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Polymer80, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

FRANCISCO GUDINO CARDENAS, an
individual; and

TROY MCFADYEN, in his Individual Capacity,
and as Heir at Law and Successor in Interest to
MICHELLE MCFADYEN, Deceased, ET AL.

Plaintiffs,

vs.

GHOST GUNNER INC., d/b/a
GHOSTGUNNER.NET; DEFENSE
DISTRIBUTED d/b/a GHOSTGUNNER.NET;
CODY WILSON d/b/a GHOSTGUNNER.NET;
BLACKHAWK MANUFACTURING GROUP
INC., d/b/a 80PERCENTARMS.COM; RYAN
BEEZLEY and BOB BEEZLEY d/b/a
RBTACTICALTOOLING.COM; GHOST
AMERICA LLC, d/b/a GHOSTGUNS.COM;
GHOST GUNS LLC, d/b/a GRID DEFENSE and
GHOSTRIFLES.COM; JUDGGERNAUT

Case No. JCCP 5167

**[Coordinated Cases CIVDS 1935422 date
filed 11/14/2019, and 30-2019-01111797-
CU-PO-CJC date filed 11/14/2019]**

**[Assigned for all purposes to Hon. William
Claster, Department CX 104]**

Filing Date: March 22, 2021

Trial Date: Not Yet Set

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION OF POLYMER80, INC.
FOR DISMISSAL, ATTORNEYS'
FEES, AND OTHER SANCTIONS,
PURSUANT TO CALIFORNIA CODE
OF CIVIL PROCEDURE SECTION 128.7**

RES. ID: 73664942

1 TACTICAL INC. d/b/a JTACTICAL.COM; MFY
2 TECHNICAL SOLUTIONS LLC, d/b/a
3 5DTACTICAL.COM; TACTICAL GEAR HEADS
4 LLC, d/b/a 80-LOWER.COM; AR-
5 15LOWERRECEIVERS.COM and
6 80LOWERJIG.COM; JAMES TROMBLEE, JR.,
7 d/b/a USPATRIOTARMORY.COM; INDUSTRY
8 ARMAMENT INC., d/b/a
9 AMERICANWEAPONSCOMPONENTS.COM;
10 THUNDER GUNS LLC, d/b/a
11 THUNDERTACTICAL.COM; POLYMER80,
12 INC.; and DOES 2 through 100, inclusive,

13 Defendants.

Date: January 14, 2022
Time: 9:00 a.m.
Dept: CX104
Honorable William Cluster

14 INTRODUCTION

15 Defendant Polymer80, Inc. (“Polymer80” or “Company”) respectfully submits this
16 Memorandum of Points and Authorities in support of its motion (“Motion”), pursuant to California
17 Code of Civil Procedure Section 128.7,¹ seeking dismissal of this action, attorneys’ fees, and other
18 sanctions against plaintiffs and their counsel. For all of the reasons set forth below and in the
19 remainder of the record of this matter, this Motion is meritorious, and the Court should entirely grant
20 it.

21 PRELIMINARY STATEMENT

22 The salient facts undergirding this Motion are few and largely undisputed. In November
23 2017, one Kevin Neal went on a shooting rampage that killed or injured a number of persons. In
24 November 2019, aggrieved plaintiffs commenced the nearly identical *McFadyen* and *Cardenas*
25 actions arising out of that rampage, lodging the same six causes of action in the two cases against
26 numerous defendants. Thereafter, said plaintiffs added Polymer80 as a defendant in both, and the
27 actions were eventually coordinated for discovery purposes in this Court. To this day, neither

28 ¹ Polymer80 emphasizes that this Motion is not a demurrer and, accordingly, reserves its right to file a demurrer in
accordance with the Court’s recent ruling and direction as to the timing and contents of all defendants’ demurrers.

1 Complaint whispers a word specifically about the Company beyond naming it as a defendant. Nor
2 does either Complaint identify what specific items or products of Polymer80 (or, indeed, of any
3 defendant) Mr. Neal wrongfully utilized in November 2017. Plainly, counsel to plaintiffs in both
4 proceedings have been unable or unwilling to determine the source(s) of Mr. Neal's guns. Yet, they
5 have seen fit to sue in blunderbuss fashion a significant portion of the supposedly relevant and
6 responsible industry upon a legal hypothesis founded completely upon probability, speculation, and
7 "market share liability." To add insult to injury, the many dubious averments in the Complaints are
8 asserted, in substantial part, upon "information and belief."

10 After scrutinizing the Complaints, studying the publicly available police photographs
11 depicting the rifles apparently used by Mr. Neal in November 2017, seeking expert advice with
12 respect to those photographs, and examining the governing California law, counsel to Polymer80 in
13 two letters, both dated August 27, 2021, ("August 27 Letters"), advised counsel to plaintiffs in
14 crystalline language that "Mr. Neal did not perform, and could not have possibly performed, his acts
15 with or through the use of any Company product." Indeed, the rifles depicted in those police
16 photographs were unequivocally *not* built from or connected with Polymer80 products of any kind
17 for two major reasons, both of which could easily have, and thus should have, been ascertained by
18 plaintiffs' counsel before initiating these cases against Polymer80:
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- 21 • **The first reason was and is that the subject police**
22 **photographs reveal rifles with lower receivers**
23 **unquestionably made from metal. However, Polymer80**
does *not* make or distribute, and *never* has made or
distributed, any such metal part or product.
- 24 • **The second reason was and is that the rifles shown in**
25 **those photographs do *not* bear the distinctive "P80" or**
26 **"Polymer80" markings/logos placed on every rifle built**
27 **from a relevant Polymer80 product.**

1 As a result, counsel to Polymer80 asked that counsel to plaintiffs withdraw the Complaints.
2 Plaintiffs' counsel elected not to respond and stood by the Complaints. As such, some four months
3 later, counsel to Polymer80 served a draft of this Motion, along with supporting Declarations from a
4 highly experienced and qualified expert (a former federal government firearms agent) and a senior
5 Company Executive Vice President and demanded that the Complaints be withdrawn pursuant to
6 California Code of Civil Procedure Section 128.7. The twenty-one (21) day "safe harbor" required
7 by that provision has now come and gone. Still, those grievously defective Complaints against
8 Polymer80 persist. Consequently, the Company has had no choice but to file this Motion.
9

