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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 **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

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INTRODUCTION

Defendant Polymer80, Inc. ("P80") seeks the extraordinary relief of dismissal and monetary sanctions before a single defendant has answered the Complaints and before a shred of discovery has been exchanged. P80's motion is based on the fundamentally flawed assumption that the photographs it attaches to its motion depict all of the weapons used during the November 2017 Tehama massacre at the heart of the litigation. The problem is that P80 has not bothered to establish how it obtained those photographs or, more importantly, what they purport to show. The photographs themselves are of little help either, since even P80's own putative expert concedes that the weapons that are depicted lack sufficient detail and context to ensure accurate identification. P80's haphazard interpretation of unauthenticated photos does not justify sanctions against Plaintiffs.

Notably, P80 does not dispute that it manufactures and sells so-called "ghost gun" kits, including for AR-15 style rifles, nor that it did so prior to November 2017. Instead, it bizarrely complains that "counsel to plaintiffs in both proceedings have been unable or unwilling to determine the source(s) of [the perpetrator's] guns" and instead "have seen fit to sue in blunderbuss fashion a significant portion of the supposedly relevant and responsible industry upon a legal hypothesis founded completely on probability, speculation, and 'market share liability.'" Br. at 1. In doing so, P80 essentially complains that Plaintiffs rely on a market share theory of liability. But market share liability is an established theory of alternative liability under California law (*see Sindell v. Abbott Labs.,* 26 Cal.3d 588 (1980)). Even were it not, California Code of Civil Procedure ("CCP") § 128.7(b)(2) expressly permits a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. Plaintiffs cannot be sanctioned for advancing a recognized legal theory, P80's florid misapprehensions aside.

Though P80's complaints are many, none are a legitimate basis for sanctions of any kind, much less for the severe sanction of dismissal and the award of fees and costs. Indeed, P80 itself should be sanctioned for bringing a motion that is plainly made for an improper purpose, namely, to harass Plaintiffs and their counsel and to increase the time and money required to litigate the

case. *See* Cal. Civ. Proc. Code § 128.7(h). In Plaintiffs' response to P80 during the safe harbor period, Plaintiffs explained they are willing to consider exculpatory evidence on an expedited basis, but they will not be bullied into a dismissal on a record that does not show what P80 claims, which is where the record currently stands.

P80 is trying to exploit the very traits that make the gun products it sells so dangerous, *i.e.,* the lack of screening and traceability, to justify sanctioning Plaintiffs—each victims and heirs of a horrific massacre—at the very earliest stages of the litigation. P80 and its counsel know they lack sufficient cause to demand dismissal because Plaintiffs deconstructed their flimsy allegations in painstaking detail during the safe harbor period. But P80 barreled ahead with its flawed motion anyway. Doing so has caused substantial hardship to Plaintiffs, whose counsel has been forced to expend substantial resources in researching and responding to P80's specious letters and motion. That is time and money Plaintiffs could have spent preparing discovery requests that might help clarify the very issues P80 contests.

P80 has not come close to meeting its heavy burden of showing on the scant evidence presented and at this early stage that no "reasonable attorney would agree that [Plaintiffs claims against P80 are] totally and completely without merit." *In re Marriage of Flaherty*, 31 Cal.3d 637, 650 (1982). Consequently, P80's motion should be denied without hearing. Because P80 has persisted in pursuing a baseless sanctions motion that even its own purported expert does not support, the Court should use its inherent authority to issue an order to show cause why P80 and its counsel should not be sanctioned for this abuse of process.

RELEVANT FACT SUMMARY AND CASE HISTORY

The coordinated cases arise out of a shooting massacre in Tehama County, California that occurred on November 13-14, 2017. McFadyen Compl., ¶ 13; Cardenas Compl., ¶ 13. Spanning two days and at least eight crime scenes, Kevin Neal, a seriously mentally disturbed and dangerous man, who was legally barred at the time from possessing firearms, used multiple weapons, including at least two "ghost gun" AR-15 style weapons, to murder five people and

injure another eighteen.[1] Plaintiffs are victims of the Tehama shootings.

