially same). Lastly, to the extent the definition of "firearm" is ambiguous, the rule of lenity requires this Court to rule in favor of Defendants. *See Hardin v. Bureau of Alcohol, Tobacco, Firearms & Explosives* (6th Cir. Apr. 25, 2023) --- F.4th ----, 2023 WL 3065807, *5 (applying rule of lenity to the definition of "machinegun" in the National Firearms Act). The Complaint fails to allege a violation of the GCA.

2. **The Child Safety Lock Act**

Plaintiff's second theory is that Defendants violated the CSLA by selling products without "any supplemental or external locking device or gun storage container." (Compl. ¶ 49). Those laws apply to "handgun[s]," which federal law defines 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." 18 U.S.C. § 921(a)(30).

Polymer80's products are not "handgun[s]" as a matter of law. Its products are not "firearm[s]" for the same reasons as above, (*supra* at 7–9), and Plaintiff does not allege that Polymer80 products satisfy that definition. Nor are Polymer80's products "any combination of parts from which a firearm described in subparagraph (A) can be *assembled*." 18 U.S.C. § 921(a)(30)(B) (emphasis added). The term "assemble" means "to fit together the parts of." *Assemble*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1990). But the Complaint concedes that each product requires "drilling or machining" workmanship and "assembly." (Compl. ¶¶ 32–40 & n.17). Polymer80's products cannot be merely "assembled," its products are not subject to the CSLA, and Defendants cannot have violated the CSLA.

3. **The California Unsafe Handgun Act**

Plaintiff's third theory is that Defendants "aided and abetted" CUHA violations "by marketing, selling, and transferring all of the components, parts, materials, tools and instructional videos needed to build an unsafe handgun in the state." (Compl. ¶ 57). The allegations fail for two reasons: (1) many of the CUHA provisions on which Plaintiff relies are unconstitutional; and (2) the Complaint fails to plead facts necessary under California pleading standards for aiding-and-abetting liability.

First, Plaintiff relies on unconstitutional and unenforceable CUHA provisions. CUHA sets forth a vast framework for defining an "unsafe handgun." Penal Code § 31900 *et seq.* The Complaint here relies on the chamber load indicator and magazine disconnect mechanism provisions, "among others." (Compl. ¶¶ 53–54).[4] But two California federal courts have held those provisions to be unconstitutional. *See Renna*, 2023 WL 2846937, at *6; *Boland*, 2023 WL 2588565, at *4. (Exs. A, C). Those provisions are likewise unconstitutional as applied to Defendants here and cannot be enforced against them. *Teixeira v. Cnty. of Alameda* (9th Cir. 2017) 873 F.3d 670, 678 (holding "would-be operator of a gun store" could "assert the subsidiary right to acquire arms on behalf of his potential customers"); *Jackson v. City & Cnty. of San Francisco* (9th Cir. 2014) 746 F.3d 953, 967–68 (holding the Second Amendment protects rights attendant to the "right to keep and bear arms").

Second, the Complaint fails to plead facts necessary for aiding-and-abetting liability. Under California law, aiding and abetting requires proof that the defendant "act[ed] with knowledge of the criminal purpose of the perpetrator *and* with the intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." *People v. Mendoza* (1998) 18 Cal.4th 1114, 1123; *see also George v. eBay* (2021) 71 Cal.App.5th 620, 641–42 (explaining that civil aiding and abetting exists only when the defendant "made a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act," which requires "the intent of facilitating the commission of that tort" (quotation marks and citations omitted)). Federal law requires proof that "the defendant [1] actively participated in the underlying [crime] [2] with advance knowledge [of the principal's criminal intent]." *Rosemond v. United States* (2014) 572 U.S. 65, 67. The Complaint satisfies none of these standards. It contains no allegations about any purchaser, transaction, act of assistance, or downstream criminal violation. The Complaint is "lacking" in facts sufficient to support a finding that any Defendant had knowledge of a purchaser's criminal intent, shared that intent, and encouraged or facilitated commission of that offense. *George*, 71 Cal.App.5th at 641–42 (affirming dismissal of civil aiding and abetting fraud claim where Complaint pleaded merely that eBay was "aware" that "unscrupulous buyers" would take advantage of the plaintiffs).