10 As illustrated below and upon the background summarized above, plaintiffs and their counsel
11 *never* had a good faith basis to name Polymer80 in either action. Nor was any "inquiry reasonable
12 under the circumstances" conducted before the actions were filed. Nor did plaintiffs' counsel after
13 receipt of the August 27 Letters, as they "must" have done under California law, take "into account
14 [the Company's] evidence." Thus, as we also proceed to establish herein, the pending Complaints
15 are "legally and factually frivolous" as to Polymer80 and should be dismissed forthwith, with
16 prejudice. And, in the demonstrably egregious and tawdry premises, the Court has ample discretion
17 and record evidence with which to seriously sanction plaintiffs and their counsel, for whose conduct
18 thus far as to Polymer80 there is simply no excuse.
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1 **RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. Plaintiffs Filed Nearly Identical Complaints In November 2019 Against**
3 **The Same Thirteen Named Defendants (But Not Polymer80) As To**
4 **Kevin Neal’s Despicable November 2017 “Rampage Shooting Spree.”**

5 On or about November 13-14, 2017, Mr. Neal is alleged to have tragically “engaged in a
6 rampage shooting spree” that “killed or injured [p]laintiffs or their loved ones.” *McFadyen* Compl.
7 ¶¶ 13, 94; *Cardenas* Compl. ¶¶ 13, 78.² On November 14, 2019, the *McFadyen* plaintiffs filed an
8 action in the Superior Court of California for San Bernardino County, and the *Cardenas* plaintiff
9 filed another in the Superior Court of California for Orange County, against the same thirteen (13)
10 named defendants (as well as fifty (50) “Does”). Both proceedings alleged the same six causes of
11 action in connection with said “shooting spree”: (i) negligence, (ii) negligence *per se*, (iii) negligent
12 entrustment, (iv) public nuisance, (v) violation of Business and Professions Code Section 17200
13 (unfair and unlawful sales practices), and (vi) contravention of Business and Professions Code
14 Section 17200 (unfair marketing tactics). The *McFadyen* and *Cardenas* actions were eventually
15 coordinated for discovery purposes under Docket Number JCCP 5167.
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17 At bottom, the now-coordinated Complaints aver that defendants bear responsibility for Mr.
18 Neal’s conduct, because they purportedly manufactured, distributed, and/or sold “kits and firearms
19 parts that are easily assembled by the purchaser into fully functioning weapons, including AR-15
20 style assault weapons . . . to California residents leading up to November 2017.” *McFadyen* Compl.
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25 ² Citations and references to the “*McFadyen* plaintiffs,” “*McFadyen* Complaint,” and “*McFadyen* action” relate to the
26 case initiated by plaintiffs Troy McFadyen, *et al.*, in the Superior Court of California for the County of San Bernardino,
27 Docket Number CIVDS 1935422. Citations and references to the “*Cardenas* plaintiff,” “*Cardenas* Complaint,” and
28 “*Cardenas* action” relate to the case brought by plaintiff Francisco Gudino Cardenas in the Superior Court of California
for the County of Orange, Docket Number 30-2019-01111797-CU-PO-CJC. Insofar as the two actions have been
coordinated and their respective plaintiffs and pleadings proffer nearly identical theories of liability against defendants,
they hereinafter are referred to in the aggregate as the “Complaints” and “Actions.”

1 ¶¶ 2, 11; *Cardenas* Compl. ¶¶ 2, 11. And, plaintiffs maintain that Mr. Neal “used these parts/kits to
2 assemble at least two AR-15 style ‘ghost gun’ rifles barred under California’s prohibition on assault
3 weapons.” *See McFadyen* Compl. ¶¶ 13, 96; *Cardenas* Compl. ¶¶ 13, 80.³ However, these
4 Complaints do not specifically identify which of defendants’ products Mr. Neal supposedly used.
5 Instead, plaintiffs expressly concede that “[i]t is unknown how and where Neal acquired the ‘ghost
6 gun’ parts/kits used to assemble the weapons used in the attack,” and that “it may be impossible to
7 determine the exact manufacturer(s)/seller(s) of the ‘ghost gun’ parts/kits Neal used to assemble the
8 AR-15 style ‘ghost gun’ rifles used in the attack.” *McFadyen* Compl. ¶ 98; *Cardenas* Compl. ¶ 82.
9 Moreover, the subject Complaints do *not* allege that plaintiffs undertook any investigation or efforts
10 to identify the source of the “two AR-15 style semiautomatic rifles” that Mr. Neal “was in
11 possession of and used . . . [d]uring his rampage.” *McFadyen* Compl. ¶ 96; *Cardenas* Compl. ¶ 80.
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14 Unable (or unwilling) to determine the source(s) of Mr. Neal’s rifles, plaintiffs have
15 sweepingly sued a large portion of the entire parts/kits industry upon a legal hypothesis wholly
16 tethered to probability and market share liability and largely asserted upon information and belief.
17 Indeed, plaintiffs allege merely (upon information and belief) that “*there is a substantial probability*
18 *that one or more of the Defendants sold Neal*” and “shipped . . . to Neal’s California
19 residence . . . one or more ‘ghost gun’ parts/kits used to assemble the AR-15 style rifles used in the
20 attack.” *McFadyen* Compl. ¶¶ 106-07 (emphasis supplied); *Cardenas* Compl. ¶¶ 90-91 (emphasis
21 supplied). That “information and belief” as to this “substantial probability” is founded, in turn, upon
22 a further averment, itself tendered “upon information and belief,” that defendants “in aggregate,
23 were responsible for manufacturing and/or selling a substantial percentage of all ‘ghost gun’
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26 ³ Plaintiffs also allege that defendants “designed, advertised, [and] marketed” these so-called “‘ghost gun’ kits/parts” to
27 “criminals, killers, and others whose possession of firearms pose an unacceptably high threat of injury to others” by
28 “intentionally emphasiz[ing] that 1) their products can be used to assemble untraceable weapons and 2) enable the
purchaser to evade background checks and interaction with [a Federal Firearms Licensee].” *McFadyen* Compl. ¶¶ 4, 7,
11; *Cardenas* Compl. ¶¶ 4, 7, 11.

