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Counsel to Defendant
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

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 Honorable William Claster, Department CX 104]

Filing Date: March 22, 2021
Trial Date: Not Yet Set

REVISED 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

GHOSTRIFLES.COM; JUDGGERNAUT TACTICAL INC. d/b/a JTACTICAL.COM; MFY TECHNICAL SOLUTIONS LLC, d/b/a 5DTACTICAL.COM; TACTICAL GEAR HEADS LLC, d/b/a 80-LOWER.COM; AR-15LOWERRECEIVERS.COM and 80LOWERJIG.COM; JAMES TROMBLEE, JR., d/b/a USPATRIOTARMORY.COM; INDUSTRY ARMAMENT INC., d/b/a AMERICANWEAPONSCOMPONENTS.COM; THUNDER GUNS LLC, d/b/a THUNDERTACTICAL.COM; POLYMER80, INC.; and DOES 2 through 100, inclusive,

Defendants.

Date: February 4, 2022
Time: 9:00 a.m.
Dept: CX104
Honorable William Claster

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Defendant Polymer80, Inc. ("Polymer80" or "Company") respectfully submits this Revised Memorandum of Points and Authorities in support of its motion ("Motion"), pursuant to California Code of Civil Procedure Section 128.7,[1] seeking dismissal of this action, attorneys' fees, and other sanctions against plaintiffs and their counsel. For all of the reasons set forth below and in the remainder of the record herein, this Motion is meritorious, and the Court should entirely grant it.

PRELIMINARY STATEMENT

The salient facts undergirding this Motion are few and largely undisputed. In November 2017, one Kevin Neal went on a shooting rampage that killed or injured a number of persons. In November 2019, aggrieved plaintiffs commenced the nearly identical *McFadyen* and *Cardenas* actions arising out of that rampage, lodging the same six causes of action in the two cases against numerous defendants. Thereafter, said plaintiffs added Polymer80 as a defendant in both, and the actions were eventually coordinated for discovery purposes in this Court. To this day, neither Complaint whispers a word specifically about the Company beyond naming it as a defendant. Nor does either Complaint identify what specific items or products of Polymer80 (or, indeed, of any defendant) Mr. Neal wrongfully utilized in November 2017. Plainly, counsel to plaintiffs in both proceedings have been unable or unwilling to determine the source(s) of Mr. Neal's guns. Yet, they have seen fit to sue in blunderbuss fashion a significant portion of the supposedly relevant and responsible industry upon a legal hypothesis founded completely upon probability, speculation, and "market share liability." To add insult to injury, the many dubious averments in the Complaints are asserted, in substantial part, upon "information and belief."

After scrutinizing the Complaints, studying the publicly available police photographs depicting the rifles apparently used by Mr. Neal in November 2017, seeking expert advice with respect to those photographs, and examining the governing California law, counsel to Polymer80 in two letters, both dated August 27, 2021, ("August 27 Letters") advised counsel to plaintiffs in crystalline language that "Mr. Neal did not perform, and could not have possibly performed, his acts with or through the use of

[1] Polymer80 emphasizes that this Motion is not a Demurrer and, accordingly, reserves its right to file one in accordance with the Court's recent ruling and direction as to the timing and contents of all defendants' Demurrers. Pursuant to discussions between plaintiffs' counsel and Polymer80's counsel, Polymer80 is filing this Revised Memorandum of Points and Authorities, which will replace and supersede its original Memorandum of Points and Authorities that was filed on December 16, 2021.

any Company product." Indeed, the rifles depicted in those police photographs were unequivocally *not* built from or connected with Polymer80 products of any kind for two major reasons, both of which could easily have, and thus should have, been ascertained by plaintiffs' counsel before initiating these cases against Polymer80:

- **The first reason was and is that the subject police photographs reveal rifles with lower receivers unquestionably made from metal. However, Polymer80 does *not* make or distribute, and *never* has made or distributed, any such metal part or product.**

- **The second reason was and is that the rifles shown in those photographs do *not* bear the distinctive "P80" or "Polymer80" markings/logos placed on every rifle built from a relevant Polymer80 product.**

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

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

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs Filed Nearly Identical Complaints In November 2019 Against The Same Thirteen Named Defendants (But Not Polymer80) As To Kevin Neal's Despicable November 2017 "Rampage Shooting Spree."