Plaintiffs filed the Complaints on November 14, 2019, with the McFadyen complaint filed on behalf of multiple plaintiffs in San Bernardino Superior Court and the Cardenas complaint filed on behalf of Francisco Cardenas in Orange County Superior Court. Compl., Nov. 14, 2019 (S.B. Super. Ct.), ROA #2 (OCSC Case No. 30-2019-01111797-CU-PO-CJC). Plaintiffs initially named thirteen defendants along with 1-100 Doe defendants. Plaintiffs completed service on all named Defendants by November 30, 2020. On February 3, 2021, Plaintiffs filed a form amendment to the complaints, identifying Doe 1 as Polymer80, Inc. Amendment to Compl., Feb. 3, 2021 (S.B. Super. Ct.).

The Complaints allege six causes of action against all Defendants: (1) negligence; (2) negligence per se; (3) negligent entrustment; (4) public nuisance; (5) violation of Cal. B&P § 17200 (unfair and unlawful sales practices); and (6) violation of Cal. B&P § 17200 (unfair marketing tactics). McFadyen Compl at 25-43; Cardenas Compl. at 22-37. Most of the allegations in the Complaints are made against Defendants as a group. For example, Plaintiffs allege:

> Upon information and belief, all DEFENDANTS designed, advertised, marketed, sold, distributed and/or offered, one or more "ghost guns" kits/parts that could be easily assembled into un-serialized AR-15 style "ghost gun" rifles that are prohibited under California's assault weapons ban to California residents leading up to and/or during November 2017.

McFadyen Compl., ¶ 11; Cardenas Compl., ¶ 11. In some cases, Plaintiffs made allegations specific to the Doe Defendants. *See, e.g.,* McFadyen Compl., ¶¶ 47-48; Cardenas Compl., ¶¶ 31-32. However, the allegations overwhelmingly are made against Defendants as a group. *See, e.g.,* McFadyen Compl., Counts I-VI; Cardenas Compl., Counts 1-VI.[2]

Of particular importance to the pending motion, Plaintiffs allege that the accused "Ghost Gun" "parts/kits that can be used to assemble unserialized AR-15 style rifles are fungible

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[1] *See, e.g.,* Shyong, Frank; Panzar, Javier; Serna, Joseph; Saint John, Paige (November 14, 2017), "Terror in Northern California town as gunman goes on rampage, sprays school with bullets," https://webarchive.loc.gov/all/20171116154316/http://beta.latimes.com/local/lanow/la-me-ln-norcal-elementary-school-shooting-20171114-story.html.

[2] The McFadyen and Cardenas cases were coordinated on May 7, 2021.

products" because they "share the same core characteristics and present an equivalent risk of danger to members of the PUBLIC like PLAINTIFFS." McFadyen Compl., ¶ 108; Cardenas Compl., ¶ 92. This allegation (among others) supports an alternative theory of liability, specifically, market share liability. *See, e.g.,* McFadyen Compl., ¶¶ 103-111; Cardenas Compl., ¶¶ 87-95. Defendants (as a group and as subgroups) are filing demurrers arguing whether, as a matter of law, a market share theory of liability can apply on the facts as pleaded or stipulated.

The McFadyen and Cardenas cases and the coordinated matter were each stayed until December 10, 2021. Min. Order Lifting Stay on Discovery, ROA # 234 (OCSC Case No. JCCP 5157). However, on August 27, 2021, while the cases were stayed and nearly seven months after P80 was added to the case, James J. McGuire at Greenspoon Marder LLP[3] sent substantively identical letters to counsel for Plaintiffs (one for the McFadyen case and one for the Cardenas case), arguing that certain photographs (which were not attached to the letters or otherwise identified with clarity) "reveal that each of [the rifles used during the massacre] contained a plainly metallic (apparently aluminum) lower receiver." Labat Decl., Ex. D at 2. P80 and its counsel concluded the letters with the following warning:

> . . . 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.

