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Attorneys for Plaintiffs
Francisco Gudino Cardenas and Troy McFadyen, et al.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

GHOST GUNNER FIREARMS CASES Included actions: 30-2019-01111797-CU-PO-CJC *Cardenas v. Ghost Gunner, Inc. dba GhostGunner.net, et al.* CIV-DS-1935422 *McFadyen, et al. v. Ghost Gunner, Inc., dba GhostGunner.net, et al.*	JCCP No. 5167 Superior Court of California County of Orange Case No. 30-2019-01111797-CU-PO-CJC Superior Court of California County of San Bernardino Case No. CIV-DS-1935422

DECLARATION OF AMY K. VAN ZANT IN SUPPORT OF PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO POLYMER80, INC. MOTION FOR DISMISSAL, ATTORNEYS' FEES, AND OTHER SANCTIONS

Date: February 4, 2021
Time: 9:00 AM
Dept.: CX 104
Judge: Hon. William D. Claster

I, Amy K. Van Zant, declare as follow:

1. I am an attorney, duly licensed to practice law in California, associated with the law firm of Orrick, Herrington & Sutcliffe LLP ("Orrick"), counsel of record for Plaintiffs Cardenas and McFayden, et al. I have personal knowledge of the facts set forth herein and, if called upon as a witness, could and would competently testify thereto.

2. On August 27, 2021, my co-counsel, Ben Rosenfeld and Brandon Storment, each received two substantively identical letters from James J. McGuire of Greenspoon Marder (one for the McFayden case and one for the Cardenas case). They forwarded a true and correct copy of Mr. McGuire's August 27 letters to me that same day. A true and accurate copy of Mr. McGuire's August 27, 2021 letter to Brandon Storment is attached here as **Exhibit 1.**

3. On November 19, 2021, I received an email from Michael Marron, also of Greenspoon Marder, stating that "Pursuant to California Code of Civil Procedure Section 128.7, you are hereby served notice that Polymer80 will file the attached sanctions motion in 21 days if the complaints are not dismissed as against it." The email also included a notice of motion, a draft motion, a declaration, and four exhibits as attachments. The declaration and four exhibits attached to the November 19 email are identical to those filed on December 16, 2021. A true and accurate copy of the November 19, 2021 email and the draft motion is attached here as **Exhibit 2.**

4. I responded to Mr. Marron's November 19 email by letter on December 9, 2021. A true and accurate copy of my December 9, 2021 letter is attached here as **Exhibit 3**.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 24th day of January, 2022, at Menlo Park, California.

By: */s/ Amy K. Van Zant*
Amy K. Van Zant

EXHIBIT 1

GreenspoonMarder LLP

James J. McGuire
New York Managing Partner
IBM Building
590 Madison Avenue, Suite 1800
New York, NY 10022
Phone: 212.524.5000
Fax: 212.524.5050
Direct Phone: 212.524.5040
Email: james.mcguire@gmlaw.com

August 27, 2021

BY E-MAIL AND
FEDERAL EXPRESS

Gerald B. Singleton, Esq.
Singleton Law Firm
450 A Street, 5th Floor
San Diego, California 92101

Ben Rosenfeld, Esq.
Attorney at Law
115 ½ Bartlett Street
San Francisco, California 94110

Re: ***Cardenas v. Ghost Gunner, Inc., et al.***
Case No. 30-2019-01111797-CV-PO-CJC

Counsel:

This Firm serves as counsel to Polymer80, Inc. ("Polymer80" or "Company") and, if necessary, will through California co-counsel be filing the requisite applications with the Court for the admission of certain of our lawyers *pro hac vice* in the above-referenced action. Since, for reasons explicated below, all of you and your firm never had, and could never have had, a good faith basis upon which to commence and/or prosecute that action against Polymer80, we hereby demand that all of you and your firm cause it to be voluntarily dismissed forthwith.

As all of you and your firm well know, the core averment in this gravely flawed and utterly unfounded (as against the Company) lawsuit is that in November 2017 one Kevin Neal utilized a Polymer80 product or products to carry out the acts giving rise to the purported civil liabilities addressed in the subject Complaint. As all of you and your firm further know and should have known all along, that averment is flatly, indisputably, and demonstrably false based upon evidence that has been publicly available since well before the action was filed.

