

KEELY ROBERTS individually and as
parent and next friend of C.R. and L.R. and
JASON ROBERTS, individually and as a
parent and next of friend of C.R. and L.R.

Plaintiffs,

v.

SMITH & WESSON BRANDS, INC., et al.,

Defendants

Lead Case No. 22-LA-00000487

Consolidated with Case Nos.

22-LA-00000488; 22-LA-00000489;
22-LA-00000490; 22-LA-00000491;
22-LA-00000492; 22-LA-00000493;
22-LA-00000494; 22-LA-00000495;
22-LA-00000496; 22-LA-00000497;
22-LA-00000532; 24-LA-00000201;
24-LA-00000203; 24-LA-00000206;
24-LA-00000466; 24-LA-00000471;
24-LA-00000474; 24-LA-00000475;
24-LA-00000476; 24-LA-00000477;
24-LA-00000478; 24-LA-00000479;
24-LA-00000480; 24-LA-00000481

Hon. Jorge L. Ortiz

**DEFENDANTS BUDSGUNSHOP.COM, LLC'S MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR CERTIFICATION OF ISSUES
FOR INTERLOCUTORY APPEAL**

Defendant BudsGunShop.com, LLC ("Bud's"), by its undersigned counsel, respectfully submits this memorandum of law in support of its motion requesting that this Court certify for purposes of interlocutory appeal certain questions of law at issue in this Court's April 1, 2025 "Order on BudsGunShop.com, LLC and Red Dot Arms, Inc.'s Motions to Dismiss the Roberts and Related Complaints" ("Order").

ARGUMENT

Pursuant to Illinois Supreme Court Rule 308(a):

When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may

materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order.

See generally De Bouse v. Bayer, 235 Ill. 2d 544, 561 (2009). There are numerous issues of law addressed in the Order about which there are substantial grounds for disagreement. Reversal on several of those grounds would result in the dismissal of Plaintiffs' claims, thereby materially advancing the termination of the litigation

I. THERE ARE SUBSTANTIAL GROUNDS FOR DISAGREEMENT WITH THIS COURT'S HOLDING THAT PLAINTIFFS' CLAIMS AGAINST BUD'S ARE NOT BARRED BY THE PLCAA.

The PLCAA prohibits the institution of a "qualified civil liability action" in any state or federal court. 15 U.S.C. § 7902(a). The PLCAA provides substantive immunity from being sued, not just a defense from liability. As such, whether its immunity applies must be decided at the earliest available opportunity. *In re Academy, Ltd.*, 625 S.W.3d 19, 35-36 (Tex. 2021) (unanimously granting petition for mandamus and holding that requiring defendant to present a defense on the merits to case barred by PLCAA would defeat substantive immunity it provides). There are numerous legal issues regarding the PLCAA in the Order about which there are substantial grounds for disagreement.

A. Whether Municipal Ordinances Can Be Used to Satisfy the PLCAA's Predicate Exception.

The PLCAA's predicate exception applies only to an "action in which a [seller of firearms] knowingly violated a state or federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought" 15 U.S.C. § 7903(5)(A)(iii). This court held that Plaintiffs' claims satisfied the predicate exception based on an alleged violation of a Highwood municipal ordinance, concluding that it qualifies as a state

statute for purposes of the predicate exception because PLCAA’s definition of a “State,” 15 U.S.C. § 7903(7), includes “any political subdivision” of a state. Order at 8-9. Whether a municipal ordinance is a state statute for purposes of the predicate exception to the PLCAA is a question of law as to which there is substantial ground for difference of opinion. Prior to the Order, no other decision in the almost two decade period in which the PLCAA has been in effect allowed the predicate exception to be satisfied by an alleged violation of a municipal ordinance or an administrative regulation, both of which are forms of statutory law.

The Illinois Supreme Court has expressly held that there is a difference between a state statute and a municipal ordinance, even though both are forms of “statutory” law. *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d. 1, 17 (2009). *See also id.* at 309. (Kilbride, J., dissenting) (explaining that “that a ‘statute’ was understood to mean a legislative act of a state or country, while an ‘ordinance’ was understood as a law of a municipality”). Illinois precedent is clear that an ordinance enacted by a municipality is not a state statute. *See generally, Village of Lake Zurich v. Deschauer*, 310 Ill. 209, 211 (1923) (explaining that “an ordinance is not a statute”); *People ex rel. Goldman v. Harrison*, 223 Ill. 540, 544 (1906) (noting that “a city ordinance is not a statute”); *Masonic Fraternity Temple Ass’n v. City of Chicago*, 217 Ill. 58, 60 (1905) (explaining that “an ordinance is a law of the municipality which ordains and enforces it, it is purely local, for the regulation of affairs within such municipality, and is distinguished from general laws and statutes”); *Wood v. City of Chicago*, 205 Ill. 70, 72 (1903) (same).

