

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

ALVINO CRAWFORD, et al.,)	
)	
Plaintiffs,)	Case No. 1916-CV17245
)	
v.)	
)	Division 10
JIMENEZ ARMS, INC., et al.,)	
)	Oral Argument Scheduled
Defendants.)	<u>Dec. 12, 2019 at 4 p.m.</u>

**PLAINTIFFS’ OPPOSITION TO JIMENEZ ARMS, INC.’S MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM FOR PUBLIC NUISANCE**

Plaintiffs Alvino and Beverly Crawford respectfully request that this Court deny Defendant Jimenez Arms, Inc.’s (“Jimenez Arms”) motion to dismiss for failure to state a claim for public nuisance. Because the petition details facts demonstrating that Jimenez Arms violated numerous federal laws and regulations in creating a public nuisance, RSMo. §§ 21.750(4) and (5)—which only apply to *lawful* actions—do not limit Plaintiffs’ ability to bring a claim for public nuisance against Jimenez Arms. Jimenez Arms’ motion to dismiss—its second in less than a month—misstates the law and should be denied.

I. FACTUAL BACKGROUND.

Federal law prohibits a person who is not federally licensed as a firearms dealer from engaging in the business of dealing in firearms.¹ It is also illegal to aid and abet,² or conspire to

¹ 18 U.S.C. § 922(a)(1) (providing that it is unlawful for any person “except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce”).

² See 18 U.S.C. § 2(a).

accomplish,³ dealing in firearms without a license. Plaintiffs’ Petition for Damages and Injunctive Relief alleges that Jimenez Arms “violated, conspired to violate, and aided and abetted the violation of numerous federal laws and regulations” Pet. ¶ 71. Specifically, it alleges that Jimenez Arms violated federal law by participating in a conspiracy with defendant James Samuels to enable Samuels’ unlicensed dealing in firearms by selling firearms directly to Samuels, an out-of-state buyer without a federal firearms license,⁴ and by failing to verify the identity of purchasers of the firearms it shipped.⁵ Pet. ¶ 71. Jimenez Arms also is alleged to have violated federal laws and regulations by making false statements in records required to be kept by a federally licensed manufacturer, and by failing to make appropriate entries in those records.⁶ Pet. ¶ 71.

The petition alleges that Jimenez Arms’ violations contributed to and worsened the public nuisance it helped create. Jimenez Arms “illegally sold 32 firearms to [James] Samuels,” Pet ¶ 57, the firearms trafficker. Jimenez Arms “knew or consciously avoided knowing that Samuels was

³ 18 U.S.C. § 371.

⁴ 18 U.S.C. § 922(a)(2) (prohibiting a licensed manufacturer from shipping or transporting a firearm in interstate commerce to a nonlicensee); 18 U.S.C. § 922(b)(3) (prohibiting a licensed manufacturer from selling or delivering a firearm to a person who the manufacturer knows or has reasonable cause to believe does not reside in the state in which the manufacturer is located); 27 C.F.R. § 478.99.

⁵ See 27 C.F.R. § 478.94 (providing, in part, that “[a] licensed importer, licensed manufacturer, or licensed dealer selling or otherwise disposing of firearms, and a licensed collector selling or otherwise disposing of curios or relics, to another licensee shall verify the identity and licensed status of the transferee prior to making the transaction.”).

⁶ See 18 U.S.C. § 922(m) (“It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.”); 18 U.S.C. § 924(a)(3) (providing, in part, that a federal firearm licensee commits an offense if the licensee knowingly “makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter”); 27 C.F.R. § 478.123(d) (requiring a licensed manufacturer to keep records of sales to nonlicensees); 27 C.F.R. § 478.124(a) (prohibiting a licensed manufacturer from selling or otherwise disposing of a firearm to a nonlicensee without recording the transaction on a firearms transaction record, Form 4473).

purchasing the firearms for re-sale,” Pet. ¶ 50, and Jimenez Arms thereby participated in and furthered Samuels’ trafficking scheme, in violation of federal law. Pet. ¶ 50. While a firearms manufacturer is obligated to maintain accurate transaction records, Pet. ¶ 24-25, Jimenez Arms twice falsely represented to the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) that it did not sell weapons to unlicensed individuals, Pet. ¶ 41, 51, notwithstanding the fact that it sold firearms directly to Samuels, an unlicensed individual. Pet. ¶ 4.