That evidence largely consists of photographs of AR-15 style rifles used by Mr. Neal and recovered by the Tehama County Sheriff's Office, which photographs reveal that each of those rifles contained a plainly metallic (apparently aluminum) lower receiver. 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." Thus, Mr. Neal did not perform, and could not have possibly performed, his acts with or through the use of any Company product. In addition and exacerbating your serious misconduct, there is nothing set forth in the Complaint directly linking Polymer80 and/or its products to the challenged behavior of Mr. Neal.

Moreover, the Complaint seems to propound a "market share" theory of liability, to the effect that "[e]ach defendant will be held liable for the proportion of the judgment represented by its share of [the respective] *market unless it demonstrates that it could not have made the product which caused plaintiff's injuries." See Sindell v. Abbott*

Laboratories, 26 Cal.3d 588, 612 (1980). The Complaint also relatedly maintains that the "parts" or "kits" at issue are "fungible," as they must be for such a theory to have even facial soundness.

Here, because Polymer80 can unequivocally prove that Mr. Neal did not use any of its products (whether an individual part or a kit) in inflicting the injuries at the center of the action, this theory of liability is vacuous. Nor can all of you and your Firm, nor can the *Cardenas* plaintiff, establish the requisite "fungibility" to enable that theory to succeed. As such, the Company cannot possibly have any liability whatsoever and should no longer be named as a defendant in the case, just as it never should have been. And, once more, all of you and your firm either knew or should have known these realities as of the initiation of the action.

California Code of Civil Procedure Section 128.7(b)(3) provides that when filing a document with a Court, an attorney "is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . [t]he 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." Plainly, all of you and your firm have not discharged your legal obligations under this provision. To be sure, it would have taken no great effort, expertise, or expense to obtain the publicly available evidence putting the lie to the many egregiously false allegations that all of you and your firm have

promulgated against the Company. Indeed, all of you and your firm can easily confirm the patent falsity of those allegations in a few minutes now.

Accordingly and for these reasons, we hereby demand that all of you and your firm cause plaintiffs forthwith to dismiss voluntarily the above-referenced action against Polymer80 and confirm that dismissal in a writing directed to and received by the undersigned by no later than 6 P.M. Eastern Daylight Time on September 7, 2021. Absent timely receipt of that writing, the Company will be positioned to take all appropriate action against all of you individually and your firm. In any event, by this letter Polymer80 expressly reserves all of its rights, remedies, claims, causes of action, defenses, privileges, protections, immunities of any kind, and the like as against all of you and your firm.

We look forward to the most expeditious response.

Sincerely,

GREENSPOON MARDER LLP

James J. McGuire
New York Managing Partner

JJM/gmh

cc: Mr. Alex Brodsky
Germain D. Labat, Esq.
Michael R. Patrick, Esq.
Michael S. Marron, Esq.

EXHIBIT 2

Barnick, Karin

From: Michael Marron <Michael.Marron@gmlaw.com>
Sent: Friday, November 19, 2021 10:26 PM
To: Van Zant, Amy K.; Said, Shayan; Saber, Anna; gsingleton; gerald@SLFfirm.com; Ben Rosenfeld; doug@ca-lawyer.com; estee; brandon; catie
Cc: Michael Patrick; James McGuire; Germain D. Labat; Puneet Bhullar; Lorraine Corrales
Subject: Cardenas & McFadyen v. Polymer80, Inc., JCCP 5167: Notice Pursuant to Code Civ. Proc. § 128.7
Attachments: Notice of Motion.pdf; Memorandum of Points and Authorities.pdf; Labat Declaration.pdf; Ex. A.pdf; Ex. B.pdf; Ex. C.pdf; Ex. D.pdf

Counsel:

We represent defendant Polymer80, Inc. ("Polymer80") in connection with the above-captioned action. Pursuant to California Code of Civil Procedure Section 128.7, you are hereby served notice that Polymer80 will file the attached sanctions motion in 21 days if the complaints are not dismissed as against it.