Similarly, the Gun Control Act, 18 U.S.C. §§ 921 *et seq.* (“GCA”), provisions of which are given as examples of statutes capable of satisfying the predicate exception, 15 U.S.C. §§7903(5)(A)(iii)(I)-(II), also distinguishes between state statutes and published ordinances. 18 U.S.C. § 922(b)(2), states that it shall be unlawful for a federal firearms licensee to sell or deliver:

any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance.

(Emphasis added). Similarly, 18 U.S.C. § 922(c)(1), allows a federal firearms licensee to sell a firearm to a person who does not appear in person at its licensed premises subject to specific requirements, including execution of an affidavit stating that “my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside”) (emphasis added). The GCA specifically defines the term “published ordinance” as a:

published law of any political subdivision of a State which the Attorney General determines to be relevant to the enforcement of this chapter and which is contained on a list compiled by the Attorney General, which list shall be published in the Federal Register, revised annually, and furnished to each licensee under this chapter.

Id. § 921(a)(19) (emphasis added).

Given the statutory language in the PLCAA, and the difference between municipal ordinances and state statutes in Illinois law and the GCA, there is a substantial ground for difference of opinion and whether violation of the Highwood municipal ordinance can satisfy the predicate exception. Resolution of this legal issue would materially advance the termination of the litigation because it would result in the dismissal of all claims against Bud’s except for the negligent entrustment claim brought by the Uvaldo plaintiffs.

B. Whether the Highwood Assault Weapons Ban is Applicable to the Sale and Marketing of Firearms That Takes Place Entirely Outside of Highwood.

The predicate exception to the PLCAA can be satisfied only by the violation of a “statute applicable to the sale or marketing of” firearms. 15 U.S.C. § 7903(5)(A)(iii). Plaintiffs alleged that Bud’s aided and abetted and/or acted in concert with the Shooter to violate the Highwood

assault weapons ban based on his possession of the Subject Rifle in Highwood. This Court held that Highwood's ban on the possession of assault weapons was a statute applicable to the sale or marketing of firearms for purposes of the predicate exception.

This is a legal conclusion on which there is a substantial ground for difference of opinion based on the examples of statutes given in the predicate exception, which apply to the manner in which firearms are sold as opposed to their possession, 15 U.S.C. §§ 7903(5)(A)(iii)(I) & (II), and the decisions by the United States Court of Appeals for the Second and Ninth Circuits in the *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 402 (2d Cir. 2008) and *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132-38 (9th Cir. 2009) cases, which held that only statutes that specifically regulate the manner in which firearms are sold can satisfy the predicate exception. The fact that no other case has held that the predicate exception can be satisfied by the alleged violation of a statute governing the places in which firearms may be legally possessed confirms the substantial grounds for a difference of opinion on this issue. A decision on this issue in favor of Bud's would materially advance the termination of the litigation because it would result in the dismissal of all claims against it except for the negligent entrustment claim brought by the Uvaldo plaintiffs.

C. Whether an Illinois Municipal Ordinance Banning the Possession of Certain Firearms is Violated by the Sale of a Firearm Outside of the Municipality.

The Highwood assault weapons ban prohibited the Shooter from possessing the Subject Rifle within the geographic boundaries of Highwood. This Court concluded that Bud's aided and abetted and/or acted in concert with the Shooter to violate the Highwood assault weapons ban because it knew he lived in Highwood and was therefore likely to illegally possess the Subject Rifle at his residence. Bud's sold the Subject Rifle to the Shooter, but shipped it to another federally licensed firearms dealer, Red Dot Arms, Inc., which legally transferred the Subject Rifle to the Shooter at its licensed premises, located outside of Highwood.

Whether the sale and transfer of a firearm to a resident of a municipality that bans its possession results in a violation of the ordinance when the firearm is transferred to the resident outside the geographic boundaries of the municipality is a legal question. There is a substantial ground for difference of opinion based on the Illinois Supreme Court's decision in *Kalodimos v. Vill. of Morton Grove*, 103 Ill. 2d 483, 508 (1984) (holding that the ordinance only outlaws the possession of handguns in the village and "permits everyone to possess a handgun that . . . is kept . . . outside village boundaries"). *See also id.* at 526 (explaining that the municipality's "ordinance does not prohibit its residents from storing, selling, or using their handguns outside the village") (Moran, J., dissenting). A decision on this issue in favor of Bud's would materially advance the termination of the litigation because it would result in the dismissal of all claims against it except for the negligent entrustment claim brought by the Uvaldo plaintiffs.