On or about November 13-14, 2017, Mr. Neal is alleged to have "engaged in a rampage shooting spree" that tragically "killed or injured [p]laintiffs or their loved ones." *McFadyen* Compl. ¶¶ 13, 94; *Cardenas* Compl. ¶¶ 13, 78.[2] On November 14, 2019, the *McFadyen* plaintiffs filed an action in the Superior Court of California for San Bernardino County, and the *Cardenas* plaintiff filed another in the Superior Court of California for Orange County, against the same thirteen (13) named defendants (as well as fifty (50) "Does"). Both proceedings alleged the same six causes of action in connection with said "shooting spree": (i) negligence, (ii) negligence *per se,* (iii) negligent entrustment, (iv) public nuisance, (v) violation of Business and Professions Code Section 17200 (unfair and unlawful sales practices), and (vi) contravention of Business and Professions Code Section 17200 (unfair marketing tactics). The two actions were eventually coordinated for discovery purposes under Docket Number JCCP 5167.

At bottom, the now-coordinated Complaints aver that defendants bear responsibility for Mr. Neal's conduct, because they purportedly manufactured, distributed, and/or sold "kits and firearms parts that are easily assembled by the purchaser into fully functioning weapons, including AR-15 style assault weapons . . . to California residents leading up to November 2017." *McFadyen* Compl. ¶¶ 2, 11; *Cardenas* Compl. ¶¶ 2, 11. And, plaintiffs maintain that Mr. Neal "used these parts/kits to assemble at least two AR-15 style 'ghost gun' rifles barred under California's prohibition on assault weapons." *See McFadyen* Compl. ¶¶ 13, 96; *Cardenas* Compl. ¶¶ 13, 80. However, these Complaints do not specifically identify which of defendants' products Mr. Neal supposedly used. Instead, plaintiffs expressly concede that "[i]t is unknown how and where Neal acquired the 'ghost gun' parts/kits used to assemble the

[2] Citations and references to the "*McFadyen* plaintiffs," "*McFadyen* Complaint," and "*McFadyen* action" relate to the case initiated by plaintiffs Troy McFadyen, *et al*., in the Superior Court of California for the County of San Bernardino, Docket Number CIVDS 1935422. Citations and references to the "*Cardenas* plaintiff," "*Cardenas* Complaint," and "*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."

weapons used in the attack," and that "it may be impossible to determine the exact manufacturer(s)/seller(s) of the 'ghost gun' parts/kits Neal used to assemble the AR-15 style 'ghost gun' rifles used in the attack." *McFadyen* Compl. ¶ 98; *Cardenas* Compl. ¶ 82. Moreover, the subject Complaints do *not* allege that plaintiffs undertook any investigation or efforts to identify the source of the "two AR-15 style semiautomatic rifles" that Mr. Neal "was in possession of and used . . . [d]uring his rampage." *McFadyen* Compl. ¶ 96; *Cardenas* Compl. ¶ 80.

Unable (or unwilling) to determine the source(s) of Mr. Neal's rifles, plaintiffs have sweepingly sued a large portion of the entire parts/kits industry upon a legal hypothesis wholly tethered to probability and market share liability and largely asserted upon information and belief. Indeed, plaintiffs allege merely (upon information and belief) that "*there is a substantial probability that one or more of the Defendants* sold Neal" and "shipped . . . to Neal's California residence . . . one or more 'ghost gun' parts/kits used to assemble the AR-15 style rifles used in the attack." *McFadyen* Compl. ¶¶ 106-07 (emphasis supplied); *Cardenas* Compl. ¶¶ 90-91 (emphasis supplied). That "information and belief" as to this "substantial probability" is founded, in turn, upon a further averment, itself tendered "upon information and belief," that defendants "in aggregate, were responsible for manufacturing and/or selling a substantial percentage of all 'ghost gun' parts/kits enabling assembly of AR-15 style 'ghost gun' rifles which entered into California leading up to and during November 2017." *McFadyen* Compl. ¶ 105; *Cardenas* Compl. ¶ 89. Thus, plaintiffs endeavor to hold all defendants liable in the "aggregate" on a market-share construct owing to the purported fungibility of defendants' products. In this respect, the Complaints allege as follows:

> "Ghost gun" parts/kits that can be used to assemble unserialized AR-15 style rifles are fungible products. Such parts/kits share the same core characteristics and present an equivalent risk of danger to members of the public like PLAINTIFFS. These products 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.

