

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER**

MINUTE ORDER

DATE: 02/04/2022

TIME: 09:00:00 AM

DEPT: CX104

JUDICIAL OFFICER PRESIDING: William Claster

CLERK: Gus Hernandez

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT: None

CASE NO: **JCCP 5167**

CASE INIT.DATE: 03/26/2021

CASE TITLE: **Ghost Gunner Firearms Cases**

CASE CATEGORY: Civil - Unlimited

CASE TYPE: PI/PD/WD - Other

EVENT ID/DOCUMENT ID: 73670729

EVENT TYPE: Motion for Sanctions

MOVING PARTY: Polymer80, Inc.

CAUSAL DOCUMENT/DATE FILED: Motion - Other for dismissal, attorneys' fees & other sanctions, 12/16/2021

APPEARANCES

Anna Saber, Ric Fukushima, and Amy K Van Zant, specially appearing for Orrick Herrington & Sutcliffe LLP, present for Plaintiff(s).

Daniel Phung, from Porter Scott, APC, present for Defendant(s) telephonically.

Michael E. Gallagher, from Edlin Gallagher Huie + Blum, present for Defendant(s) telephonically.

Renzulli Law Firm by Howard Schilsky appearing telephonically for defendant Juggernaut Ta

Inc.; Livingston Law Firm by Crystal L. Van Der Putten appearing telephonically for defendant Tactical Gear Heads

Defendant Polymer80, Inc.'s Motion for Dismissal, Attorneys; Fees, and Other Sanctions Pursuant to CCP Section 128.7 ROA # 248

Tentative Ruling posted on the Internet.

The Court hears oral argument and confirms the tentative ruling. The Court's ruling is attached hereto and incorporated herein by reference.

Court orders clerk to give notice.

GHOST GUNNER FIREARMS CASES JCCP 5167

Defendant Polymer80, Inc.'s motion for sanctions under CCP § 128.7 is DENIED. Plaintiffs' request that the Court issue an order to show cause against Polymer80 (presumably pursuant to CCP § 128.7(c)(2)) is also DENIED.

Plaintiffs' opposition was filed one day later than the parties' stipulated timetable. Because Polymer80 filed a reply responding to the merits of the opposition, the Court finds Polymer80 will not be prejudiced if the Court considers the opposition.

The Court has not considered the reply declaration of Germain D. Labat. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1538 ["The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers."].)

I. Background

Polymer80 is one of a number of "ghost gun" part manufacturers sued by Plaintiffs, the victims of a shooting spree in Tehama County that was allegedly committed with ghost guns. Because ghost guns are untraceable by design, Plaintiffs filed suit against numerous ghost gun part manufacturers, seeking to proceed on a market share liability theory.

Polymer80 contends it is undisputed that it could not have manufactured the gun components at issue. Specifically, it argues that photographic evidence from the shooting spree shows guns with metal components, but Polymer80 doesn't manufacture metal components. Furthermore, the components manufactured by Polymer80 bear a distinct "P80" or "Polymer80" marking not seen in the photographs.

Polymer80 sent letters to Plaintiffs' counsel setting forth the foregoing on August 27, 2021. It now moves for sanctions under CCP § 128.7(b)(2) and (b)(3), arguing

the claims against it in the underlying complaints in *Cardenas* and *McFayden* are without foundation.

II. Standard of Review

“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.’” (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 440 [quoting *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167].) The party seeking sanctions bears the burden of showing “the [other] party’s conduct in asserting the claim was objectively unreasonable.” (*Ibid.*) “A claim is objectively unreasonable if ‘any reasonable attorney would agree that [it] is totally and completely without merit.’” (*Ibid.* [quoting *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.]

“[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.” (*Id.*, at p. 441.) “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.’ Instead, ‘to satisfy [the] obligation under [Code of Civil Procedure 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.’” (*Ibid.* [quoting *Childs v. State Farm Mut. Auto. Ins. Co.* (5th Cir. 1994) 29 F.3d 1018, 1025].)

III. Discussion

A. Polymer80’s Motion for Sanctions

1. Factual Frivolousness

As to factual frivolousness, Polymer80's motion is based on a single overarching premise: it makes non-metallic firearms parts stamped with a distinct mark, and photographs show the guns used in the shooting spree had metallic parts without the distinct mark. It contends that if Plaintiffs had conducted an adequate pre-filing investigation, this would have been obvious to them. Alternatively, by the time Polymer80 sent its August 27 letter, Plaintiffs had a duty to update their investigation to take account of this evidence, and they failed to do so.