Jimenez Arms’ illegal dealings are alleged to have facilitated Samuels’ trafficking scheme from its infancy. Pet. ¶ 53. In November 2013, Jimenez Arms began dealing directly with Samuels. Pet. ¶ 36. That month, after a conversation with Samuels, Jimenez Arms illegally shipped six firearms to Samuels through the gun dealer Conceal & Carry, receiving payment from Samuels’ personal credit card. Pet. ¶¶ 36-37. In December 2013, Jimenez Arms shipped one order of seven handguns and another order of three handguns to Samuels. Pet. ¶¶ 38-39. About a year later, Jimenez Arms even shipped firearms *directly to Samuels home*. Pet. ¶¶ 42-44. By supplying him with firearms, Jimenez Arms helped build Samuels’ reputation as a gun trafficker. Pet. ¶ 53. Even after Samuels stopped buying Jimenez Arms guns directly from the manufacturer, Jimenez Arms did not withdraw from the gun trafficking conspiracy and continued to conceal its relationship with Samuels, representing to the ATF in 2017 that it did not sell firearms to unlicensed buyers. Pet. ¶¶ 49-51. Meanwhile, as Jimenez Arms concealed its illegal dealings and declined to notify law enforcement about Samuels, Samuels continued to traffic firearms, including purchasing at least 19 Jimenez Arms handguns. Pet. ¶ 52.

II. STANDARD OF REVIEW.

A claim is sufficiently pled if “it invokes principles of substantive law which entitle the plaintiff to relief and informs the defendant of what the plaintiff will attempt to establish at trial.”

Am. Eagle Waste Indus. LLC v. St. Louis County, 379 S.W.3d 813, 829 (Mo. 2012) (quoting *Memco, Inc. v. Chronister*, 27 S.W.3d 871, 876 (Mo. Ct. App. 2000)). On a motion to dismiss for failure to state a claim, a petition successfully states a claim “[i]f the petition asserts any set of facts that would, if proven, entitle the plaintiffs to relief” *Ste. Genevieve Sch. Dist. R-II v. Bd. of Aldermen of Ste. Genevieve*, 66 S.W.3d 6, 11 (Mo. 2002).

III. LEGAL ANALYSIS.

Defendant’s motion to dismiss is without basis in law and ignores central allegations in the petition. Plaintiffs’ allegations more than suffice to allow their claim for public nuisance against Jimenez Arms to proceed. For this reason, Jimenez Arms does not—and cannot—argue that the petition fails to allege facts meeting the elements of public nuisance. It argues only that the state of Missouri has abolished the cause of action for public nuisance. However, in so doing, Jimenez Arms ignores the text of the statute on which it relies, which refers only to the “lawful design, marketing, manufacture, distribution, or sale of firearms or ammunition.” Because Plaintiffs have alleged that the public nuisance was caused by Jimenez Arms’ *unlawful* acts, the motion to dismiss should be denied.

Under Missouri law, a claim for public nuisance may be brought to remedy an “unreasonable interference with a right common to the general public,” *City of Greenwood v. Martin Marietta Materials, Inc.*, 299 S.W.3d 606, 616 (Mo. Ct. App. 2009), and a “special injury not common to the public generally.” *Kelly v. Boys' Club of St. Louis, Inc.*, 588 S.W.2d 254, 256-57 (Mo. Ct. App. 1979). The petition alleges that Jimenez Arms’ violations of law created an ongoing public nuisance in and around the Kansas City, Missouri community that caused special harm to Plaintiffs—namely in causing the wrongful death of their son. Pet. ¶¶ 72-74. Jimenez Arms’s illegal conduct “place[d] a substantial number of small, cheap handguns often used in

crimes into the community” causing an “unlawful proliferation of handguns [which] interferes with rights common to the general public.” Pet. ¶¶ 72-73. As a result of the unlawful proliferation of handguns that Jimenez Arms enabled through its illegal actions, Plaintiffs suffered a special injury—the murder of their son with a Jimenez Arms pistol. Pet. ¶ 74.

Jimenez Arms’ argument that RSMo. §§ 21.750(4)-(5) “abolished the common law tort of public nuisance,” Def. Br. at 1, has no support in the text of the statute or in the single appellate decision interpreting those provisions. RSMo. § 21.750 preempts local regulation of firearms and in no way abolishes the tort of public nuisance. To be sure, subsections 4 and 5 of that statute limit *certain* public nuisance actions against firearms manufacturers and dealers—namely those claims brought by public entity plaintiffs and premised solely on tortious actions that do not violate Missouri or federal statutes. But RSMo. §§ 21.750(4)-(5) do not apply to Plaintiffs’ public nuisance claim because Plaintiffs are private individuals whose claim is based on Jimenez Arms’ *unlawful* conduct.