1 parts/kits enabling assembly of AR-15 style ‘ghost gun’ rifles which entered into California leading
2 up to and during November 2017.” *McFadyen* Compl. ¶ 105; *Cardenas* Compl. ¶ 89. Thus, plaintiffs
3 endeavor to hold all defendants liable in the “aggregate” on a market-share construct owing to the
4 purported fungibility of defendants’ products. In this respect, the Complaints allege as follows:

5 “Ghost gun” parts/kits that can be used to assemble unserialized
6 AR-15 style rifles are fungible products. Such parts/kits share the
7 same core characteristics and present an equivalent risk of danger
8 to members of the public like PLAINTIFFS. These products
9 provide dangerous parties like NEAL with an identical capability
to possess untraceable assault weapons without going through an
FFL and in violation of California’s assault weapons ban.

10 *McFadyen* Compl. ¶ 108; *Cardenas* Compl. ¶ 92.

11 Nonetheless, plaintiffs tacitly acknowledge that their market-share and fungibility-based
12 legal theory is infirm, insofar as they know that specific defendants *must* have proximately caused
13 the cited harm for the injury to be legally cognizable. Therefore, plaintiffs assert, as they are
14 constrained to do, that “[w]hichever Defendant or Defendants are responsible, either directly or as
15 an accomplice, for selling Neal one or more ‘ghost gun’ parts/kits in violation of one or more
16 statutes including, at minimum, California’s assault weapons ban, breached the standard of care
17 imposed by statute.” *McFadyen* Compl. ¶ 137; *Cardenas* Compl. ¶ 118. Accord, *McFadyen* Compl.
18 ¶ 155 (“Whichever Defendant or Defendants sold or shipped one or more ‘ghost gun’
19 parts/kits . . . to Neal . . . were . . . negligently entrusting these one or more items.”); *Cardenas*
20 Compl. ¶ 133.⁴

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23 ⁴ See also, e.g., *McFadyen* Compl. ¶¶ 117-27 (alleging that “the actions and conduct of Defendants, which granted Neal
24 access to . . . dangerous weapons” caused Plaintiffs’ harm); *Cardenas* Compl. ¶¶ 101-08; *McFadyen* Compl. ¶ 179
25 (“Defendants’ unlawful, negligent and/or intentional creation and maintenance of the public nuisance directly and
26 proximately caused significant harm, including serious physical injury and associated harm to Plaintiffs that is different
27 from the harm suffered by other members of the public”); *Cardenas* Compl. ¶ 154; *McFadyen* Compl. ¶ 185 (“By selling
28 to Neal . . . ‘ghost gun’ parts/kits . . . Defendants engaged in business practices that were unlawful, immoral, unethical,
oppressive, and unscrupulous”); *Cardenas* Compl. ¶ 160; *McFadyen* Compl. ¶ 5 [sic] (“[H]ad Defendants not violated
California’s prohibition on such unethical and unlawful marketing and business practices, Neal could not have acquired
the parts/kits used to assemble his AR-15 style ‘ghost gun’ rifles or used these weapons to harm Plaintiffs.”); *Cardenas*
Compl. ¶ 170.

1 Notably, there is *not one* allegation in either of the pending Complaints specifically
2 concerning Polymer80, its products, or its purported actions.⁵ Nor could there have been. The
3 Company was not initially named in either of the now-coordinated Actions but was later added by
4 and through amendments in both as “Doe 1.” But tellingly, plaintiffs have not since then amended
5 those Complaints to add *any* averment (or anything) specific to Polymer80 and have elected to
6 proceed solely upon their allegations against “Does 1-100,” which state, *inter alia*, as follows:

8 PLAINTIFFS are informed and believe and thereon allege that
9 each of the DEFENDANTS designated herein as a DOE is
10 negligently, intentionally, or in some other manner, responsible for
11 the events and happenings herein referred to and negligently,
intentionally, or in some other manner, caused injury and damages
proximately thereby to the PLAINIFFS [SIC] as herein alleged.

12 *McFadyen* Compl. ¶ 48; *Cardenas* Compl. ¶ 32. As will be further explicated, upon these scant
13 allegations plaintiffs cannot possibly responsibly maintain their “belie[f]” that the Company is in any
14 way “responsible” for the events or injuries here.

15 **B. Polymer80 Is A Purveyor Of Gun-Related Products, Components, And**
16 **Accessories That Mr. Neal Definitely *Did Not* Use During His 2017 Shooting**
17 **Rampage, As Anyone, Particularly Plaintiffs’ Counsel, Could Have Easily**
Determined And Verified By And Through Multiple Independent Methods.

18 Polymer80 is a Dayton, Nevada-based entity that designs, develops, and manufactures
19 innovative gun-related products, components, and aftermarket accessories. A core principle of the
20 Company’s business is the empowerment of its customers to exercise their constitutional rights to
21 gun ownership and to enjoy lawful engagement with its products. A material part of Polymer80’s
22 commercial activities is the distribution of components “that provide ways for [its] customer[s] to
23 participate in the build process, while expressing their right to bear arms,” as enshrined in the
24 Second Amendment to the Constitution of the United States. *See* About Polymer80,
25 <https://www.polymer80.com/about-us> (last accessed November 19, 2021).
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27 ⁵ This is in stark contrast to other defendants, whose websites counsel to plaintiffs quoted and even provided pictures of
28 in the Complaints. *See* *McFadyen* Compl. ¶ 73; *Cardenas* Compl. ¶ 57.

1 Lest there be any uncertainty, **the centerpiece of this Motion is the unassailable fact that**
2 **the unidentified AR-15 style rifles that Mr. Neal used and the police recovered were**
3 **unequivocally and definitely *not* built from Polymer80 kits or components.** This fact can be --
4 and should long ago have been -- ascertained through an elementary inquiry -- simply by studying
5 the photographs the police took of those rifles and comparing them with the Company's website. *See*
6 photographs produced by the County of Tehama's Office of County Counsel ("Photographs"),
7 copies of which are annexed to the concurrently filed Declaration of Germain D. Labat, Esq., dated
8 December 9, 2021, (Labat Declaration") as Exhibit A.