Id. at 4. As P80 had only requested a written response to "confirm" a dismissal that Plaintiffs were not going to make, Plaintiffs did not respond in writing.

Nearly three months later (and while the coordinated cases were still stayed), on November 19, 2021, Michael Marron of Greenspoon Marder sent an email to Plaintiffs' counsel

[3] Mr. McGuire was not admitted to practice as counsel of record in the coordinated matter until December 14, 2021. Min. Order and Order Admitting James J. McGuire, Esq. to Appear *Pro Hac Vice*, ROA #s 237, 240 (OCSC Case No. JCCP 5157).

stating, "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." Van Zant Decl., Ex. 2. However, the untested declarations proffered by P80 did not support the conclusions drawn in P80's motion and memorandum. *See* Van Zant Decl., Ex. 3. Plaintiffs detailed the reasons for rejecting P80's dismissal demand, concluding with:

> 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.

Id. at 4. Undeterred, P80 filed the present motion on December 16, 2021 and filed its revised memorandum on January 6, 2022. ROA #s 244, 262. P80 attached three declarations to its motions: (1) the Labat Declaration, an attorney affidavit in which Mr. Labat purports to "have personal knowledge of the facts stated herein or through a review of GM's litigation files over which I have care, custody, or control as well as documents retrieved from the files maintained by the Clerk of the Superior Court, County of Orange." (Labat Decl., ¶ 2); (2) the Vasquez Declaration, the statement of "an Independent Firearms Consultant who has been retained by" P80 for this matter (Labat Decl., Ex. B); and (3) the McCalmon Declaration, a statement from a P80 executive (Labat Decl., Ex. C).

The Labat Declaration attaches what Mr. Labat claims to be a true and correct copy of a letter to Laura Palmerin at Michel & Associates (a secretary or paralegal at a law firm representing other defendants in the coordinated cases but not P80) from a legal secretary at the Tehama County Counsel's office named Stacey I. Ogg and dated January 28, 2021, *i.e.,* before

P80 was added as a named Doe defendant.[4] Labat Decl., Ex. A at ¶ 3 and at 2. The Labat Declaration also appends a series of photographic images, which Mr. Labat avers were the "photographs" enclosed with the Ogg letter. *Id.*, Ex. A at 6-70. However, the Ogg letter states, "Enclosed please find the USB drive with copies of the photographs you requested." *Id* at 2. Exhibit A includes what appear to be copies of the envelope for the Ogg letter and the image of a USB drive. *Id.* at 3-5.

LEGAL STANDARD

Under Section 128.7, a court may impose sanctions if it concludes a pleading was filed for an improper purpose or was indisputably without merit, either legally or factually. *Guillemin v. Stein,* 104 Cal.App.4th 156, 168 (2002). A claim is factually frivolous if it is "not well grounded in fact" and 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." *Id.* at 167. In either case, to obtain sanctions, the moving party must show the party's conduct in asserting the claim was objectively unreasonable. *Id.* A claim is objectively unreasonable if "any reasonable attorney would agree that [it] is totally and completely without merit." *Flaherty,* 31 Cal.3d at 650; *Guillemin,* 104 Cal.App.4th at 168.

Federal case law construing Rule 11 (28 U.S.C.) is persuasive authority on the meaning of section 128.7. *Guillemin,* 104 Cal.App.4th at 167. Under Rule 11 (28 U.S.C.), even 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. *See Childs v. State Farm Mut. Auto. Ins. Co.,* I29 F.3d 1018, 1024 (5th Cir. 1994).