Sincerely,

Michael S. Marron
Greenspoon Marder LLP
Senior Counsel
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Direct Phone Number: 212-501-7673
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JAMES J. McGUIRE (New York SBN 2106664)
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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 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

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: January 6, 2021
Time: 9:00 a.m.
Dept: CX104
Honorable William Claster

INTRODUCTION

Defendant Polymer80, Inc. ("Polymer80" or "Company") respectfully submits this Memorandum of Points and Authorities in support of its motion ("Motion"), pursuant to California Code of Civil Procedure Section 128.7, seeking dismissal of this action, attorneys' fees, and other sanctions from plaintiffs and their counsel. For all of the reasons set forth below and in the remainder of the record of this matter, this Motion is meritorious, and the Court should 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 and lodging the same six causes of action against numerous defendants. Thereafter, said plaintiffs added Polymer80 as a defendant in both cases and the two 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, any

defendant) Mr. Neal utilized in November 2017. Plainly, counsel to plaintiffs in both proceedings were unable or unwilling to determine the source(s) of Mr. Neal's guns but, as a result, 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 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, 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 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 been, 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 important "P80" or "Polymer80" markings/logos that are placed on every rifle built from a relevant Polymer80 product.**

Accordingly, 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 twenty-one (21) day "safe harbor" 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 the 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/both actions. Nor was any "inquiry reasonable under the circumstances" conducted before the actions were filed. Nor did plaintiffs' counsel after receipt of the August 27, 2021 letters take, as they "must" have done under California law, "into account [the Company's] evidence." Thus, as also established 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 November 2017 "Rampage Shooting Spree."

On or about November 13-14, 2017, one Kevin Neal is alleged to have tragically "engaged in a rampage shooting spree" that "killed or injured [p]laintiffs or their loved ones." Cardenas Compl. ¶¶ 13, 78; McFadyen Compl. ¶¶ 13, 94.[1] On November 14, 2019, the McFadyen plaintiffs filed an

[1] Citations and references to the "Cardenas plaintiff," the "Cardenas Complaint," and the "Cardenas action" are to the action 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. Citations and references to the "McFadyen plaintiffs," "McFadyen

action in the Superior Court of California for San Bernardino County, and the Cardenas plaintiff filed a case in the Superior Court of California for Orange County, against the same thirteen named defendants (and also 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 Cardenas and McFadyen actions were eventually coordinated for discovery purposes under Docket Number JCCP 5167.

At bottom, the now-coordinated Complaints aver that defendants bear responsibility for Neal's activities because they purportedly manufactured, distributed, and 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." Cardenas Compl. ¶¶ 2, 11; McFadyen Compl. ¶¶ 2, 11. And, Plaintiffs maintain that 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* Cardenas Compl. ¶¶ 13, 80; McFadyen Compl. ¶¶ 13, 96.[2] However, these Complaints do not specifically identify which of defendants' products 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 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

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Complaint," and "McFadyen action" are to the action brought by plaintiff Troy McFadyen, et al., in the Superior Court of California for the County of San Bernardino, Docket Number CIVDS 1935422. Because the two actions have been coordinated and their respective plaintiffs and pleadings offer nearly identical theories of liability against defendants, they are referred to in the aggregate herein as the "Plaintiffs," "Complaints," and "Actions."

[2] They also allege that defendants "designed, advertised, [and] marketed" these so-called "'ghost gun' kits/parts" to "criminals, killers, and others whose possession of firearms pose an unacceptably high threat of injury to others" by "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]." Cardenas Compl. ¶¶ 4, 7, 11; McFadyen Compl. ¶¶ 4, 7, 11.

AR-15 style 'ghost gun' rifles used in the attack." Cardenas Compl. ¶ 82; McFadyen Compl. ¶ 98. 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 Neal "was in possession of and used . . . [d]uring his rampage." Cardenas Compl. ¶ 80; McFadyen Compl. ¶ 96.

Unable (or unwilling) to determine the source(s) of Neal's rifles, Plaintiffs have sweepingly sued a large portion of the entire parts/kits industry upon a legal theory 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." Cardenas Compl. ¶¶ 90-91 (emphasis supplied); McFadyen Compl. ¶¶ 106-107 (emphasis supplied). That "information and belief" on 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." Cardenas Compl. ¶ 89; McFadyen Compl. ¶ 105. Thus, Plaintiffs endeavor to hold all defendants liable in the "aggregate" on a market-share hypothesis 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.