D. Whether the Negligent Entrustment Exception Can Be Satisfied Based on the Shipment of a Firearm to Another Federally Licensed Firearms Dealer.

The negligent entrustment exception to the PLCAA can only be satisfied based on the "supplying of a [firearm] by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the [firearm] is supplied is likely to, and does, use the [firearm] in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B). This Court held that Bud's supplied the Subject Rifle to the Shooter because it sold it to him and shipped it to Red Dot for purposes of transferring it to the Shooter. Order 12-13.

Whether the person to whom a firearm is directly transferred is the person to whom the firearm is supplied for purposes of the negligent entrustment exception to the PLCAA is a legal issue. There is a substantial ground for difference of opinion based on the language in the PLCAA referring to the person to whom the firearm is supplied being the one to use it in a "manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B).

Bud's supplied the Subject Rifle directly to Red Dot not for its use, but for purposes of transfer to a customer after completion of a 4473 form and background check pursuant to the requirements of federal and Illinois law. Red Dot did not use the Subject Rifle in a manner "involving unreasonable risk of physical injury to the person or others," but instead legally transferred it to the Shooter. 15 U.S.C. § 7903(5)(B).

The negligent entrustment exception to the PLCAA is intended to apply only to direct entrustments of a firearm to the person who actually uses it in a manner a "manner involving unreasonable risk of physical injury to the person or others," 15 U.S.C. § 7903(5)(B), which is why the exception applies only to claims against sellers and not manufacturers, *id.* § 7903(5)(A)(ii). Prior decisions have held that the negligent entrustment exception to the PLCAA can be satisfied only when a firearm is transferred directly to the shooter, and not to another federal firearms licensee who then transfers it to the shooter. *See Minnesota v. Fleet Farm LLC*, 679 F. Supp. 3d 825, 842 (D. Minn. 2023); *Soto Bushmaster Firearms Int'l, LLC*, No. FBTCV156048103S, 2016 WL 8115354, at *14-15 (Conn. Super. Ct. Oct. 14, 2016), *rev'd in part on other grounds*, 202 A.3d 262 (Conn. 2019). In contrast, no other court has allowed the negligent entrustment exception to be satisfied based on the transfer of a firearm from one federal firearms licensee to another. To the contrary, the Illinois Supreme Court previously held that negligent entrustment does not apply to the transfer of firearms among federal firearms licensees for ultimate transfer to consumers. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 357 (2004). A decision on this issue in favor of Bud's would materially advance the termination of the litigation because it would result in the dismissal of the negligent entrustment claim brought by the Uvaldo plaintiffs.

II. WHETHER LIABILITY BASED ON AIDING AND ABETTING AND/OR ACTING IN-CONCERT CAN BE BASED ON AWARENESS INSTEAD OF INTENTIONAL ASSISTANCE.

This Court held that Bud's could be held liable on the basis that it aided and abetted and acted in concert with the Shooter to violate the Highwood assault weapons ban because it sold the Subject Rifle to him and was aware that he resided in Highwood and could not legally possess the Subject Rifle in his home. Order at 3-5. To avoid duplication of arguments, Bud's adopts the arguments in the Motion for Certification of Issues for Interlocutory Appeal filed by Red Dot regarding these issues.

There is also substantial ground for difference of opinion based on whether aiding and abetting and/or acting in concert liability for purposes of the predicate exception to the PLCAA, which is an issue of federal law, can be based on awareness of an unlawful act, as opposed to active participation in the unlawful act as "something that [it] wishes to bring about [and] that [it] seek[s] by [its] action to make it succeed." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 490 (2023) (citation and quotation marks omitted). A decision on this issue in favor of Bud's would materially advance the termination of the litigation because it would result in the dismissal of all claims against it except for the negligent entrustment claim brought by the Uvaldo plaintiffs.

III. WHETHER A FEDERAL FIREARMS LICENSEE WHO TRANSFERS A FIREARM TO ANOTHER FEDERAL FIREARMS LICENSEE OWNES A DUTY TO PERSONS WHO COULD BE HARMED BY THE CRIMINAL MISUSE OF SUCH FIREARMS BY THIRD PARTIES.