[4] To the extent Plaintiff relies on the microstamping provision, the *Boland* injunction barring its enforcement remains in effect. (RJN, Exs. C, D). It is thus unenforceable against Defendants here.

At best, the Complaint offers a conclusory allegation that Defendants aided and abetted a CUHA violation and speculates that Defendants sold something to someone who later committed a crime. But conclusory allegations and speculation are insufficient, *Spencer*, 88 Cal.App.5th at 862, and the Complaint ignores that Polymer80 could act without knowledge of a purchaser's intent and without sharing that intent, *George*, 71 Cal.App.5th at 638 (rejecting "speculation" that "ignor[ed] the innumerable other reasons that would readily explain why [the plaintiffs'] sales may have fluctuated"). Plaintiff has not adequately alleged that Polymer80 aided and abetted any CUHA violation.

4. **California's Assembly of Firearms Law**

Plaintiff's fourth theory is that Defendants' "actions [of] selling and aiding and abetting the manufacture and assembly of firearms" violate CAFL. (Compl. ¶ 61). The Complaint falls short.

First, CAFL does not prohibit "a federally licensed firearms manufacturer" from selling an unmanufactured or unassembled firearm. Penal Code § 29180(d)(1). Moreover, there is no adequately pleaded basis to conclude that Polymer80's products are "firearm[s]" when sold. *Id.* Plaintiff's allegations about Polymer80 "selling" products thus are irrelevant. (Compl. ¶ 61).

Second, Plaintiff has not alleged accomplice liability for the same reasons as above. (*Supra* at 9–11). The Complaint fails to allege that Defendants sold or assisted any actual purchaser with actual knowledge of the purchaser's criminal intent and sharing that intent. *See Mendoza*, 18 Cal.4th at 1123. The Complaint's conclusory allegation that Defendants "aided and abetted" and CAFL violation is insufficient, *Spencer*, 88 Cal.App.5th at 862, and any effort to speculate that Defendants sold a product to or assisted some unnamed person while knowing and sharing in criminal intent likewise fails, *id.* Plaintiff failed to allege adequately that Polymer80 aided and abetted any CAFL violation.

Plaintiff has not adequately alleged any violation of a federal or state law "applicable to the sale or marketing of" firearms. 15 U.S.C. § 7903(5)(A)(iii). This is a sufficient reason to reject PLCAA's predicate exception. This Court therefore should dismiss this lawsuit. *Id.* § 7902(b).

iii. **Plaintiff has not adequately alleged proximate causation**

To rely on the predicate exception, Plaintiff must allege that the violation of the predicate statute "was a proximate cause of the harm for which relief is sought," *i.e.*, downstream effects independent criminal actors' misuses of Polymer80 products. 15 U.S.C. § 7903(5)(A)(iii). Federal

proximate causation standards govern this issue. Courts "ordinarily presume that 'Congress intends to incorporate the well-settled meaning of the common-law term it uses,'" *Jam v. Int'l Fin. Corp.* (2019) 139 S. Ct. 759, 769–70, and courts regularly apply federal standards when Congress incorporates a proximate causation requirement into federal law. *See, e.g.*, *Bank of Am., Corp. v. City of Miami* (2017) 581 U.S. 189, 202 (FHA); *Holmes v. Secs. Investor Prot. Corp.* (1992) 503 U.S. 258, 268 (RICO). Plaintiff's causation theory fails for three reasons.

First, Plaintiff's causation theory is too speculative to satisfy California pleading requirements. Plaintiff must allege concrete facts and not merely "conclusions," "opinions," and "speculation." *Spencer*, 88 Cal.App.5th at 862. Plaintiff alleges that Defendants caused an "increase in ghost gun-related violence and illegal activity," and similar other harms. (Compl. ¶¶ 43, 58, 61, 80, 101, 102). But only speculation or opinion connects an allegedly violative Polymer80 sale to downstream criminal acts. Plaintiff's allegations also "ignore[] the innumerable other reasons" why Polymer80 products might wind up in the hands of criminal actors. *George*, 71 Cal.App.5th at 638. For example, CUHA's prohibition on sales of "unsafe" handguns is subject to many exceptions, including that it does not prohibit sales to law enforcement or the military, Penal Code § 32000(b)(4), and it does not prohibit private-party secondary-market sales, *id.* § 32110(a), with the result that "handguns may be purchased by ordinary people on the secondary market from law enforcement officials and others, often at a high markup." *Boland*, 2023 WL 2588565, at *3. The Complaint is legally deficient because there is no allegation of facts establishing a non-speculative "causal connection between any conduct of the defendants and any . . . criminal acts." *In re Firearms Cases* (2005) 126 Cal.App.4th 959, 989.