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

Nonetheless, Plaintiffs tacitly acknowledge that their market-share and fungibility-based legal construct is infirm, insofar as they know that specific defendants *must* have proximately caused the cited harm for the injury to be legally cognizable. Plaintiffs, therefore, assert, as they are constrained to do, that "*Whichever 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." Cardenas Compl. ¶ 118; McFadyen Compl. ¶ 137. *Accord*, Cardenas Compl. ¶ 133; 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.").[3]

Notably, there is *not one* allegation in either of the pending Complaints specifically concerning Polymer80, its products, or its purported actions.[4] 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 amendment 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,

[3] *See also, e.g.*, Cardenas Compl. ¶¶ 101-108; McFadyen Compl. ¶¶ 117-127 (alleging that "the actions and conduct of Defendants, which granted Neal access to . . . dangerous weapons" caused Plaintiffs' harm); Cardenas Compl. ¶ 154; McFadyen Compl. ¶ 179 ("Defendants' unlawful, negligent and/or intentional creation and maintenance of the public nuisance directly and proximately caused significant harm, including serious physical injury and associated harm to Plaintiffs that is different from the harm suffered by other members of the public"); Cardenas Compl. ¶ 160; McFadyen Compl. ¶ 185 ("By selling to Neal . . . 'ghost gun' parts/kits . . . Defendants engaged in business practices that were unlawful, immoral, unethical, oppressive, and unscrupulous"); Cardenas Compl. ¶ 170; 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.").

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

> intentionally, or in some other manner, caused injury and damages proximately thereby to the PLAINIFFS [SIC] as herein alleged.

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

B. Polymer80 Is A Purveyor Of Gun-Related Products, Components, And Accessories That Were Definitively *Not* Used By Mr. Neal During His Shooting Rampage As Can Easily Be 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 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 Neal used and were recovered by police 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 as Exhibit A to the concurrently filed Declaration of Germain D. Labat ("Labat Decl.").

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, 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 Neal's unidentified rifles were not made from polymer but from metal. *See* Declaration of Richard Vasquez, dated November 19, 2021, ("Vasquez Decl."), a copy of which is annexed as Labat Decl. Exhibit B.[5] Moreover, Polymer80 Executive Vice President Daniel L. McCalmon has stated 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 Decl."), a copy of which is annexed as Labat Decl. Exhibit C. Mr. McCalmon further testified that "[a] review of the Company's website clearly demonstrates, and would demonstrate, this fact." *Id.* ¶ 3.

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, an accompanying "P80" or "Polymer80" marking or logo. Mr. McCalmon has testified that every single Company AR-15 product contains a "P80" or "Polymer80" marking somewhere. *Id.* ¶ 4. 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. Furthermore, Mr. McCalmon has stated that Polymer80 AR-15 products have very distinct 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 Neal used, as shown in the Photographs, were and

[5] 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. Quite obviously, these are not Polymer80 products (and the Complaints do not allege that they were manufactured by any defendant).

are ***not*** Company products. *Id.* Similarly, Mr. Vasquez testified that when reviewing the Photographs he "did not observe any firearms bearing a mark of 'P80' or 'Polymer80.'" Vasquez Dec. ¶ 9. Due 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 similarly "conclude[d] that the unidentified AR-15 style rifles . . . are not Company products." *Id.* ¶¶ 8-10.

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

On August 27, 2021, counsel to Polymer80 sent 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 (together, the "August 27 Letters"), copies of which are annexed as Labat Decl. 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 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.

In the multiple months since the forwarding of the August 27 Letters, no one representing any of the Plaintiffs has seen fit to respond. As such, no one has taken any steps to dismiss the Complaints against the Company.

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 sanctions by withdrawing a subject Complaint. Polymer80 served this Motion upon counsel to Plaintiffs on November 19, 2021 and, accordingly, filed it on December 10, 2021, given that the offending Complaints were not withdrawn as of the latter date.