10 Two crucial realities buttress this dispositive fact. The first is that the Photographs reflect
11 rifles with lower receivers made from metal. **Polymer80 does not make, or distribute, and has**
12 **never made or distributed, such metal products.** Just by looking at the Photographs, an
13 independent firearms consultant who spent approximately fifteen years working for the Bureau of
14 Alcohol, Tobacco, Firearms and Explosives, Richard Vasquez, has determined that Mr. Neal's
15 unidentified rifles were not made from polymer but from metal. *See* Declaration of Richard Vasquez,
16 dated November 19, 2021, ("Vasquez Declaration"), a copy of which is annexed to the Labat
17 Declaration as Exhibit B, ¶¶ 2, 6-8, at pp. 2-10.⁶ Moreover, Polymer80 Executive Vice President
18 Daniel L. McCalmon has stated under penalties of perjury that the Company has never
19 manufactured, distributed, sold, advertised, or marketed metallic or aluminum lower-receiver-style
20 components for AR-15 type rifles, either alone or as part of any "kit." *See* Declaration of Daniel Lee
21 McCalmon, dated November 19, 2021, ("McCalmon Declaration"), a copy of which is annexed to
22 the Labat Declaration as Exhibit C, ¶¶ 1-3, at p. 2. Mr. McCalmon further testified that "[a] review
23 of the Company's website clearly demonstrates, and would demonstrate, this fact." *Id.* ¶ 3, at p. 2.
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27 ⁶ Mr. Vasquez also determined from the Photographs that Mr. Neal used a handgun manufactured by Glock and a metal-
28 based rifle manufactured by Bushmaster. *See id.* at ¶¶ 6-8, pp. 3-10. Obviously, these are not Polymer80 products, and
the Complaints do not allege that they were manufactured by any current defendant.

1 The second key reality is that the Photographs depict rifles that do not bear important
2 hallmarks of every rifle made from the Company products, namely, a distinctive “P80” or
3 “Polymer80” marking or logo. Mr. McCalmon has testified that every single Company AR-15
4 product somewhere contains a “P80” or “Polymer80” marking. *Id.* ¶ 4, at p. 2. And, because the
5 Photographs feature rifles that do not, those rifles cannot have been (and were not) built by or from
6 Company components. *Id.* ¶ 6, at p. 3. Furthermore, Mr. McCalmon has testified that Polymer80
7 AR-15 products have special aesthetics that, although perhaps not easily discernible to a lay-person,
8 do not exist on the rifles in the Photographs. *Id.* Accordingly, Mr. McCalmon has asserted with
9 100% certainty that the unidentified AR-15 style rifles that Mr. Neal used, as shown in the
10 Photographs, were and are *not* Company products. *Id.* Similarly, Mr. Vasquez has testified that when
11 reviewing the Photographs he “did not observe any firearms bearing a mark of ‘P80’ or
12 ‘Polymer80.’” Vasquez Decl. ¶ 9, at p. 10. Owing to this fact, and his observation “from a review of
13 the Photographs that the unidentified rifles police recovered after Kevin Neal’s shooting spree have
14 lower receivers that appear to be made from metal, not polymer,” Mr. Vasquez has similarly
15 “conclude[d] that the unidentified AR-15 style rifles . . . are not Company products.” *Id.* ¶¶ 8-10, at
16 pp. 9-10.

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19 **C. Long Ago, Polymer80 Warned Plaintiffs’ Counsel That The Company**
20 **Was And Is Not A Proper Party To The Actions, Because The Rifles That**
21 **Mr. Neal Used And That The Police Recovered Had Metallic Receivers,**
22 **And That The Company Has Never Made Or Sold Any Such Products.**

23 Over three months ago, counsel to Polymer80 sent the August 27 Letters to both counsel to
24 the *McFadyen* plaintiffs and counsel to the *Cardenas* plaintiff, explaining that there is not, and never
25 has been, any “good faith basis upon which to commence and/or prosecute [the Actions] against
26 Polymer80” and “demand[ing] that [they] cause [them] to be voluntarily dismissed forthwith.” *See*
27 Letter from James J. McGuire, Esq. to Gerald B. Singleton, Esq. and Ben Rosenfeld, Esq., dated
28 August 27, 2021; and Letter from James J. McGuire, Esq. to Douglas Mudford, Esq., Estee Lewis,

1 Esq., Catie Barr, Esq., and Brandon Storment, Esq., dated August 27, 2021, copies of which are
2 annexed to the Labat Declaration as Exhibit D. No such good faith basis existed upon
3 commencement of the Actions or exists today, since “photographs of AR-15 style rifles used by Mr.
4 Neal and recovered by the Tehama County Sheriff’s Office . . . reveal that each of those rifles
5 contained a plainly metallic (apparently aluminum) lower receiver” and “Polymer80 does not
6 manufacture or distribute (and never has manufactured or distributed) metallic or aluminum lower
7 receivers, either alone or as part of any ‘kit.’” *Id.* at 2. Accordingly, the August 27 Letters asserted
8 that “Mr. Neal did not perform, and could not have possibly performed, his acts with or through the
9 use of any Company product.” *Id.* In addition, counsel to the Company further stated that the extant
10 evidence defeats any of plaintiffs’ market share or fungibility liability theories. *See id.* at 2-3. As a
11 result, these Letters made clear that plaintiffs and their counsel had (and have) violated their legal
12 obligations pursuant to California Code of Civil Procedure Section 128.7(b)(3). *See id.* at 3-4.
13 Therefore, counsel to the Company demanded that plaintiffs and their counsel “dismiss voluntarily”
14 the Actions “against Polymer80” by September 7, 2021. *Id.* at 4.

17 **D. On November 19, 2021, Polymer80 Served This Motion**
18 **Upon Plaintiffs’ Counsel, Providing Them With A 21-Day**
19 **Safe Harbor Within Which To Withdraw The Complaints.**

20 California Code of Civil Procedure (“CCP”) Section 128.7(c)(1) provides for a 21-day safe-
21 harbor window, during which a plaintiff served with a Section 128.7 application may avoid the
22 prospect of sanctions by withdrawing the subject pleading. Polymer80 served a draft of this Motion
23 upon counsel to plaintiffs on November 19, 2021.