CCP § 128.7(c)(1) provides for a 21-day period during which a party may avoid sanctions by withdrawing the allegedly offending pleading or other document. *See also Li v. Majestic*

[4] It is unclear how Mr. Labat purports to have personal knowledge of the Ogg letter since he neither wrote nor received it and the letter was not prepared by nor received by his law firm. *See,* Labat Decl., Ex. A at 2. In fact, Mr. Labat does not explain how he came into possession of the Ogg letter at all. *Id.,* ¶ 3.

Indus. Hills LLC, 177 Cal.App.4th 585, 590-591 (2009). The Legislature included this safe harbor provision so that the statute would be remedial rather than punitive. *Li,* 177 Cal.App.4th at 591. If a party does not take advantage of the safe harbor period by withdrawing a frivolous filing, a court has broad discretion to impose sanctions. *Kojababian v. Genuine Home Loans, Inc.,* 174 Cal.App.4th 408, 421 (2009). However, the application of section 128.7 must not "conflict with the primary duty of an attorney to represent his or her client zealously," through innovative but sensible advocacy. *Guillemin,* 104 Cal.App.4th at 167-68. Moreover, a sanction must be limited to an amount that is sufficient to deter repetition of the improper conduct or comparable conduct by others who are similarly situated. Cal. Civ. Proc. Code § 128.7(d).

ARGUMENT

The central predicate for P80's entire motion is its unfounded assertion that the photographs it relies on (1) definitively show all weapons that were used in the Tehama shooting and (2) do so in sufficient detail that both all relevant markings and the material from which the weapons were made can be ascertained from mere photos with certainty. *See* Br. at 1-2 (police photographs depicting the rifles apparently used" in the massacre show that "the rifles [used] . . . were unequivocally *not* built from or connected with Polymer80 products of any kind.") (emphasis in original). P80's own expert witness concedes this much is true.

Nor does the case law that P80 relies on support its extreme application of CCP § 128.7. P80 does not come close to proffering undisputed facts to suggest that their products were not used during the Tehama massacre. Indeed, Plaintiffs carefully considered P80's contentions during the safe harbor period and meticulously refuted them. *See* Van Zant Decl., Ex. 3. Sanctions are to be imposed with restraint and in very limited circumstances, none of which exist here.

A. P80 Cannot Verify the Provenance or Subject Matter of the Photos.

P80 asserts it to be an "unassailable fact" that the weapons used in the Tehama massacre "were unequivocally and definitely not built from Polymer 80 kits or components." Br. at 9. However, precisely what the photos at issue show and where they came from is very much in dispute.

Neither P80 nor its counsel nor any of its declarants can vouch for the original provenance of the photographs, including who took the photos and when or even what they purport to be photographs of. This is because none of those parties were directly involved in obtaining the photographs in question—a non-lawyer at the law firm of Michel & Associates appears to have requested them, not P80. Thus, when P80 and their counsel repeatedly refer to the photographs as "police photos," they appear to be relying on information they have not bothered to share with Plaintiffs and the Court, or else they are outright guessing.

As the letter submitted by P80's counsel shows, it was not P80 or its counsel that obtained the photographs in question from the Tehama County Counsel's office. Instead, it appears that someone named Laura Palmerin at the law firm of Michel & Associates requested certain photographs from County Counsel. Labat Decl., Ex. A at 2 (January 28, 2021 Letter from S. Ogg to L. Palmerin). P80 does not describe who Ms. Palmerin is or what she claims to have requested that County Counsel provide. Nor does the letter from the County Counsel's office clarify the matter—it simply states, "Please find enclose the USB with copies of the photographs you have requested." *Id.* We do not know where County Counsel obtained the USB drive it sent to Ms. Palmerin, whether it contained other files, or whether a chain of custody was preserved. For all P80 has bothered to establish, that drive could contain photos taken at a CSI crime show set.