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). Counsel to Plaintiffs have utterly failed to satisfy this obligation and so sanctions should issue. Any objectively reasonable lawyer

would have known at the time of adding Polymer80 to the Actions, and certainly after receipt of the August 27 Letters, that Neal's recovered rifles were *assuredly not* Polymer80 products. Consequently, there is and can be no factual or legal basis for the Company to be named in this case. Yet, those Complaints persist as of the filing of the instant Motion.

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). 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). The Fourth District Court of Appeal has further elucidated such matters 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).

Therefore, "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. Notably, a plaintiff's unreasonableness in filing and maintaining a claim is evaluated in connection with 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).[6]

Unquestionably, a Court finding a violation of Section 128.7(b) may award sanctions, including dismissal and attorneys' fees, from counsel. CCP § 128.7(c)-(d); *Peake*, 227 Cal. App. 4th at 432-33, 448-50 (affirming lower Court's sanctions of dismissal and attorneys' fees pursuant to Section 128.7). *See also Averill v. Superior Court*, 42 Cal. App. 4th 1170, 1176 n.2 (1996) ("We note that under these circumstances section 128.7 might provide an alternative basis for dismissing this suit.").

[6] 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." *Id. Accord*, *Peake*, 227 Cal. App. 4th at 440 (same).

II

AT MINIMUM, THE SANCTIONS OF DISMISSAL AND ATTORNEYS' FEES ARE WARRANTED HERE, BECAUSE NEAL CONCLUSIVELY DID NOT USE COMPANY PRODUCTS, AS PLAINTIFFS' COUNSEL COULD EASILY HAVE DETERMINED.

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. Thus, counsel to Plaintiffs should quickly have found out and known that the rifles recovered from Neal were surely not Polymer80 products. CCP § 128.7(b); *Peake*, 227 Cal. App. 4th at 439. *See also, supra*, Statement of Facts Section B. Plaintiffs' counsel's cavalier addition of Polymer80 to the Actions absent an amendment of their Complaints to aver facts specific to the Company illuminates the utter and disabling failure to conduct any reasonable inquiry about the Company. Whereas the Complaints include information from other defendants' websites, they treat Polymer80 simply as "Doe 1." *See, supra*, Statement of Facts Section A. Had counsel to Plaintiffs actually expended the minimal effort needed to scrutinize the Company website and compared 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, since, once again, the rifles depicted do not contain Polymer80 markings and are made of a material that the Company does not use 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 obviate their sanction-worthy failure to respond rationally to the August 27 Letters. 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). In actuality, once counsel received those Letters, they could have, *inter alia*, compared the pertinent Photographs to Polymer80's website, conducted an inspection of Neal's recovered rifles, hired an expert, and/or reached out to counsel to the Company for further information and colloquy. They apparently did none of that, effectively buried their heads in the sand, and hoped for the best.[7] *See Bucur*, 244 Cal. App. 4th at 190. In these premises, sanctions is the correct and best result.

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." 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. 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

[7] 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* CCP § 128.7(b)(1).

> truth-finding inquiry's reasonableness under an objective standard, and apply this standard both to attorneys and to their clients.

Id. at 82.

The Court was not done and 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, subd. (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 extant record, the Court, while addressing a hypothetical posed by defendants' counsel, stated that "[a] ***cancer-afflicted plaintiff suing every manufacturer*** *of an 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 analogous to that of counsel to Plaintiffs in this matter. That counsel have essentially sued the *entire* industry of so-called "ghost gun" manufacturers, admittedly asserting 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," *before* adding Polymer80 to the Actions. Cardenas Compl. ¶ 89; McFadyen Compl. ¶ 105. But plainly, the Company is not a proper party to this suit, therefore rendering Plaintiffs and their counsel "exposed to sanctions." 21 Cal.4th at 83.[8]

[8] Sensibly, counsel to plaintiffs in the separate *O'Sullivan* action have, as this Court 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 this action to follow this common-sense approach underscores their gross negligence in continuing this action against Polymer80 despite knowledge that Company products were not involved in Mr. Neal's rampage.