24 At 10:23 p.m. EST on December 9, 2021, literally late on the twentieth (20th) day of the safe
25 harbor period and more than one hundred (100) days since the forwarding of the August 27 Letters,
26 counsel to plaintiffs issued a letter raising certain objections and comments with respect to the draft
27 of the Motion with which they had been served. Suffice to say, all of those objections and comments
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1 were and are without merit and will be addressed in detail, as necessary and/or appropriate, in the
2 proper manner at the proper time.

3 Thus and notwithstanding counsel's eleventh (11th) hour fifty-ninth (59th) minute, baseless
4 apologia, the Complaints have not been withdrawn and remain on file. As such, this Motion timely
5 and rightly ensued on December 15, 2021.
6

7 **ARGUMENT**

8 An attorney filing a pleading must make "an inquiry reasonable under the circumstances" to
9 ensure that its "claims, defenses, and other legal contentions therein are warranted" and that
10 "allegations and other factual contentions have evidentiary support or, if specifically so identified,
11 are likely to have evidentiary support after a reasonable opportunity for further investigation or
12 discovery." CCP § 128.7(b)(2)-(3). Moreover, it is well settled that "to satisfy [the] obligation under
13 [section 128.7] to conduct a reasonable inquiry to determine if his [or her] client's claim was well-
14 grounded in fact, the attorney must take into account [the adverse party's] evidence." *Bucur v.*
15 *Ahmad*, 244 Cal. App. 4th 175, 190 (2016) (alterations in original) ("*Bucur*"). Counsel to plaintiffs
16 have utterly failed to satisfy this obligation, and so sanctions should issue. In sum, any objectively
17 reasonable lawyer would have known at the time of adding Polymer80 to the Actions, and certainly
18 after receipt of the August 27 Letters, that Mr. Neal's recovered rifles were *assuredly not* Polymer80
19 products. Consequently, there is and can be no factual or legal basis for the Company to be named in
20 this case. Yet, those Complaints persist as of the filing of the instant Motion.
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I

**THE LEGAL STANDARD UPON A SANCTIONS MOTION PURSUANT
TO CODE OF CIVIL PROCEDURE SECTION 128.7 IS SETTLED.**

The Supreme Court of California has articulated that California Code of Civil Procedure Section 128.7 “provides a remedy for improperly speculative pleading.” *Bockrath v. Aldrich Chem. Co.*, 21 Cal.4th 71, 82 (1999) (“*Bockrath*”). That provision “enables courts to deter or punish frivolous filings which disrupt matters, waste time, and burden courts’ and parties’ resources.” *In re Mark B.*, 149 Cal. App. 4th 61, 76 (2007). *Accord*, *In re Marriage of Falcone & Fyke*, 164 Cal. App. 4th 814, 826 (2008) (“The purpose of section 128.7 is to deter frivolous filings.”). Indeed, Section 128.7 permits a California Court to “impose sanctions for filing a pleading if the court concludes the pleading . . . was indisputably without merit, either legally or factually” or, in other words, “legally and factually frivolous.” *Peake v. Underwood*, 227 Cal. App. 4th 428, 439 (2014) (“*Peake*”). The Fourth District Court of Appeal has further elucidated the concept of frivolity as follows:

A claim is factually frivolous if it is not well grounded in fact and it is legally frivolous if it is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. In either case, to obtain sanctions, the moving party must show the party’s conduct in asserting the claim was objectively unreasonable. A claim is objectively unreasonable if any reasonable attorney would agree that [it] is totally and completely without merit.

Id. (internal citations and quotation marks omitted). *Accord*, *McCluskey v. Henry*, 56 Cal. App. 5th 1197, 1206 (2020) (same).

As a consequence, “when establishing a claim is factually or legally without merit under Code of Civil Procedure section 128.7, it is not necessary to show the party acted with an improper motive or subjective bad faith.” *Peake*, 227 Cal. App. 4th at 449. A plaintiff’s unreasonableness in filing and maintaining a claim is evaluated in connection with any new evidence that comes to the fore. “[E]ven though an action may not be frivolous when it is filed, it may become so if later-

1 acquired evidence refutes the findings of a prefiling investigation and the attorney continues to file
2 papers supporting the client's claims. Thus, a plaintiff's attorney cannot 'just cling tenaciously to the
3 investigation he had done at the outset of the litigation and bury his head in the sand.'" *Bucur*, 244
4 Cal. App. 4th at 190 (alterations in original), quoting *Childs v. State Farm Mut. Auto. Ins. Co.*, 29
5 F.3d 1018, 1025 (5th Cir. 1994).⁷ Unquestionably, a Court finding a violation of Section 128.7(b)
6 may award sanctions, including dismissal and attorneys' fees, from counsel. CCP § 128.7(c)-(d);
7 *Peake*, 227 Cal. App. 4th at 432-33, 448-50 (affirming lower Court's sanctions of dismissal and
8 attorneys' fees pursuant to Section 128.7). *See also Averill v. Superior Court*, 42 Cal. App. 4th 1170,
9 1176 n.2 (1996) ("*Averill*") ("We note that under these circumstances section 128.7 might provide an
10 alternative basis for dismissing this suit."). This Court should levy such sanctions here against
11 plaintiffs and their counsel.
12
13

14 II

15 **AT MINIMUM, THE SANCTIONS OF DISMISSAL AND ATTORNEYS' FEES ARE** 16 **WARRANTED HERE, BECAUSE MR. NEAL CONCLUSIVELY DID NOT USE COMPANY** **PRODUCTS, AS PLAINTIFFS' COUNSEL LONG AGO COULD EASILY HAVE LEARNED.**

17 This Court, at the very least, should impose the sanctions of dismissal and attorneys' fees,
18 because counsel to plaintiffs have acted "objectively unreasonabl[y]" by not conducting an "inquiry
19 reasonable under the circumstances" that would have easily and incontestably demonstrated that
20 Polymer80 should not be a party to these Actions. Thus, counsel to plaintiffs should quickly have
21 found out and known that the rifles recovered from Mr. Neal were surely not Polymer80 products.
22 CCP § 128.7(b); *Peake*, 227 Cal. App. 4th at 439. *See also, supra*, Statement of Facts, Section B.
23 Plaintiffs' counsel's cavalier addition of Polymer80 to the Actions absent an amendment of their
24 Complaints to set forth facts specific to the Company illuminates counsel's utter and disabling
25
26

27 ⁷ It is black-letter law that "federal case law construing rule 11 is persuasive authority on the meaning of section 128.7,"
28 because the California "Legislature enacted section 128.7 based on rule 11 of the Federal Rules of Civil Procedure (28 U.S.C.), as amended in 1993." *Bucur*, 244 Cal. App. 4th at 190. *Accord, Peake*, 227 Cal. App. 4th at 440 (same).