Second, any connection between a violation and Plaintiff's alleged harms is too remote. Proximate cause requires a "sufficiently close connection," *Bank of Am. Corp.*, 581 U.S. at 201, or "some direct relation," *Hemi Grp., LLC v. City of New York* (2009) 559 U.S. 1, 9, between conduct and harm. By contrast, "[a] link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." *Id.* at 9. "The general tendency of the law, in regards to damages at least, is not to go beyond the first step" of attenuation. *Id.* at 10. Plaintiff's theory assumes at least five steps: (1) Polymer80 unlawfully sold products into California; (2) the purchaser manufactured a weapon or transferred the product; (3) the purchaser or transferee criminally misused the product in a foreseeable way; (4) the person

would not have otherwise committed the act; and (5) those criminal acts manifested in increased public costs that would not have arisen but for Polymer80's conduct. That chain exceeds far "beyond the first step," *id.*, and is otherwise too remote to support liability, *see Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A.* (3d Cir. 2002) 273 F.3d 536, 541 (finding seven-link theory too remote).

Third, the superseding criminal misuse of Polymer80 products by independent actors forecloses proximate cause. A cause is "superseding" if "it is a 'cause of independent origin that was not foreseeable.'" *See Staub v. Proctor Hosp.* (2011) 562 U.S. 411, 420. And "acts that are either criminal or intentionally tortious . . . are more likely to be adjudged superseding causes." *Kemper v. Deutsche Bank AG* (7th Cir. 2018) 911 F.3d 383, 393. Plaintiff's alleged harms stem from independent third parties who criminally misused Polymer80 products. Further, no non-speculative allegation or inference supports the conclusion that any criminal act was a foreseeable consequence of any transaction; indeed, there are no allegations about any specific transactions. This Court should therefore hold that the Complaint does not circumvent principles of superseding causation.

Plaintiff has failed to adequately allege that any violation of a predicate statute "was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii).[5] This is another, independent reason that the predicate exception does not save this lawsuit from PLCAA preemption.

B. The nuisance claim fails for lack of interference with a cognizable public right

To prevail on a public nuisance claim, Plaintiff must show "that a defendant knowingly created or assisted in the creation of a substantial and unreasonable interference with a public right." *People v. ConAgra Grocery Prods. Co.* (2017) 17 Cal.App.5th 51, 79; *see also* Civ. Code §§ 3479–80.

This claim fails for lack of a cognizable public right. Plaintiff cites the purported "public right of health and safety," (Compl. ¶ 99), but this Court should reject reliance on an overgeneralized public right "so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it," *City of Chicago v. Beretta, U.S.A. Corp.* (Ill. 2004) 821 N.E.2d 1099, 1116. Plaintiff relies on a public right to be free from assault or violence involving a firearm. But that is *not* a public right: A public right is "collective in nature and not like the individual

[5] Plaintiff's claims also fail on the merits for lack of causation. *See In re Firearms Cases*, 126 Cal.App.4th at 977; *Martinez v. Pacific Bell* (1990) 225 Cal.App.3d 1557, 1565.

right that everyone has not to be assaulted or defamed or defrauded or negligently injured." *People v. Acuna* (1997) 14 Cal.4th 1090, 1104 (quoting RESTATEMENT (SECOND) OF TORTS § 821B cmt. g); *Philadelphia v. Beretta U.S.A. Corp.* (E.D. Penn. 2000) 126 F. Supp. 2d 882, 909 ("Idyllic and desirable though it may be, there is no similar right to be free from guns and violence."). Plaintiff cannot rely on an aggregation of private rights such as the mere "assertion, on behalf of the entire community, of the individual right not to be assaulted." *City of Chicago*, 821 N.E.2d at 1116.[6]