Taking RSMo. § 21.750(4) first: that subsection provides that “[t]he **lawful** design, marketing, manufacture, distribution, or sale of firearms or ammunition to the public is not an abnormally dangerous activity and does not constitute a public or private nuisance.” (emphasis added). The word “lawful” describes those activities that the legislature deemed to not be a public nuisance, making plain that *unlawful* activities still may constitute a public nuisance. Because Plaintiffs allege that Jimenez Arms violated federal firearms laws and regulations in creating a public nuisance, the public nuisance claim is premised on Jimenez Arms’ unlawful activities; therefore, RSMo. § 21.750(4) is inapplicable.⁷

⁷ However, if this Court determines that the statute is ambiguous, this Court should resolve any doubt about RSMo. § 21.750(4)’s application to Plaintiffs’ claim in favor of Plaintiffs: because RSMo. 21.750(4) does not clearly or explicitly abrogate a private individual’s common law public

Nevertheless, Jimenez Arms insists that the Missouri legislature has “abolished” and “directly abrogated” Plaintiffs’ public nuisance claim. That reading twists the text of the statute by inserting words into the statute or by treating the word “lawful” as excess verbiage without meaning. A court “[is] not to supply, insert, or read words into a statute unless there is an omission plainly indicated and unless the statute as written is incongruous, unintelligible, or leads to absurd results.” *State ex rel. May Dep’t Stores Co. v. Weinstein*, 395 S.W.2d 525, 527 (Mo. Ct. App. 1965). Yet that is exactly what Jimenez Arms asks this Court to do: to replace “lawful” with “lawful or unlawful” in RSMo. § 21.750(4). To do so would be to willfully ignore the intent of the Missouri legislature. *See State ex rel. Missouri Local Gov’t Retirement Sys. v. Bill*, 935 S.W.2d 659, 666 (Mo. Ct. App. 1996) (“We should not interpret statutes in a way which will render some of their phrases to be mere surplusage. We must presume that every word of a statute was included for a purpose and has meaning.”).

Jimenez Arms also quotes in full a plainly irrelevant subsection that limits the ability of public entities to bring actions for “damages, abatement or injunctive relief” resulting from “lawful” firearms industry activities. *See* RSMo. § 21.750(5). On its face, this provision applies only to suits brought by public entities, not suits brought by private individuals like Plaintiffs.⁸

The single appellate court decision construing RSMo. §§ 21.750(4)-(5) involved a public nuisance action, brought by a city, that did not allege illegal activity by the defendants. In that case, the City of St. Louis’ public nuisance claim against firearms industry defendants was

nuisance claim against a firearms industry defendant that violated federal law and regulations, that common law claim remains valid. *See State ex rel. KCP&L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 20 (Mo. Ct. App. 2011) (“Where the legislature intends to preempt a common law claim, it must do so clearly. Unless a statute clearly abrogates the common law either expressly or by necessary implication, the common law rule remains valid.”) (quoting *State ex rel. Brown v. III Invs., Inc.*, 80 S.W.3d 855, 859-60 (Mo. Ct. App. 2002)).

⁸ RSMo. § 21.750(5) also applies only to suits premised on “lawful” firearms industry conduct.

premised on those defendants' tortious actions. *See City of St. Louis v. Cernicek*, 145 S.W.3d 37, 38-39 (Mo. Ct. App. 2004). In *Cernicek*, the city's central argument was that the defendants' tortious acts and omissions should be considered "unlawful" conduct that exempted the city from the limitations imposed by RSMo. §§ 21.750(4)-(5). *Id.* at 42. But the court correctly concluded that the city's interpretation would read words out of the statute. *Id.* at 43 ("[S]ubsection 4 would be mere idle verbiage if we were to accept The City's argument."). Therefore, the court upheld the dismissal of the city's claim, finding that RSMo. §§ 21.750(4)-(5) applied to limit public nuisance suits premised only on tortious activities. *Id.* at 42-43.

Plaintiffs' public nuisance claim is very different from the city's claim in *Cernicek*. By pleading facts showing that Jimenez Arms violated federal laws and regulations, Plaintiffs have shown that their claim is not barred by Missouri law because RSMo. §§ 21.750(4)-(5) do not limit public nuisance claims brought by private individuals against firearm manufacturers and dealers based on illegal conduct.

IV. CONCLUSION.

For the foregoing reasons, Plaintiffs request that this Court deny Jimenez Arms' motion to dismiss for failure to state a claim for public nuisance.

Dated: November 8, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of November 2019, the foregoing document was filed with the Clerk of the Court using the Court's E-Filing system which electronically sends notice to all counsel of record.

/s/ Eric L. Dirks _____
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