Likewise, P80 fails to establish the most foundational issue of what photographs were requested—*e.g.,* did Ms. Palmerin seek all known law enforcement photographs of the Tehama shooting crime scenes? And even if that is what Ms. Palmerin requested, is that what County Counsel actually provided? Neither P80 nor its counsel responded to address these most basic questions even though Plaintiffs raised each of these issues in their December 9, 2021 safe harbor response. Van Zant Decl., Ex. 3 at 1. P80 should have withheld filing its baseless sanctions motion unless it could answer these fundamental questions.

Likewise, while P80 has surmised that the photographs it relies on depict every weapon used in the Tehama massacre, there is nothing in the photos themselves that would confirm that supposition. Labat Decl., Ex. A at 6-70. Some of the photos appear to contain images of crime scene tape while others have yellow evidence markets, but not all of them do. Moreover, the

photos do not capture a 360-degree view of any single weapon nor do they offer a clear, unobscured view of most of the weapons shown. *See, e.g.,* Labat Decl, Ex. A at 6 (showing an unidentifiable weapon or weapon part laying on the roof of a car), 7 (depicting what appears to be an unidentifiable AR-15 style rifle obscured by the grass and weeds in which it was placed), and 8 (showing what appears to be an unidentifiable AR-15 style rifle jammed beneath a car seat). The list goes on and on. *See id.* at 9 (a rifle or portion of a rifle obscured in darkness on a passenger side car seat), 10 (possibly the same rifle or portion of a rifle depicted in better lighting), 11 (same); and 25 (depicting another AR-15 style rifle that may be a Bushmaster with a serial number).

Now that discovery is open, the parties will have the opportunity to subpoena original crime scene photographs and supporting declarations from the Tehama County Sherriff's Department and any other entities who might hold relevant evidence.[5] The unsourced and inconclusive photographs that P80 relies on in its motion are manifestly insufficient to support sanctions against Plaintiffs and their counsel.

B. Neither Vasquez Nor McCalmon's Testimony Establishes Whether P80 Parts/Weapons Were Used in Tehama.

P80 credulously relies on the Vasquez and McCalmon Declarations, but Plaintiffs need not accept P80's paid (Vasquez) and self-interested (McCalmon) testimony wholesale. *See, e.g., People v. Esquivel*, No. A149692, 2019 WL 2592630, at *14 (Cal. Ct. App. June 25, 2019), *review denied* (Oct. 9, 2019) (plaintiff not required to accept defendant's unsupported, self-serving claims). Nonetheless, even were Plaintiffs to credit the Vasquez and McCalmon Declarations as true, neither establishes that P80 could not have manufactured or supplied parts/kits used in assembling the ghost guns used in the Tehama massacre.

Mr. Vasquez, who appears to have a credible background in weapons, however, bases his

[5] Certain Plaintiffs are currently suing the Tehama County Sherriff's Department in a separate action for failing to disarm Mr. Neal pursuant to court order even though law enforcement knew he was in possession of a virtual arsenal. That co-pending litigation may impact how law enforcement responds to discovery requests in the coordinated cases. Moreover, it is unclear how thorough an investigation was conducted given that there was no active case to prosecute against Mr. Neal, who died of a self-inflicted gunshot wound during the massacre.

analysis solely on his "visual analysis of the photographs," something he does not purport to have expertise in doing. Labat Decl., Ex. B at 3-4. Indeed, Mr. Vasquez outright concedes that aside from a Bushmaster rifle and a Glock handgun, "the remainder of the rifles [depicted in the photos] were not identifiable via markings." *Id*. In Mr. Vasquez's own words, "the photos are not clear enough to make an identification." *Id.* at 7 (describing Photos 8, 9, and 10) (emphasis added); *see also id.* ("an identification cannot be made with the photos provided" (describing photos 43-44). This concession alone defeats P80's motion—its own expert cannot identify several of the weapons depicted in the alleged crime scene photographs.