California nuisance law does not extend to the lawful distribution of firearms components and kits. California courts have refused to extend public nuisance to the sale or distribution of lawful products. *See City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 587 (rejecting "a products liability action in the guise of a nuisance action"). Other efforts to bring nuisance claims against products companies have been "rejected by most courts . . . because the common law of public nuisance is an inapt vehicle." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. g. The Supreme Court of Oklahoma recently canvassed common law and held that nuisance does not cover "the manufacturing, marketing, and selling of lawful products." *State ex rel. Hunter v. Johnson & Johnson* (Okla. 2021) 499 P.3d 719, 725–26. Holding otherwise would permit nuisance to "become a monster that would devour in one gulp the entire law of tort." *City of San Diego*, 30 Cal.App.4th at 586 (citation omitted). Polymer80 lawfully manufactured and sold products into California, (*supra* at 7–11), and there is otherwise no justification or "authority for the unprecedented expansion of the concept of public rights to encompass the rights asserted by [Plaintiff]." *City of Chicago*, 821 N.E.2d at 1116. This Court should decline Plaintiff's invitation to expand public nuisance law to the lengths necessary to entertain this claim, which fails as a matter of law.

II. MOTION FOR A STAY

Alternatively, this Court should exercise its inherent power or its authority under Rule of Court 3.1332 to stay these proceedings pending the Ninth Circuit decision on the constitutionality of relevant CUHA provisions. *See* ECF No. 9 at 2, *Boland v. Bonta* (9th Cir. Mar. 31, 2023) No. 23-55276 (scheduling appeal for "the next available calendar upon the completion of briefing") (RJN, Ex. D).

[6] The legality of Defendants' conduct is irrelevant to this part of the nuisance analysis. Legality informs whether "an interference with a public right is unreasonable," not whether that public right exists. *In re Firearms Cases*, 126 Cal.App.4th at 987.

This Court has "inherent power, in its discretion, to stay proceedings when such a stay will accommodate the ends of justice." *St. Paul*, 80 Cal.App.5th at 6–7 (quoting *People v. Bell* (1984) 159 Cal.App.3d 323, 329). This power is based on this Court's inherent authority "to control the disposition of the causes on its docket." *Id.* at 13. "Granting a stay in a case where the issues in two actions are substantially identical is a matter addressed to the sound discretion of the trial court." *Thomson v. Continental Ins. Co.* (1967) 66 Cal.2d 738, 746 (citation omitted).

A stay is warranted in these circumstances. The Ninth Circuit is currently considering the constitutionality of California firearms statutory provisions which Plaintiff seeks to enforce against Defendants in this case. Issues in the two actions are "substantially identical," *i.e.*, the enforceability of the chamber load indicator, magazine disconnect mechanism, and microstamping provisions. (Compl. ¶¶ 53–54, 87, 90). The parties in the two actions are likewise "substantially identical," because Plaintiff in this case sues on behalf of "the People of the State of California." (Compl. ¶ 4). The Ninth Circuit's decision will also have "[t]he bellwether effect . . . to educate the parties (whether or not the same) and the trial court about the issues and how to streamline the litigation here." *St. Paul*, 80 Cal.App.5th at 17–18 (holding bellwether effect supports stay). These circumstances constitute "good cause" under Rule of Court 3.1332(c), and a stay pending the Ninth Circuit's review is justified.

If this Court is disinclined to stay proceedings, then it should strike allegations from the Complaint relying on unconstitutional CUHA provisions. Civ. Proc. Code § 436. (Compl. ¶¶ 53–54, 87, 90). Defendants cannot be subjected to liability based on held-to-be-unconstitutional statutes.

CONCLUSION

This Court should grant Defendants' motion for judgment on the pleadings. In the alternative, this Court should stay proceedings pending the Ninth Circuit's appellate review of CUHA.

DATED: April 27, 2023

GREENSPOON MARDER LLP

By: _____
MICHAEL MARRON
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PROOF OF SERVICE

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

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

I am employed in the County of Jefferson, State of Alabama. I am over the age of eighteen years and not a party to this action. My business address is 1819 5th Avenue N, Birmingham, AL 35203. On April 27, 2023, I served true and correct copies of the following document(s) described as **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR A STAY** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address clamar@bradley.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission unsuccessful.

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

Executed on April 27, 2023, at Birmingham, Alabama.

/s/ W. Chadwick Lamar, Jr.
W. Chadwick Lamar, Jr.

SERVICE LIST

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

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