This Court held that Bud's owed a duty to Plaintiffs in connection with its sale of the Subject Rifle to the Shooter because of the reasonable foreseeability and likelihood of injury associated with the sale of firearms. Order at 6. There is substantial ground for difference of opinion whether Bud's owed a duty to Plaintiffs based on the Illinois Supreme Court's decision that federal firearms licensees "owe no duty . . . to prevent their firearms from ending up in the

hands of persons who use and possess them illegally.” *City of Chicago*, 213 Ill. 2d at 393-94; *see also Linton v. Smith & Wesson, a Div. of Bangor Punta Corp.*, 127 Ill. App. 3d 676, 678 (1984) (firearm industry member did not owe duty to use “reasonable means to prevent the sale its handguns to persons who are likely to cause harm to the public”). Resolution of this issue in favor of Bud’s would materially advance the termination of the litigation because it would result in the dismissal of all of Plaintiffs’ against it.

IV. WHETHER THE TRANSFER OF FIREARMS BETWEEN FEDERAL FIREARMS LICENSEES IS A PROXIMATE CAUSE OF CRIMES COMMITTED BY THIRD PARTIES USING THOSE FIREARMS.

This Court held that Bud’s sale of the Subject Rifle to the Shooter was a proximate cause of Plaintiffs’ damages because it was foreseeable that he would “commit the mass shooting” because “he was prohibited from possessing [it] where he lived.” Order at 7. Proximate cause is a legal issue and there is substantial ground for difference of opinion whether Bud’s sale of the Subject Rifle is a proximate cause of Plaintiff’s damages based on the Illinois Supreme Court’s decisions in the *City of Chicago*, 213 Ill. 2d at 395-414, and *Young v. Bryco Arms*, 213 Ill. 2d 433, 449, 455 (2004) cases that the transfer of firearms between federal firearms licensees is not the proximate cause of harm caused by criminal shootings because it merely creates a condition by which damages can be caused by the criminal use of such firearms by third parties. Resolution of this issue in favor of Bud’s would materially advance the termination of the litigation because it would result in the dismissal of all of Plaintiffs against it.

CONCLUSION

For the foregoing reasons, Bud’s respectfully requests that this Court certify the following questions of law as related to the Order such that Bud’s may pursue an interlocutory appeal:

1. Do Plaintiffs' claims against Bud's constitute a qualified civil liability action from which the PLCAA provides it with immunity unless an exception applies?

2. Whether a municipal ordinance is a "State statute" for purposes of the predicate exception to the PLCAA set forth in 15 U.S.C. § 7903(5)(A)(iii)?

3. Whether a municipal ordinance banning the possession of certain firearms within the geographic boundaries of the enacting municipality is a "statute applicable to the sale or marketing of" firearms that takes place entirely outside of the municipality for purposes of 15 U.S.C. § 7903(5)(A)(iii)?

4. Whether an Illinois municipal ordinance banning the possession of certain firearms within the geographic boundaries of the municipality is violated by the online sale of a firearm to a resident of that municipality by a federally licensed firearms dealer located in another state when the firearm is shipped to a federally licensed firearms dealer in Illinois?

5. Whether a firearms dealer that sells a firearm to a customer through the Internet and ships the firearm to a federally licensed firearms dealer, who in turn, transfers the firearm to the customer who purchased it, "supplies" the firearm to the customer who purchased it or the dealer to whom it shipped the firearm for purposes of 15 U.S.C. §§ 7903(5)(B)?

6. Whether a firearms dealer who transfers a firearm to another federally licensed firearms dealer can be held liable for negligent entrustment pursuant to 15 U.S.C. §§ 7903(5)(A)(ii) & (B) if the person to whom the other dealer transfers the firearm uses it "in a manner involving unreasonable risk of physical injury to the person or others"?

7. Whether liability based on aiding and abetting the violation of a state or federal statute applicable to the sale or marketing of firearms for purposes of 15 U.S.C. §§ 7903(5)(A)(iii)

can be based on anything less than acts by the defendant that seek to make the principal's violation of the statute succeed?

8. Whether liability based on aiding and abetting and/or in concert liability pursuant to Illinois law can be based on anything less than intentional acts or omissions specifically intended to assist the principal to commit the unlawful act?

9. Whether a firearms dealer that sells a firearm to a customer online and ships it to another federally licensed firearms dealer to transfer it to the customer pursuant to the requirements of state and federal law owes a duty to third parties who could be harmed if the customer to whom the firearm was sold uses it to commit crimes?

10. Whether the online sale of a firearm that is shipped to another federally licensed firearms dealer to transfer it to the customer pursuant to the requirements of state and federal law is a proximate cause of damages sustained by plaintiffs when the purchaser of the firearm uses it to commit multiple premeditated murders?

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Respectfully submitted,

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