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

Nonetheless, plaintiffs tacitly acknowledge that their market-share and fungibility-based legal theory is infirm, insofar as they know that specific defendants *must* have proximately caused the cited harm for the injury to be legally cognizable. Therefore, plaintiffs assert, as they are constrained to do, that "*[w]hichever Defendant or Defendants are responsible*, either directly or as an accomplice, *for selling Neal one or more 'ghost gun' parts/kits* in violation of one or more statutes including, at minimum, California's assault weapons ban, breached the standard of care imposed by statute." *McFadyen* Compl. ¶ 137 (emphasis supplied); *Cardenas* Compl. ¶ 118 (same). *Accord*, *McFadyen* Compl. ¶ 155 ("Whichever Defendant or Defendants sold or shipped one or more 'ghost gun' parts/kits . . . to Neal . . . were . . . negligently entrusting these one or more items."); *Cardenas* Compl. ¶ 133. *See also, e.g., McFadyen* Compl. ¶¶ 117-27, 179, 185, 5 [*SIC*]; *Cardenas* Compl. ¶¶ 101-08, 154, 160, 170.

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

> PLAINTIFFS are informed and believe and thereon allege that each of the DEFENDANTS designated herein as a DOE is negligently, intentionally, or in some other manner, responsible for 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.

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

[3] This is in stark contrast to other defendants, whose websites counsel to plaintiffs quoted and even provided pictures of in the Complaints. *See McFadyen* Compl. ¶ 73; *Cardenas* Compl. ¶ 57.

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

Polymer80 is a Dayton, Nevada-based entity that designs, develops, and manufactures innovative gun-related products, components, and aftermarket accessories. A core principle of the Company's business is the empowerment of its customers to exercise their constitutional rights to gun ownership and to enjoy lawful engagement with its products. A material part of Polymer80's commercial activities is the distribution of components "that provide ways for [its] customer[s] to participate in the build process, while expressing their right to bear arms," as enshrined in the Second Amendment to the Constitution of the United States. *See* About Polymer80, https://www.polymer80.com/about-us (last accessed November 19, 2021).

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

Two crucial realities buttress this dispositive fact. The first is that the Photographs reflect rifles with lower receivers made from metal. **Polymer80 does not make, or distribute, and has never made or distributed, such metal products**. Just by looking at the Photographs, an independent firearms consultant who spent approximately fifteen years working for the Bureau of Alcohol, Tobacco, Firearms and Explosives, Richard Vasquez, has determined that Mr. Neal's unidentified rifles were not made from polymer but from metal. *See* Declaration of Richard Vasquez, dated November 19, 2021, ("Vasquez Declaration"), a copy of which is annexed to the Labat Declaration as Exhibit B, ¶¶ 2, 6-8,

at pp. 2-10.[4] Moreover, Polymer80 Executive Vice President Daniel L. McCalmon has stated under penalties of perjury that the Company has never manufactured, distributed, sold, advertised, or marketed metallic or aluminum lower-receiver-style components for AR-15 type rifles, either alone or as part of any "kit." *See* Declaration of Daniel Lee McCalmon, dated November 19, 2021, ("McCalmon Declaration"), a copy of which is annexed to the Labat Declaration as Exhibit C, ¶¶ 1-3, at p. 2. Mr. McCalmon further testified that "[a] review of the Company's website clearly demonstrates, and would demonstrate, this fact." *Id.* *¶* 3, at p. 2.

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

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[4] Mr. Vasquez also determined from the Photographs that Mr. Neal used a handgun manufactured by Glock and a metal-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.