It is no surprise that Mr. Vasquez cannot identify the majority of the weapons depicted in the photographs since they simply show a series of guns or gun parts *in situ*. Some of the weapons are barely discernible. *See, e.g.,* Labat Decl., Ex. A at photo 5. Even Mr. Vasquez does not know how many separate weapons are depicted in the photographs. *See, e.g.,* Labat Decl., Ex. B at 3 ("Photos 8 and 9 appears [sic] to be the rifle identified in photo 10. However, the photos are not clear enough to make an identification."). In short, the photographs are not susceptible to making firm conclusions about the weapons used in the massacre, something Mr. Vasquez, to his credit, readily admits.

Unfortunately, Mr. Vasquez loses credibility in purporting to conclude, based on the photographs alone, what substance was used in making some of the weapons shown. Common sense dictates that photos can easily be manipulated these days and thus the best way to assess whether the weapons used in the massacre are comprised of metal or a polymer would be to physically inspect the weapon in person, including to hold and handle it, if possible. Without such an inspection, Mr. Vasquez appears to be just guessing what material is depicted, perhaps based on his real-life assessment of how polymer-based weapons and metal-based weapons appear in-person, but not based on any stated expertise in photographic evidence. Mr. Vasquez has not provided any background information to suggest that he is an expert in materials analysis using photographs only.

For example, where Mr. Vasquez concludes that certain weapons in the photographs must be comprised of metal because they appear to have "scratches," a physical inspection would

reveal whether the "scratches" were painted on or were the result of actual wear and tear. Holding the weapons, even tapping on them would be a far more reliable method of determining what substance each weapon is comprised of (including, possibly that some of the weapons might be comprised of multiple substances).

Similarly, where Mr. Vasquez assesses that a particular photograph of a weapon does not show a "P80" or "Polymer80" marking and concludes that it therefore cannot be a P80 weapon/part, he does so based on his review of only limited angles of the weapon in question and his assumption that Mr. McCalmon's declaration is true. For example, Mr. Vasquez concludes that the unidentified rifle in photos 45-49 (Ex. A) have been coated with paint. Labat Decl., Ex. B at 8. He does not appear to consider whether such paint could cover any identifiable markings. *Ibid.* Similarly, in concluding that there are "no markings identifying this firearm" (photos 50-51) (Ex. A), Mr. Vasquez selected an image showing a closeup of right-hand side of the trigger. Ex. B at 9. While there do not appear to be any P80 markings depicted in this particular image, there is no basis to conclude that the left-hand side of the weapon or other portions of the weapon that are not shown also do not bear any identifiable markings. Rather, on the issue of whether the photographs definitively show P80 markings, Mr. Vasquez's conclusions are pure conjecture based solely on the limited angles of the weapons Mr. Vasquez was able to review.

Mr. McCalmon's declaration is even more flawed than Mr. Vasquez's declaration. Mr. McCalmon, who does not discuss any weapons expertise he might have outside of working in some unspecified capacity as "Vice President" at P80, claims to "have reviewed the photographs of the AR-15 style rifles that police recovered after Kevin Neal's shooting spree in November 2019." Labat Decl., Ex. C, ¶ 5. As already established, however, Mr. McCalmon can only be assuming that the photographs he reviewed are from the Tehama shooting; having had no hand in acquiring the photos, he has provided no evidence to suggest that he has any reason to know what the photographs actually document.

Worse, Mr. McCalmon asserts without any hint of embarrassment that he knows "with 100% confidence and certainty that none of the AR-15 type rifles [in the photos] is a Polymer80 product." *Id.,* ¶ 6. However, as established *supra,* the photographs are sufficiently incomplete and

poorly lit that even Mr. Vasquez—P80's paid expert—won't go so far as Mr. McCalmon will. Plaintiffs need not accept Mr. McCalmon's statements without question. *Esquivel*, 2019 WL 2592630, at *14.

P80's own declarations warrant skepticism of the very claims advanced as unassailable fact in its motion. Nothing—and certainly not Mr. Vasquez nor Mr. McCalum's declarations—requires Plaintiffs to abandon their claims at this early stage.