Indeed, Courts award sanctions in situations where, as here, a plaintiff unreasonably sues the wrong party and should have known not to do so. For instance, in *Eichenbaum v. Alon*, 106 Cal. App. 4th 967 (2003), plaintiff sued defendant Barry Alon, who "died shortly after the first amended complaint was filed." *Id*. at 970. The Court then substituted Mr. Alon's sister in his place, but plaintiff still named "the deceased Barry Alon" in multiple subsequent Complaints. *Id.* at 970-71. Upon this background, the Second District Court of Appeal affirmed the trial Court's grant of Section 128.7 sanctions against plaintiff and counsel in part owing to the "frivolousness of any claim against a deceased individual." *Id.* at 976. Likewise, in *Shek v. Children Hosp. Research Ctr. in Oakland*, No. 12-cv-04517, ECF No. 66 at 3-4 (N.D. Cal. Dec. 13, 2012), where plaintiff "knowingly persisted in serving process against Mr. Joseph L. Robinson, the wrong defendant" and thereby "forced Mr. Robinson to needlessly incur litigation-related expenses and stress," the Court held that "[t]he failure of plaintiff to discontinue the action against Mr. Robinson, after knowing that he was not the intended defendant, violated Rule 11 of the FRCP."[9] Similarly, in the Actions at bar, Plaintiffs and their counsel should have known at the time of adding Polymer80, and *definitely* knew after receiving the August 27 Letters, that the Company did *not* manufacture or distribute the AR-15 style rifles used by Mr. Neal. Their refusal and "failure . . . to discontinue the action against" Polymer80 violates Section 128.7 and consequently triggers, as it were, sanctions. *Shek*, No. 12-cv-04517, ECF No. 66 at 3-4.

Furthermore, sanctions are warranted in situations, as with this one, where a simple investigation by plaintiff's counsel would have revealed that there should not be a suit against a

[9] *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 "ordered Plaintiffs' counsel to pay [certain defendants'] costs and attorney fees as Rule 11 sanctions" after "Plaintiffs acknowledged [those defendants'] innocence and dropped them from the case"); *Roor Int'l BV v. Ullah Bus. Inc.*, No. 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").

particular party. For instance, in *Jones v. International Riding Helmets*, plaintiff brought a products liability proceeding against several manufacturers for an allegedly defective helmet purchased in 1985. 145 F.R.D. at 123-24. The Court sanctioned plaintiff for bringing suit against a helmet manufacturer ("International") that was not incorporated until 1986 and that accordingly could not have made the helmet, because "[t]he most minimal investigation, such as checking International's certificate of incorporation, would have revealed the 1986 incorporation date." *Id.* at 124. In a similar vein, the Ninth Circuit has upheld sanctions against a plaintiff's attorney for filing a copyright case concerning dolls "without factual foundation," where "he would have been able to discover the copyright information simply by examining the doll heads." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002).[10]

In this matter, as set forth above, Plaintiffs' counsel easily could have reviewed Polymer80's website, including previous iterations thereof, to learn that the Company has never sold metallic AR-15 receivers, as with the firearms used by Neal, and that Neal's firearms did 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 alerted them 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. In response, they, once more, did not engage even in "[t]he most minimal investigation." *Jones*, 145 F.R.D. at 124. Simply stated, counsel to plaintiffs did not fulfill their

[10] There are numerous other decisions to the same effect. *See, e.g.*, *Terran v. Kaplan*, 109 F.3d 1428, 1434-35 & n.7 (9th Cir. 1997) (upholding award of Rule 11 sanctions where plaintiff alleged mental and emotional stress but his counsel never spoke with the relevant medical doctor or reviewed his medical records); *Chapman & Cole v. Itel Container Int'l B.V.*, 865 F.2d 676, 683-84 & n.11 (5th Cir. 1989) (upholding Rule 11 sanctions because plaintiff's counsel "filed the complaint based on unverified hearsay" and "rumors" and counsel "admitted that she did not ask [a witness] about the 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.").

Section 128.7 obligations to make an "inquiry reasonable under the circumstances," making sanctions in order.