1 failure to conduct any reasonable inquiry about the Company. Whereas the Complaints include
2 information from other defendants' websites, those pleadings treat Polymer80 simply as "Doe 1."
3 *See, supra*, Statement of Facts, Section A. Had counsel to plaintiffs actually expended the minimal
4 effort needed to scrutinize the Company website and compare Polymer80's products to the rifles
5 shown in the Photographs, said counsel would have quickly realized that the Company could not
6 possibly be liable in the Actions. Once again, the rifles depicted do *not* contain Polymer80 markings
7 and are made of a material that the Company does *not* employ in its AR-15 style components. *See*
8 Labat Decl., Exs. B, C.

10 But, even assuming, *arguendo*, that counsel to plaintiffs somehow could credibly contend
11 that adding Polymer80 to the Actions was not sanctionable because of information in their
12 possession as of the filing of the Complaints against the Company, counsel cannot erase their
13 sanctions-worthy failure to respond rationally (or at all) to the August 27 Letters until late on the day
14 before the end of the safe harbor period. As will be described more fully below, the rank omission by
15 counsel to plaintiffs of conducting even the "most minimal investigation" in the face of "[the adverse
16 party's] evidence" makes their conduct objectively unreasonable and legally sanctionable. *Bucur*,
17 244 Cal. App. 4th at 190; *Jones v. Int'l Riding Helmets, Ltd.*, 145 F.R.D. 120, 124 (N.D. Ga. 1992),
18 *aff'd*, 49 F.3d 692 (11th Cir. 1995) ("*Jones*"). In actuality, once counsel received those Letters, they
19 could have, *inter alia*, compared the pertinent Photographs to Polymer80's website, conducted an
20 inspection of Mr. Neal's recovered weapons, hired an expert, and/or reached out to counsel to
21 Company counsel for further information and colloquy. They apparently did none of that, effectively
22 buried their heads in the sand, and hoped for the best from their perspective.⁸ *See Bucur*, 244 Cal.

27 ⁸ If plaintiffs' counsel argue that they *did* conduct an inquiry and learn these facts, then they should be sanctioned for
28 maintaining this suit "for an improper purpose." *Peake*, 227 Cal. App. 4th at 440. *See also* CCP § 128.7(b)(1).

1 App. 4th at 190. In these premises, dismissal and monetary sanctions are two correct (and
2 appropriate) results.

3 The California Supreme Court's analysis in *Bockrath* is particularly germane here. In that
4 case, plaintiff contracted cancer and sued "at least 55 defendants . . . alleg[ing] that the disease arose
5 through his exposure to harmful substances in their products." *Bockrath*, 21 Cal.4th at 77. While
6 addressing defendants' contentions, the Court stated that a "concern about overbroad litigation is
7 wholly understandable," because the "law cannot tolerate lawsuits by prospecting plaintiffs who sue
8 multiple defendants on speculation that their products may have caused harm over time through
9 exposure to toxins in them, and who thereafter try to learn through discovery whether their
10 speculation was well-founded." *Id.* at 81. The Court expressly noted that the "law provides a remedy
11 for" such "improperly speculative pleading" -- "Code of Civil Procedure section 128.7." *Id.* at 81-82.
12

13 And, the Court further found as follows:
14

15 [I]t is sharp practice to implead defendants in a products liability
16 suit alleging long-term exposure to multiple toxins unless, after a
17 reasonable inquiry, the plaintiff actually believes that evidence has
18 been or is likely to be found raising a reasonable medical
19 probability that each defendant's product was a substantial factor
20 in causing the harm, as the latter term is defined in *Rutherford [v.*
21 *Owens-Illinois, Inc.* (1997) 16 Cal.4th 953]. The actual belief
standard requires more than a hunch, a speculative belief, or
wishful thinking: it requires a well-founded belief. We measure the
truth-finding inquiry's reasonableness under an objective standard,
and apply this standard both to attorneys and to their clients.

22 *Id.* at 82.

23 The *Bockrath* Court went on to state that "[i]f a lawyer is found to have deliberately filed a
24 products liability suit of the type under discussion on a lesser basis, he or she can be sanctioned
25 (Code Civ. Proc., § 128.7, subd. (c)) and is subject to other disciplinary action," because these are
26 some of the "deterrents that state law provides for dishonest, reckless, or negligent pleading
27 practice." *Id.* at 82-83. Finally and most revealingly upon the record before it, the Court, while
28

1 addressing a hypothetical posed by defendants’ counsel, stated that “[a] *cancer-afflicted plaintiff*
2 *suing every manufacturer of an airborne substance found in the Los Angeles basin probably would*
3 *be exposed to sanctions for the suit, even if certain defendants eventually were found to have*
4 *made a product that was a substantial factor in the onset of the plaintiff’s cancer.*” *Id.* at 83
5 (emphasis supplied).