C. Plaintiffs Need Not Accept Defendants' Assertions as True.

P80 relies on *Bucur* to support its assertion that Plaintiffs are required to accept its untested declarations as true. However, its citation to *Bucur* is misleading. While *Bucur* does state, "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." *Ibid*. However, "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," an attorney need only "take into account [the adverse party's] evidence..." *Bucur v. Ahmad,* 244 Cal. App. 4th 175, 190 (2016) (*quoting Childs v. State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1025 (5th Cir.1994)). Plaintiffs have done precisely that and rejected P80's claims as unsubstantiated. *See* Van Zant Decl., Ex. 1. By contrast, in *Childs*, the plaintiff ignored "significant evidence" amassed during discovery. *Childs*, 29 F.3d at 1025. It was a failure to take the evidence amassed during discovery into account that subjected the *Childs* plaintiff to Rule 11 sanctions. *Id*. at 1026.

Here, P80 has not proffered Plaintiffs any admissible evidence or evidence of any usable value at all at this juncture. Moreover, P80 refused to work with Plaintiffs on expedited discovery, as Plaintiffs invited them to do, to provide such evidence if it could. Van Zant Decl., Ex. 3. Defendant provided only three inadmissible, unreliable, and self-serving declarations that do not support the assertions that P80 claims they do in their Motion and, as such, Plaintiffs have no obligation to rely on such submissions. 1 Witkin, Cal. Evid. 5th Hearsay § 145 (2021) ("Obviously, a statement in the declarant's own interest is inadmissible hearsay"); *Carlston v. Shenson*, 47 Cal. App. 2d 52, 56 (1941) ("It has never been the law that a self–serving sworn declaration of a party in a collateral and independent matter may be introduced as proving or

tending to prove the truth of such statement"); *Lak v. Lak*, 50 Cal. App. 5th 581 (2020) (benefits claim rejected where moving party did not corroborate his self-serving declarations of financial hardship with financial documents).

Unlike in *Bucur,* the declarations P80 relies on are offered by a P80 executive, a P80 lawyer, and a P80 paid "expert." Nor did Plaintiffs "bury [their] head[s] in the sand" at P80's claims, rather, P80 stonewalled Plaintiffs legitimate concerns about the obvious holes in P80's analysis. Section 128.7 motions are disfavored and that "as with Rule 11 (28 U.S.C.) sanctions, Code of Civil Procedure section 128.7 sanctions should be 'made with restraint.'" *Peake v. Underwood*, 227 Cal. App. 4th 428, 448 (2014), *as modified on denial of reh'g* (July 17, 2014). On these facts, P80 has not come close to establishing so much as a hint of wrongdoing by Plaintiffs. In fact, the record reflects wrongdoing by P80 in exaggerating the evidence proffered for the purpose of bullying Plaintiffs into a dismissal.

Nor should Plaintiffs be sanctioned for advancing in good faith a market share theory of liability in what P80 claims to be new contexts (an assertion Plaintiffs do not concede). As California courts have recognized, "[b]ecause our adversary system requires that attorneys and litigants be provided substantial breathing room to develop and assert factual and legal arguments, sanctions should not be routinely or easily awarded even for a claim that is arguably frivolous. *Id.* at 448; *see also Kojababian*, 174 Cal.App.4th at 421 (even in cases where the claim is frivolous, sanctions are not mandatory). P80's motion does not even come close to meeting the high bar set forth in Section 128.7 for seeking sanctions, particularly not such a severe sanction as dismissal.

Under CCP § 128.7, Plaintiffs certify in filing a pleading before the court that, "to the best of [its] knowledge, information, and belief, formed after an inquiry reasonable under the circumstance" that its claims are non-frivolous and "any other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery." Cal. Civ. Proc. Code § 128.7(b). Whether a CCP § 128.7 certification is violated is tested objectively. *Bockrath v. Aldrich Chem. Co., Inc*., 21 Cal.4th 71, 82 (1999) ("We measure the truth-finding inquiry's reasonableness under

an objective standard, and apply this standard both to attorneys and to their clients."). In signing the complaints and the amendment adding P80, Plaintiffs have averred that they have done just that. Nothing that P80 has proffered reasonably suggests otherwise.