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

Over four months ago, counsel to Polymer80 sent the August 27 Letters to both counsel to the *McFadyen* plaintiffs and counsel to the *Cardenas* plaintiff, explaining that there is not, and never has been, any "good faith basis upon which to commence and/or prosecute [the Actions] against Polymer80" and "demand[ing] that [they] cause [them] to be voluntarily dismissed forthwith." *See* Letter from James J. McGuire, Esq. to Gerald B. Singleton, Esq. and Ben Rosenfeld, Esq., dated August 27, 2021; and Letter from James J. McGuire, Esq. to Douglas Mudford, Esq., Estee Lewis, Esq., Catie Barr, Esq., and Brandon Storment, Esq., dated August 27, 2021, copies of which are annexed to the Labat Declaration as Exhibit D. No such good faith basis existed upon commencement of the Actions or exists today, since "photographs of AR-15 style rifles used by Mr. Neal and recovered by the Tehama County Sheriff's Office . . . reveal that each of those rifles contained a plainly metallic (apparently aluminum) lower receiver" and "Polymer80 does not manufacture or distribute (and never has manufactured or distributed) metallic or aluminum lower receivers, either alone or as part of any 'kit.'" *Id.* at 2. Accordingly, the August 27 Letters asserted that "Mr. Neal did not perform, and could not have possibly performed, his acts with or through the use of any Company product." *Id.* In addition, counsel to the Company further stated that the extant evidence defeats any of plaintiffs' market share or fungibility liability theories. *See id.* at 2-3. As a result, these Letters made clear that plaintiffs and their counsel had (and have) violated their legal obligations pursuant to California Code of Civil Procedure Section 128.7(b)(3). *See id.* at 3-4. Therefore, counsel to the Company demanded that plaintiffs and their counsel "dismiss voluntarily" the Actions "against Polymer80" by September 7, 2021. *Id.* at 4. Plaintiffs and their counsel, as they have to this day, refused.

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

California Code of Civil Procedure ("CCP") Section 128.7(c)(1) provides for a 21-day safe-harbor window, during which a plaintiff served with a Section 128.7 application may avoid the prospect

of sanctions by withdrawing the subject pleading. Polymer80 served a draft of this Motion upon counsel to plaintiffs on November 19, 2021. Then, 10:23 p.m. EST on December 9, 2021, literally late on the twentieth (20th) day of the safe harbor period and more than one hundred (100) days since the forwarding of the August 27 Letters, counsel to plaintiffs issued a letter raising certain objections and comments with respect to the draft of the Motion with which they had been served. Suffice to say, all of those objections and comments were and are without merit and will be addressed in detail, as necessary and/or appropriate, in the proper manner at the proper time. Thus and notwithstanding counsel's eleventh (11th) hour fifty-ninth (59th) minute, baseless apologia, the Complaints have remained on file. Thereafter, this Motion timely and rightly ensued.

ARGUMENT

An attorney filing a pleading must make "an inquiry reasonable under the circumstances" to ensure that its "claims, defenses, and other legal contentions therein are warranted" and that "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." CCP § 128.7(b)(2)-(3). Moreover, it is well settled that "to satisfy [the] obligation under [Section 128.7] to conduct a reasonable inquiry to determine if his [or her] client's claim was well-grounded in fact, the attorney must take into account [the adverse party's] evidence." *Bucur v. Ahmad*, 244 Cal. App. 4th 175, 190 (2016) (alterations in original) ("*Bucur*"). In sum, Counsel to plaintiffs have utterly failed to satisfy this obligation, and so sanctions should issue.

I. THE LEGAL STANDARDS UPON A SANCTIONS MOTION PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 128.7 ARE 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). 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-acquired evidence refutes the findings of a prefiling investigation and the attorney continues to file papers supporting the client's claims. Thus, a plaintiff's attorney cannot 'just cling tenaciously to the investigation he had done at the outset of the litigation and bury his head in the sand.'" *Bucur*, 244 Cal. App. 4th at 190 (alterations in original), quoting *Childs v. State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1025 (5th Cir. 1994).[5] Unquestionably, a Court finding a violation of Section 128.7(b) may award sanctions, including dismissal and attorneys' fees, against counsel. CCP § 128.7(c)-(d); *Peake*, 227 Cal. App. 4th at 432-33, 448-50; *Averill v. Superior Court*, 42 Cal. App. 4th 1170, 1176 n.2 (1996) ("*Averill*"). Here, the Court should levy such sanctions as to plaintiffs and their counsel.

[5] It is black-letter law that "federal case law construing rule 11 is persuasive authority on the meaning of section 128.7," 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).

II. AT MINIMUM, DISMISSAL AND ATTORNEYS' FEES ARE WARRANTED, SINCE MR. NEAL CONCLUSIVELY DID NOT USE COMPANY PRODUCTS, AS PLAINTIFFS' COUNSEL LONG AGO COULD EASILY HAVE LEARNED.