6
7 The conduct against which the California Supreme Court railed in *Bockrath* is directly and
8 substantially analogous to that of counsel to plaintiffs in the Actions. Said counsel have essentially
9 sued the *entire* industry of so-called “ghost gun” manufacturers, admittedly asserting that they “in
10 aggregate, were responsible for manufacturing and/or selling a substantial percentage of all ‘ghost
11 gun’ parts/kits enabling assembly of AR-15 style ‘ghost gun’ rifles which entered into California
12 leading up to and during November 2017,” *before* adding Polymer80 to the Actions. *McFadyen*
13 Compl. ¶ 105; *Cardenas* Compl. ¶ 89. But plainly, the Company is not a proper party to this suit,
14 therefore rendering plaintiffs and their counsel “exposed to sanctions.” *Bockrath*, 21 Cal.4th at 83.⁹
15

16 To be sure, Courts award sanctions in situations where, as here, a plaintiff unreasonably sues
17 the wrong party and should have known not to do so. For instance, in *Eichenbaum v. Alon*, 106 Cal.
18 App. 4th 967 (2003), plaintiff sued one Barry Alon, who “died shortly after the first amended
19 complaint was filed.” *Id.* at 970. The Court then substituted Mr. Alon’s sister in his place, but
20 plaintiff still named “the deceased Barry Alon” in multiple subsequent Complaints. *Id.* at 970-71. In
21 this setting, the Second District Court of Appeal affirmed the trial Court’s grant of Section 128.7
22 sanctions against plaintiff and counsel in part owing to the “frivolousness of any claim against a
23 deceased individual.” *Id.* at 976. Likewise, in *Shek v. Children Hosp. Research Ctr. in Oakland*, No.
24

25
26 ⁹ Sensibly, counsel to plaintiffs in the separate *O’Sullivan* action have, as this Court has recognized,
27 “represent[ed] . . . that they understand defendants’ products may be distinguishable, and if so, they are willing to
28 proceed against only those parties whose component parts were used in [plaintiff] Officer O’Sullivan’s death.” Minute
Order, dated November 12, 2021. The refusal by plaintiffs’ counsel in these Actions to follow that or any other common-
sense approach underscores their gross negligence in continuing to promulgate this action against Polymer80 despite
knowing that Company products were not involved in Mr. Neal’s rampage.

1 12-cv-04517, ECF No. 66 at 3-4 (N.D. Cal. Dec. 13, 2012) (“*Shek*”), where plaintiff “knowingly
2 persisted in serving process against Mr. Joseph L. Robinson, the wrong defendant” and thereby
3 “forced Mr. Robinson to needlessly incur litigation-related expenses and stress,” the Court held that
4 “[t]he failure of plaintiff to discontinue the action against Mr. Robinson, after knowing that he was
5 not the intended defendant, violated Rule 11 of the FRCP.”¹⁰ Similarly, in the Actions at bar,
6 plaintiffs and their counsel should have known at the time of adding Polymer80, and *definitely* knew
7 after receiving the August 27 Letters, that the Company did *not* manufacture or distribute the AR-15
8 style rifles used by Mr. Neal. Their refusal and “failure . . . to discontinue the action against”
9 Polymer80 violates Section 128.7 and consequently triggers, as it were, sanctions. *Shek*, No. 12-cv-
10 04517, ECF No. 66 at 3-4.

11
12 Furthermore, sanctions are warranted in situations, as in the one at hand, where a simple
13 investigation by plaintiff’s counsel would have revealed that there should not be a suit against a
14 particular party. For instance, in *Jones*, plaintiff brought a products liability proceeding against
15 several manufacturers for an allegedly defective helmet purchased in 1985. 145 F.R.D. at 123-24.
16 The Court sanctioned plaintiff for bringing suit against a helmet manufacturer (“International”) that
17 was not incorporated until 1986 and accordingly could not have made the helmet, stating that “[t]he
18 most minimal investigation, such as checking International’s certificate of incorporation, would have
19 revealed the 1986 incorporation date.” *Id.* at 124. In a similar vein, the Ninth Circuit has upheld
20 sanctions against a plaintiff’s attorney for filing a copyright case concerning dolls “without factual
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25 ¹⁰ See also, e.g., *Roor Int’l BV v. Ullah Bus. Inc.*, 2019 WL 5088608, at *1 (M.D. Fla. Aug. 30, 2019) (noting Court
26 “ordered Plaintiffs’ counsel to pay [certain defendants’] costs and attorney fees as Rule 11 sanctions” after “Plaintiffs
27 acknowledged [those defendants’] innocence and dropped them from the case”); *Roor Int’l BV v. Ullah Bus. Inc.*, No.
28 19-cv-00222, ECF No. 41 at 1-2 (M.D. Fla. July 31, 2019) (awarding Rule 11 sanctions, where certain named defendants
did not own store at time of incident, and therefore “the original Complaint was objectively baseless”); *Shek v. Children
Hosp. Research Ctr. in Oakland*, 2013 WL 6512650, at *1 (N.D. Cal. Dec. 12, 2013) (noting “plaintiff was sanctioned
for intentionally serving the wrong person and causing that person grief and trouble”).

1 foundation,” where “he would have been able to discover the copyright information simply by
2 examining the doll heads.” *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002).¹¹

3 In this matter and as set forth above, plaintiffs’ counsel easily could have reviewed
4 Polymer80’s website, including previous iterations thereof, to learn that the Company has *never*
5 made or sold metallic AR-15 receivers, as with the rifles used by Mr. Neal, and that Mr. Neal’s
6 weapons did not include the “Polymer” or “P80” markings that all Company products do. It is
7 undisputed that counsel to plaintiffs did not do so. And, once the August 27 Letters vividly alerted
8 them to the fact that the Company was and is not a proper party to the Actions, there were any
9 number of steps plaintiffs’ counsel could have taken to verify this fact and then do the right thing. In
10 response, they, once more, did not engage in even “[t]he most minimal investigation.” *Jones*, 145
11 F.R.D. at 124. Simply stated, counsel to plaintiffs did not fulfill their Section 128.7 obligations to
12 make an “inquiry reasonable under the circumstances,” making sanctions in order.
13
14

15 Finally, considering that Polymer80 did not make, sell, or distribute any of Mr. Neal’s
16 weapons recovered by the police, the Complaint against the Company is legally frivolous. Plaintiffs
17 just cannot substantiate any legal theory that involves Polymer80 manufacturing, selling,
18 distributing, designing, advertising, or marketing the actual kits and/or firearms that Mr. Neal used.
19 *See, supra*, Statement of Facts, Sections A, B. Moreover, even if plaintiffs’ market share and
20 fungibility-based legal salvos were valid, they would still be vacuous as against Polymer80, insofar
21 as the Company has “demonstrate[d] that it could not have made the product which caused
22