Indeed, P80's motion is so bereft of virtue that it asserts that Plaintiffs somehow violated Section 128.7 by pleadings certain allegations "on information and belief." Br. at 4. However, such allegations are not only routine but are expressly approved. *See* Committee Notes, Amendments to Federal Rules of Civil Procedure, 146 FRD 401, 585 (1993) (interpreting FRCP 11 and noting that stating a factual contention "on information and belief" is sufficient to identify that further discovery is needed). P80's castigation of Plaintiffs for a routine pleading convention only serves to underscore the total lack of any substance to its Motion.

Likewise, P80 is mistaken that Plaintiffs were required to add allegations specific to P80 in their Complaints when identifying P80 as a Doe defendant. Nor were Plaintiffs obligated to add screenshots of P80's website to its Complaint. And the absence of such specific factual evidence does not support Defendant's bald assertion that Plaintiff's failed to conduct an inquiry reasonable under the circumstances. Importantly Defendant makes no claim that Plaintiffs did not comply with CCP § 474; Plaintiffs appropriately used California's Form Amendment to Complaint (a form approved by the California Judicial Council) to add P80 as a named Doe defendant. As Defendant should know, a Form Amendment to Complaint *does not require* Plaintiffs to modify the existing complaint in any fashion. Further, as discussed *supra*, Plaintiffs make the majority of their allegations as against all Defendants and thus it is of no moment that there is not a specific allegation about only P80. *See* Relevant Fact Summary, *supra.*

D. P80's Aversion to the Market Share Theory of Liability is Not Grounds for Sanctions.

P80 incongruously argues that because Plaintiffs allege that they are not able to identify precisely which ghost gun manufacturer or seller actually provided the kits/parts that Mr. Neal used in the Tehama massacre, Plaintiffs claims must fail. Br. at 15-17. This topsy-turvy argument essentially faults Plaintiffs for pleading the requirements for reliance on a market share theory of liability, which only applies where the provenance of a product cannot be ascertained.

In support of this strange claim, Defendant relies heavily on the *Bockrath* opinion. However, in *Bockrath*, the plaintiff filed a claim against "at least" 55 manufacturers of a wide array of products, contending that the products in combination had somehow caused his cancer. *Bockrath,* 21 Cal. 4th 77-78. Unfortunately, the plaintiff—despite some four attempts at pleading a viable claim—was not able to allege just *how* the alleged products might have caused his cancer. *Id.* Initially, the California Supreme Court remanded the case on demurrer so that the plaintiff could amend his complaint, noting: "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. But the *Bockrath* plaintiff was never able to allege a viable thesis of the case. *Id*.

Moreover, there is an explicit exception to the *Bockrath* rule when a plaintiff's claim is based on an alternate theory of liability, including the "market share" theory of liability Plaintiffs advance here. *See In re Yasmin & Yaz (Drospirenone) Mktg., Sales Pracs. & Relevant Prod. Liab. Litig.*, No. 09-md-02100, 2010 WL 3937414, at *5–9 (S.D. Ill. Oct. 4, 2010) (recognizing alternative theories of liability against multiple defendants); *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 597–598 (1980) (noting that, in California, there are several alternative bases for imposing liability on a defendant when a plaintiff cannot identify the particular defendant that manufactured the harmful product). Plaintiffs are advancing a well-recognized theory of liability.

CONCLUSION

P80 lacked a good faith basis to file its Motion but persevered in an effort to extract a dismissal through fear. The Motion should be denied, and the Court should issue an Order to Show Cause why P80 and its lawyers should not be sanctioned.

Dated: January 25, 2022

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