This Court, at the very least, should impose the sanctions of dismissal and attorneys' fees, because counsel to plaintiffs have acted "objectively unreasonabl[y]" by not conducting an "inquiry reasonable under the circumstances" that would have easily and incontestably demonstrated that Polymer80 should not be a party to these Actions. CCP § 128.7(b); *Peake*, 227 Cal. App. 4th at 439. Thus, counsel to plaintiffs should quickly have found out and known that the rifles recovered from Mr. Neal were surely not Polymer80 products. Plaintiffs' counsel's cavalier addition of Polymer80 to the Actions absent an amendment of their Complaints to set forth facts specific to the Company illuminates counsel's utter and disabling failure to conduct any reasonable inquiry about the Company. Whereas the Complaints include information from other defendants' websites, those pleadings treat Polymer80 simply as "Doe 1." Had counsel to plaintiffs actually expended the minimal effort needed to scrutinize the Company website and compare Polymer80's products to the rifles shown in the Photographs, said counsel would have quickly realized that the Company could not possibly be liable in the Actions. Once again, the rifles depicted do *not* contain Polymer80 markings and are made of a material that the Company does *not* employ in its AR-15 style components. *See* Labat Decl., Exs. B, C.

But, even assuming, *arguendo*, that counsel to plaintiffs somehow could credibly contend that adding Polymer80 to the Actions was not sanctionable because of information in their possession as of the filing of the Complaints against the Company, counsel cannot erase their sanctions-worthy failure to respond rationally (or at all) to the August 27 Letters until late on the day before the end of the safe harbor period. As will be described more fully below, the rank omission by counsel to plaintiffs of conducting even the "most minimal investigation" in the face of "[the adverse party's] evidence" makes their conduct objectively unreasonable and legally sanctionable. *Bucur*, 244 Cal. App. 4th at 190; *Jones v. Int'l Riding Helmets, Ltd.*, 145 F.R.D. 120, 124 (N.D. Ga. 1992), *aff'd*, 49 F.3d 692 (11th Cir. 1995) ("*Jones*"). In actuality, once counsel received those Letters, they could have, *inter alia*, compared the pertinent Photographs to Polymer80's website, conducted an inspection of Mr. Neal's recovered weapons, hired an expert, and/or reached out to Company counsel for further information and colloquy.

They apparently did none of that, effectively buried their heads in the sand, and hoped for the best from their perspective.[6] *See Bucur*, 244 Cal. App. 4th at 190. In these premises, dismissal and monetary sanctions are two correct (and appropriate) results.

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

> [I]t is sharp practice to implead defendants in a products liability suit alleging long-term exposure to multiple toxins unless, after a reasonable inquiry, the plaintiff actually believes that evidence has been or is likely to be found raising a reasonable medical probability that each defendant's product was a substantial factor in causing the harm, as the latter term is defined in *Rutherford [v. 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.

Id. at 82. The *Bockrath* Court went on to state that "[i]f a lawyer is found to have deliberately filed a products liability suit of the type under discussion on a lesser basis, he or she can be sanctioned (Code Civ. Proc., § 128.7 (c)) and is subject to other disciplinary action," because these are some of the "deterrents that state law provides for dishonest, reckless, or negligent pleading practice." *Id.* at 82-83. Finally and most revealingly upon the record before it, the Court, while addressing a hypothetical posed by defendants' counsel, stated that "[a] ***cancer-afflicted plaintiff suing every manufacturer*** *of an*

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

airborne substance found in the Los Angeles basin ***probably would be exposed to sanctions for the suit, even if certain defendants eventually were found to have made a product that was a substantial factor in the onset of the plaintiff's cancer***." *Id.* at 83 (emphasis supplied).

The conduct against which the California Supreme Court railed in *Bockrath* is directly and substantially analogous to that of counsel to plaintiffs in the Actions. Said counsel have essentially sued the *entire* industry of so-called "ghost gun" manufacturers, admittedly asserting that they "in aggregate, were responsible for manufacturing and/or selling a substantial percentage of all 'ghost gun' parts/kits enabling assembly of AR-15 style 'ghost gun' rifles which entered into California leading up to and during November 2017," *before* adding Polymer80 to the Actions. *McFadyen* Compl. ¶ 105; *Cardenas* Compl. ¶ 89. But plainly, the Company is not a proper party to this suit, therefore rendering plaintiffs and their counsel "exposed to sanctions." *Bockrath*, 21 Cal.4th at 83.[7]