Finally, considering that Polymer80 did not make or distribute any of Neal's weapons recovered by the police, the Complaint against the Company is legally frivolous. Quite obviously, Plaintiffs cannot prove any legal theory that involves Polymer80 manufacturing, distributing, selling, designing, advertising, or marketing the subject kits and firearms that Neal actually used. *See, supra,* Statement of Facts Sections A-B. Moreover, even if Plaintiffs' market share and fungibility-based legal theory were valid, it 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). Because Plaintiffs have no legal basis to continue their suit against Polymer80, this Court should dismiss the Complaints, *with prejudice*, against the Company. *See Peake*, 227 Cal. App. 4th at 432-33, 448-50; *Averill*, 42 Cal. App. 4th at 1176 n.2

CONCLUSION

For all of the foregoing reasons and those arising from the remainder of the record of this matter, the Court should grant the instant Motion pursuant to California Code of Civil Procedure Section 128.7, dismiss the Complaints against Polymer80, award the Company its attorneys' fees, and grant such other and further relief as the Court may deem just and proper. In sum, the two Complaints are grievously groundless, both as a matter of fact and law, since Neal did not use Polymer80 products in the horrific acts alleged therein.

Dated: December 10, 2021

GREENSPOON MARDER LLP

By: _____
GERMAIN D. LABAT
Counsel to defendant Polymer80, Inc.

EXHIBIT 3

December 9, 2021

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VIA ELECTRONIC MAIL

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Re: *McFayden, et al. v. Ghost Gunner, Inc., et al.*, Case No.: CIV-SD1935422;
Cardenas v. Ghost Gunner, Inc., et al., Case No.: 30-2019-01111797-CU-PO-CJC

Dear Mr. Marron:

We write in response to your November 19, 2021 email on behalf of Polymer80, Inc. ("Polymer80") attaching a draft Motion for Dismissal, Attorneys' Fees, and Other Sanctions Pursuant to California Code of Civil Procedure § 128.7 (the "Motion"). Polymer80's draft Motion lacks both substantive and procedural merit and would circumvent the Court's forthcoming order setting a single date for filing defendant demurrers. The Plaintiffs had (and have) a good faith basis for filing the Complaints and for naming Polymer80 as a defendant. Nothing in Polymer80's untested, self-serving, and incomplete "evidence" offered with its draft Motion is grounds for dismissal, much less for sanctions.

A fundamental substantive problem with Polymer80's draft Motion is that it is predicated on the unverified, untested notion that the photos it claims to have received from Tehama County Counsel1 reflect a complete and accurate photographic inventory of all weapons used during the Tehama massacre. Indeed, Mr. Vasquez, the purported "independent firearms consultant" who offers a declaration in support of Polymer80's draft Motion, concedes that several of the weapons shown in the photographs offered by Polymer80 are "unidentifiable" and that "the photos are not clear enough to make an identification." This admission alone shows that Polymer80 does not have a good faith basis to file its draft Motion; that is, its own purported expert cannot ascertain identifiable features for several of the weapons shown. The photos do not show 360-degree views of the weapons and, in many cases, do not even offer a clear view of each weapon from the limited angles that were shot. Most of the photos offered show weapons laid in tall grass or shot through the window of a vehicle such that only a portion of the weapon is visible. Based on these unverified and disputed facts alone, there is no basis for demurrer

[1] Polymer80 has not included the written request to Tehama County Counsel that prompted the photos to be mailed. As a result, it is unclear what was asked for and what purports to be shown, including whether the photos even purport to be related to the Tehama massacre at all.

much less dismissal and sanctions under § 128.7. As Mr. Vasquez's declaration makes clear, discovery to identify the complete set of weapons used in the massacre (if possible), and visual inspections of those weapons, are necessary precursors to any claim that photographs of the weapons used in the massacre definitively prove that a particular defendant's products were not used.

Likewise, Polymer80's claims that its weapons are only made of a polymer and are always marked with a "P80" or "Polymer80" are untested and unreliable for purposes of its draft Motion. These claims, too, should be the subject of discovery. Neither Mr. McMahon nor Mr. Vasquez have provided any information to suggest that either one of them is an expert in photographic analysis, including any expertise in determining from an inspection of photos only the substance from which a particular weapon is made. Yet both offer opinions that the weapons shown in the Tehama County Counsel photographs cannot be assembled from Polymer80 products because they are not made of a polymer material. Both jump to the conclusion that the weapons in the photographs cannot be Polymer80 weapons because they do not have a "P80" or "Polymer80" marking. Yet, as already discussed, the photographs do not show full views of the weapons and we do not even know if the photographs show the weapons used in the Tehama massacre at all, much less whether they show all of them. These disputes and uncertainties present fact issues that are ripe for discovery and are not the basis of a viable motion seeking dismissal as a sanction.