23 ¹¹ There are numerous other decisions to the same effect. *See, e.g., Terran v. Kaplan*, 109 F.3d 1428, 1434-35 & n.7 (9th
24 Cir. 1997) (upholding award of Rule 11 sanctions, where plaintiff alleged mental and emotional stress but his counsel
25 never spoke with the relevant medical doctor or reviewed his medical records); *Chapman & Cole v. Itel Container Int’l*
26 *B.V.*, 865 F.2d 676, 683-84 & n.11 (5th Cir. 1989) (upholding Rule 11 sanctions, since plaintiff’s counsel “filed the
27 complaint based on unverified hearsay” and “rumors,” and counsel “admitted that she did not ask [a witness] about the
28 names, dates, places, or circumstances underlying the rumors that he had heard” and “thus failed to explore readily
available avenues of inquiry and on that basis alone could be sanctioned for filing a factually frivolous appeal”); *Abner*
Realty, Inc. v. Adm’r of Gen. Servs. Admin., 1998 WL 410958, at *4-5 (S.D.N.Y. July 22, 1998) (imposing Rule 11
sanctions, where plaintiff “could easily have determined who owned title to [a] New Jersey building by accessing the
LEXIS/NEXIS database, the Internet, or by obtaining a copy of the current deed to the property from the Registrar of
Deeds in East Orange for a modest fee”).

1 [plaintiffs'] injuries." *Sindell v. Abbott Labs.*, 26 Cal.3d 588, 612 (1980). Because plaintiffs have no
2 legal basis to continue their suit against Polymer80, this Court should dismiss the Complaints, *with*
3 *prejudice*, against the Company. *See Peake*, 227 Cal. App. 4th at 432-33, 448-50; *Averill*, 42 Cal.
4 App. 4th at 1176 n.2.

5
6 **CONCLUSION**

7 For all of the foregoing reasons and those arising from the remainder of the record of the
8 Actions, the Court should grant the instant Motion pursuant to California Code of Civil Procedure
9 Section 128.7, dismiss the Complaints against Polymer80, award the Company its attorneys' fees,
10 and grant such other and further relief as the Court may deem just and proper.¹²

11
12 Dated: December 16, 2021

GREENSPOON MARDER LLP

13
14 By: 

GERMAIN D. LABAT

Counsel to Defendant Polymer80, Inc.

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¹² Polymer80 respectfully believes that this Memorandum of Points and Authorities is an appropriate length pursuant to the Code of Civil Procedure and is amenable to plaintiffs' filing an opposition brief of the same length.

1 **PROOF OF SERVICE**

2 *Francisco Gudino Cardenas, et al. v. Ghost Gunner Inc., et al.*
3 Case No. JCCP 5167

4 STATE OF CALIFORNIA)
5) ss
6 COUNTY OF LOS ANGELES)

7 I am employed in the County of Los Angeles, State of California. I am over the age of
8 eighteen years and not a party to the action. My business address is 1875 Century Park East, Suite
9 1900, Los Angeles, CA 90067. On December 16, 2021, I served the document(s) on the interested
10 parties in this action as follows:

11 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF
12 POLYMER80, INC. FOR DISMISSAL, ATTORNEYS' FEES, AND OTHER SANCTIONS,
13 PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 128.7**

14 By placing ☐ the original ☒ a true copy thereof enclosed in a sealed envelope addressed as follows:
15 **(SEE ATTACHED SERVICE LIST)**

- 16 ☒ **BY ELECTRONIC MAIL-** I caused the foregoing document(s) to be served on all parties at
17 the e-mail addresses listed herein.
- 18 ☐ **BY MAIL:** The envelope was mailed with postage thereon fully prepaid. I am "readily
19 familiar" with the firm's practice of collection and processing correspondence for mailing.
20 Under that practice it would be deposited with the U.S. postal service on that same day with
21 postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I
22 am aware that on motion of the party served, service is presumed invalid if the postal
23 cancellation date or postage meter date is more than one day after service of deposit for mailing
24 in affidavit.
- 25 ☐ **BY OVERNIGHT DELIVERY:** By causing such envelope to be deposited or delivered in a
26 box or other facility regularly maintained by Federal Express authorized to receive documents,
27 or delivering to a courier or driver authorized by said express service carrier to receive
28 documents, the copy of the foregoing document in a sealed envelope designated by the express
service carrier, addressed as stated above, with fees for overnight (next business day) delivery
paid or provided for and causing such envelope to be delivered by said express service carrier.
- ☒ [State] I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct.

Executed on December 16, 2021, at Los Angeles, California.

24 

25 Lorraine Corrales

SERVICE LIST

Francisco Gudino Cardenas, et al. v. Ghost Gunner Inc., et al.
Case No. JCCP 5167

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1 **PROOF OF SERVICE**

2 *Francisco Gudino Cardenas, et al. v. Ghost Gunner Inc., et al.*
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22 am aware that on motion of the party served, service is presumed invalid if the postal
23 cancellation date or postage meter date is more than one day after service of deposit for mailing
24 in affidavit.
- 25 ☒ **BY PERSONAL SERVICE:** I caused to be delivered the foregoing document(s) to the
26 addressee(s) specified.
- 27 ☒ [State] I declare under penalty of perjury under the laws of the State of California that the
28 foregoing is true and correct.

Executed on December 16, 2021, at Los Angeles, California.



Lorraine Corrales

SERVICE LIST

Francisco Gudino Cardenas, et al. v. Ghost Gunner Inc., et al.
Case No. JCCP 5167

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Lorraine Corrales

From: donotreply@occourts.org
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Subject: Superior Court of Orange County - Motion Reservation Request - CONFIRMATION

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Superior Court of California, County of Orange RESERVE A MOTION DATE

Your reservation request has been **CONFIRMED** by the Superior Court. The hearing date and time below has been reserved. You will be asked to provide your reservation number to the court at a later date.

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Hearing Date: January 14, 2022
Hearing Time: 9:00 AM
Department: CX104
Motion Type: Motion for Sanctions

Case Number: JCCP 5167
Case Title: Ghost Gunner Firearms Cases
Judicial Officer: Hon. William Claster

Email: lorraine.corrales@gmlaw.com
Requestor Name: Lorraine Corrales
Requestor Phone: 3238804520
Filing Party: Polymer80, Inc.

Date of Request: December 16, 2021
Time of Request: 12:13 PM
Transaction Number: 1000247974

Superior Court of California • County of Orange