To be sure, Courts award sanctions in situations where, as here, a plaintiff unreasonably sues the wrong party and should have known not to do so. *See Eichenbaum v. Alon*, 106 Cal. App. 4th 967, 976 (2003); *Shek v. Children Hosp. Research Ctr. in Oakland*, No. 12-cv-04517, ECF No. 66 at 3-4 (N.D. Cal. Dec. 13, 2012).[8] Furthermore, sanctions are warranted in situations, as in the one at hand, where a simple investigation by plaintiff's counsel would have revealed that there should not be a suit against a particular party. *Jones*, 145 F.R.D. at 123-24. *See also Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002).[9] In this matter and as set forth above, plaintiffs' counsel easily could have reviewed Polymer80's website, including previous iterations thereof, to learn that the Company has *never* made or sold metallic AR-15 receivers, as with the rifles used by Mr. Neal, and that Mr. Neal's weapons did

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[7] Sensibly, counsel to plaintiffs in the separate *O'Sullivan* action have, as this Court has recognized, "represent[ed] . . . that they understand defendants' products may be distinguishable, and if so, they are willing to 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.

[8] *See also, e.g.*, *Roor Int'l BV v. Ullah Bus. Inc.*, 2019 WL 5088608, at *1 (M.D. Fla. Aug. 30, 2019); *Roor Int'l BV v. Ullah Bus. Inc.*, No. 19-cv-00222, ECF No. 41 at 1-2 (M.D. Fla. July 31, 2019); *Shek v. Children Hosp. Research Ctr. in Oakland*, 2013 WL 6512650, at *1 (N.D. Cal. Dec. 12, 2013).

[9] There are numerous other decisions to this same effect. *See, e.g.*, *Terran v. Kaplan*, 109 F.3d 1428, 1434-35 & n.7 (9th Cir. 1997); *Chapman & Cole v. Itel Container Int'l B.V.*, 865 F.2d 676, 683-84 & n.11 (5th Cir. 1989); *Abner Realty, Inc. v. Adm'r of Gen. Servs. Admin.*, 1998 WL 410958, at *4-5 (S.D.N.Y. July 22, 1998).

not include the "Polymer" or "P80" markings that all Company products do. It is undisputed that counsel to plaintiffs did not do so. And, once the August 27 Letters vividly alerted them to the fact that the Company was and is not a proper party to the Actions, there were any number of steps plaintiffs' counsel could have taken to verify this fact and then do the right thing. In response, they, once more, did not engage in even "[t]he most minimal investigation." *Jones*, 145 F.R.D. at 124. Simply stated, counsel to plaintiffs did not fulfill their Section 128.7 obligations to make an "inquiry reasonable under the circumstances," making sanctions in order.

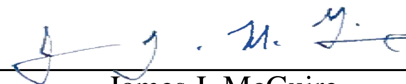
Finally, considering that Polymer80 did not make, sell, or distribute any of Mr. Neal's weapons recovered by the police, the Complaint against the Company is legally frivolous. Plaintiffs just cannot substantiate any legal theory that involves Polymer80 manufacturing, selling, distributing, designing, advertising, or marketing the actual kits and/or firearms that Mr. Neal used. *See*, *supra*, Statement of Facts, Sections A, B. Moreover, even if plaintiffs' market share and fungibility-based legal salvos were valid, they would still be vacuous as against Polymer80, insofar as the Company has "demonstrate[d] that it could not have made the product which caused [plaintiffs'] injuries." *Sindell v. Abbott Labs.*, 26 Cal.3d 588, 612 (1980).

CONCLUSION

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

Dated: January 6, 2022

GREENSPOON MARDER LLP

By: 
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PROOF OF SERVICE

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

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the action. My business address is 1875 Century Park East, Suite 1900, Los Angeles, CA 90067. On January 6, 2022, I served the document(s) on the interested parties in this action as follows:

REVISED 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

By placing ☐ the original ☒ a true copy thereof enclosed in a sealed envelope addressed as follows:

(SEE ATTACHED SERVICE LIST)

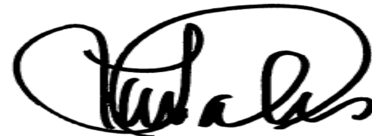
☒ **BY ELECTRONIC MAIL**- I caused the foregoing document(s) to be served on all parties at the e-mail addresses listed herein.

☐ **BY MAIL**: The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

☐ **BY OVERNIGHT DELIVERY**: By causing such envelope to be deposited or delivered in a box or other facility regularly maintained by Federal Express authorized to receive documents, or delivering to a courier or driver authorized by said express service carrier to receive 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 January 6, 2022, at Los Angeles, California.



Lorraine Corrales

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

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Francisco Gudino Cardenas, et al. v. Ghost Gunner Inc., et al.
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