Contrary to Polymer80's claim that it has presented "irrefutable" evidence, parties are not required to accept information in untested declarations as true. See, e.g, People v. Bowen, 11 Cal. App. 4th 102, 107, n.4 (1992) (no obligation to accept counsel's unsworn recitation of defendants' view of events); People v. Peete, 54 Cal. App. 333, 341 (Cal. Ct. App. 1921) (no obligation to believe any particular part of defendant's unsworn declaration); People v. Esquivel, No. A149692, 2019 WL 2592630, at *14 (Cal. Ct. App. June 25, 2019), review denied (Oct. 9, 2019) (not required to accept defendant's unsupported, self-serving claims); and In re Marriage of Melone, 193 Cal. App. 3d 757, 763 (Ct. App. 1987) (rejecting appellant's counsel's unsworn oral declarations regarding appellant's alleged financial). Thus, Polymer80's demand that Plaintiffs dismiss their claims based on the untested say-so of its Executive Vice President and a putative expert lacks any basis in fact or in law.

Procedurally, Polymer80 is wrong that Plaintiffs were required to add allegations specific to Polymer80 in their Complaints when identifying Polymer80 as a Doe defendant. Nor does the absence of such allegations show that Plaintiffs did not conduct an "inquiry reasonable under the circumstances." Plaintiffs complied with CCP § 474 in naming Polymer80 as a Doe defendant, using the Judicial Council's approved form to amend their complaint, which does not, on its face,

require amending the allegations in the Complaints. Again, based on the information that was reasonably available to it at the time of the form amendment, Plaintiffs have acted in good faith in naming Polymer80 as a Doe defendant.

In fact, Polymer80 itself is acting with a disregard for the law and the facts in threatening to file its draft Motion before any discovery has been exchanged. As discussed above, Polymer80's draft Motion is essentially a demurrer dressed-up as a motion for sanctions. But it is premature to file a demurrer since the Court has stated that it will enter a coordinated schedule pursuant to which all defense demurrers must be filed. And it is premature to file a motion for sanctions2 as no discovery has been taken and the "evidence" Polymer80 has proffered is untested and incomplete on its face. Thus, if Polymer80 goes forward with filing its improper, premature, and baseless Motion in disregard of the Court's demurrer schedule, Plaintiffs reserve the right to seek sanctions based on Polymer80's misuse of C.C.P. § 128.7, consistent with subparagraph (h):

> A motion for sanctions brought by a party or a party's attorney primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, shall itself be subject to a motion for sanctions. It is the intent of the Legislature that courts shall vigorously use its sanctions authority to deter that improper conduct or comparable conduct by others similarly situated.

Polymer80 may also be liable for Plaintiff's attorney fees and costs in responding to its baseless motion. See C.C.P. § 128.5(a) ("A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay."). Judge Claster has already said that he will not go beyond the four corners of the Complaints in evaluating any demurrers and will assume the facts as pled are true. It is a non-starter to threaten dismissal and sanctions at this earliest stage of the case given the fact-intensive nature of Polymer80's untested and piecemeal allegations and thus there is no good faith basis to file Polymer80's draft Motion.

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[2] The draft motion currently states Polymer80 will file its flawed Motion on December 10, 2021, but Plaintiffs are entitled to 21 days to consider amending their Complaint under the §128.7 safe harbor plus two court days for the electronic service of Polymer's notice of the motion. Thus, the earliest filing date would be December 15, were it not for the Court's coordinated demurrer schedule, which will likely set a later date for demurrers.

Plaintiffs have no desire to keep any defendant in the case who does not belong. To that end, we are open to cooperating with any defendant who claims their products could not have been used in the Tehama massacre, including Polymer80, to exchange discovery related to such claims on a priority basis. We therefore trust that Polymer80 will not proceed with filing its baseless draft Motion and instead will focus on working with Plaintiffs to exchange discovery on the alleged facts that Polymer80 claims dictate its dismissal. We look forward to working expeditiously and cooperatively with Polymer80 to develop the evidence and facts relevant to the case.

Sincerely,

Amy K. Van Zant