As Plaintiffs correctly point out in opposition, there are too many unanswered questions about the photographs to support a sanctions motion. For example, and not exhaustively:

- The photographs were apparently provided by the Tehama County Counsel's office, but there is no testimony from the County Counsel's office authenticating them, only a declaration from Polymer80's counsel.
- The cover letter for the photographs (Labat Decl. (ROA 246), Ex. A) is addressed not to Polymer80's counsel, but to someone who works in the office of Michel & Associates, counsel for a different defendant. Even if Michel & Associates could be said to have procured the photographs on behalf of Polymer80, what basis does counsel for Polymer80 have to authenticate actions taken by another attorney?
- The cover letter says it includes a USB drive with "copies of the photographs you have requested." What was requested? The cover letter is silent on this point.

It appears Polymer80 attempts to address some of these flaws in a reply declaration. But the general rule is that new evidence is not allowed on reply, and the Court will not consider new evidence here. Polymer80, as the party

moving for sanctions, should have ensured its supporting evidence was proper from the beginning. Without proper authentication or chain of custody, the photographs—and the purported expert opinions based upon them—are not enough to show that Plaintiffs were objectively unreasonable in filing suit against Polymer80 or in failing to dismiss it after the August 27 letter.

Moreover, even if the photographs and opinions based upon them were properly authenticated, Polymer80 has not met its burden. As it correctly points out, when an attorney is confronted with new facts, he or she cannot ignore the new facts and act as though nothing has happened. The attorney must take into account the new facts and act accordingly.

For example, Polymer80 cites to *Childs v. State Farm Mut. Auto. Ins. Co.* (5th Cir. 1994) 29 F.3d 1018. In *Childs*, the defense amassed considerable evidence that the plaintiff's claims were fraudulent and presented it to plaintiff's counsel. Despite this evidence, "all of [counsel's] investigative efforts [could] be summed up as asking [plaintiff] and his alleged co-conspirators if they were frauds." (*Id.*, at p. 1025.) "Never did [counsel] conduct any affirmative discovery to test the verity of the evidence developed by [defendant]. He never conducted a single deposition. He never sent out any interrogatories, requests for production or requests for admission." (*Ibid.*) The Fifth Circuit affirmed sanctions against plaintiff's counsel, finding his investigation unreasonable.

Here, by way of contrast, Plaintiffs' counsel indicated their interest in "expeditiously and cooperatively" working with Polymer80 to "exchange discovery on the alleged facts that Polymer80 claims dictate its dismissal." (Van Zant Decl. (ROA 282), Ex. 3, at p. 4.) They did not bury their heads in the sand like the attorney in *Childs*. But rather than working with Plaintiffs to complete discovery that would "test the verity of the evidence" (*Childs, supra*, 29 F.3d at p. 1025), Polymer80 filed this motion. Polymer80 cannot on the one hand fault Plaintiffs for failing to investigate the evidence it developed and on the other hand move for sanctions instead of taking up Plaintiffs' offer to conduct that same investigation.

2. Legal Frivolousness

Although the argument is difficult to parse, Polymer80 also suggests Plaintiffs' complaint is *legally* frivolous, accusing it of "suing every gun component manufacturer indiscriminately and sorting them out later." (Reply (ROA 311), at p. 8.) The difficulty arises from the mismatch between Polymer80's argument, which assumes Plaintiffs' injuries are ultimately traceable to specific parts manufacturers, and Plaintiffs' theory of the case, which rests on market share liability. The point of market share liability is that defendants *cannot be* "sorted out," so liability is apportioned among the defendants in proportion to their market share.

For this reason, *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71 is inapposite: it was not a market share liability case. (See *id.*, at p. 80 [discussing what a plaintiff must allege to state a cause of action in toxic tort cases, "except in a case (unlike this one) governed by the principle of liability based on market share"].) *Bockrath* says it may be sanctionable for "[a] cancer-afflicted plaintiff [to] su[e] every manufacturer of an airborne substance found in the Los Angeles basin," but it does so in the context of a claim founded on injuries traceable to specific defendants. Plaintiffs' theory of the case is different from what *Bockrath* criticizes.

B. Plaintiffs' Request for Sanctions in Opposition

In opposition, Plaintiffs contend Polymer80's motion is sanctionable, and they ask the Court to sua sponte issue an order to show cause to that effect. (See CCP § 128.7(c)(2).) The request is unsupported by reasoned argument, so the Court will deny it. The Court further notes that if Plaintiffs felt the motion was sanctionable, they were free to file a motion for sanctions themselves. (See CCP § 128.7(h).) If Plaintiffs were unwilling to file such a motion (which they threatened to do in counsel's December 9, 2021 letter), the Court does not see why it should issue an

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OSC at Plaintiffs' request.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

Civil Complex Center
751 W. Santa Ana Blvd
Santa Ana, CA 92701

SHORT TITLE: Ghost Gunner Firearms Cases

**CLERK'S CERTIFICATE OF MAILING/ELECTRONIC
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JCCP 5167

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