IN THE CIRCUIT COURT OF LAKE COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

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

Plaintiffs,

v. No. 22-LA-00000487

SMITH & WESSON BRANDS, INC., SMITH & WESSON SALES COMPANY, SMITH & WESSON, INC. BUDSGUNSHOP.COM, LLC, RED DOT ARMS, INC., ROBERT CRIMO, JR., AND ROBERT CRIMO, III,

Defendants,

and

CYBEAR INTERACTIVE, LLC, WATAUGA GROUP LLC, and CLANDESTINE MEDIA GROUP, LLC,

Respondents in Discovery.

ROBERTS, JOYCE, & _JAFFE_ PLAINTIFFS' OMNIBUS OPPOSITION TO THE MOTIONS TO DISMISS OF THE SMITH & WESSON DEFENDANTS, BUDSGUNSHOP.COM, LLC, & RED DOT ARMS, INC.[1]

[1] This brief is jointly filed on behalf of Plaintiffs in the following actions: *Roberts* (22 LA 487), *Sundheim* (22 LA 488), *Straus* (22 LA 489), *Rebollar-Sedano* (22 LA 490), *Bennett* (22 LA 491), *Rodriguez* (22 LA 492), *Tenorio* (22 LA 493), *Vergara* (22 LA 494), *Toledo* (22 LA 495), *Zeifert* (22 LA 496), *Aguilar* (24 LA 475), *Castellanos* (24 LA 476), *Castillo* (24 LA 477), *Gutman* (24 LA 478), *Medina* (24 LA 479), and *Ring* (24 LA 480) (collectively, the "*Roberts* Plaintiffs"); *Joyce* (24 LA 201), *Z. Kolpack* (24 LA 203), and *S. Kolpack* (24 LA 206) (collectively, the "*Joyce* Plaintiffs"); and *Jaffe* (24 LA 481).

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PRELIMINARY STATEMENT

For years, Smith & Wesson has engaged in an unfair and deceptive marketing strategy aimed at thrill-seeking young men who want to act out the perverse militaristic fantasies that Smith & Wesson sells them. One of the customers reached by Smith & Wesson's marketing was Robert Crimo III (the "Shooter"), an unstable, impressionable young man obsessed with violence and weapons. Influenced by Smith & Wesson's marketing, the Shooter acquired a Smith & Wesson Military & Police ("M&P") rifle from two firearm retailers, which sold and transferred the rifle to him despite knowing that he lived in a town that banned assault weapons. Then, on July 4, 2022, the Shooter—a self-styled "Master Gunnery Sergeant"—selected his Smith & Wesson M&P rifle from his arsenal to achieve maximum destruction and used that weapon to terrorize his hometown.

Perched on the roof of a building on Central Avenue in Highland Park, Illinois, like the military marksman he fantasized himself to be, the Shooter indiscriminately shot paradegoers attending the town's annual Fourth of July Parade (the "Shooting"). The Shooter fired 83 shots from his M&P rifle in a matter of seconds, killing seven people, injuring 48 others, and traumatizing a community. Among the injured, killed, and traumatized that day were Plaintiffs, 52 men, women, and children from 19 Lake County families. They had set out to enjoy a holiday parade—the first in Highland Park since the COVID-19 pandemic—only to find themselves in a mass shooting.

The Shooting and its continuing effects on Plaintiffs' lives are the foreseeable result of a chain of events initiated by Defendants Smith & Wesson Brands, Inc., Smith & Wesson Sales Company, and Smith & Wesson, Inc. (together, "Smith & Wesson"), Budsgunshop.com, LLC ("Bud's"), and Red Dot Arms, Inc. ("Red Dot") (with Bud's, the "Gun Store Defendants"). Defendants ask this Court to dismiss Plaintiffs' Complaints, asserting that they cannot possibly be held accountable for their wrongdoing. Defendants rely on a laundry list of legal theories, but their

arguments for dismissal disregard Plaintiffs' well-pleaded allegations and fail under established state and federal law.

First, Plaintiffs sufficiently allege that Smith & Wesson's marketing violates Illinois' prohibitions on unfair and deceptive trade practices under the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") and the Illinois Uniform Deceptive Trade Practices Act ("IUDTPA"). ICFA and IUDTPA have long barred unlawful trade practices by all companies operating in Illinois, and their application to the firearms industry was made crystal clear by the passage of the Firearms Industry Responsibility Act ("FIRA"), which declares that gun companies that market firearms in a deceptive or unfair manner are in violation of ICFA. Smith & Wesson's argument that it owed no duty to Plaintiffs is contradicted by this statutory regime, and its constitutional challenge to FIRA falls under the weight of precedent.

Second, Plaintiffs sufficiently allege in-concert liability claims against the Gun Store Defendants. Bud's, an online firearms retailer, and Red Dot, a local brick-and-mortar store, are federally licensed firearms dealers charged with knowledge of state, local, and federal firearms laws. Yet they sold and transferred the M&P assault rifle to the Shooter, despite knowing that he lived in Highwood, Illinois, a jurisdiction that has long banned assault weapons. The stores argue that their then-19-year-old customer "could have" kept the assault rifle at a "hunting cabin" outside Highwood. But this rank speculation finds no support in the Complaints or in any evidence or affidavits that the Gun Store Defendants were free to present on their 2-619 motions.

Third, Defendants argue that none of them could have proximately caused Plaintiffs' harm because the Shooting was a criminal intervening act. This argument falls flat because a mass shooting is a foreseeable result of Defendants' conduct. Thus, under black-letter Illinois law, the Shooter's actions do not supersede Defendants' own wrongful conduct.

Fourth, Defendants' reliance on the federal Protection of Lawful Commerce in Arms Act ("PLCAA") fails because PLCAA contains an exception for suits in which defendants violated laws applicable to the sale or marketing of firearms, which is precisely what Plaintiffs plead here.

At this threshold stage of the litigation, Plaintiffs have met their obligation to state viable causes of action, none of which is barred by Defendants' affirmative defenses. These cases should proceed to discovery.

STATEMENT OF FACTS

Smith & Wesson is a major firearms manufacturer that owns the leading share of the assault rifle market. ¶¶ 20–23, 53.[2] Smith & Wesson's success is due, in part, to its strategy of deceptively and unfairly marketing its assault rifles to appeal to the impulsive, risk-taking tendencies of civilian adolescent and post-adolescent men like the Shooter—the same category of consumers that Smith & Wesson has watched, time after time, commit mass shootings in the United States using such weapons. ¶¶ 6–9, 13, 37, 60–62, 76, 81, 89–102, 159, 163, 181, 202, 207. In just the last decade, Smith & Wesson's M&P assault rifles have been used to kill at least 50 people and injure more than 150 others in mass shootings around the nation. ¶¶ 3, 6, 51–56, 91.

Rather than reconsider its marketing practices given these devastating events, Smith & Wesson has continued to knowingly and intentionally exploit the violent and impulsive tendencies of young men like the Shooter through misleading and perverse marketing that encourages these disaffected youth to act out their video-game combat fantasies. ¶¶ 93–102. Smith & Wesson intentionally, unfairly, and deceptively markets its M&P rifles as approved, endorsed, and/or used

[2] Citations to "¶" are to paragraphs of the Amended Complaint filed in *Roberts, et al. v. Smith & Wesson Brands, Inc., et al.*, No. 22-LA-00000487, on July 2, 2024, unless otherwise indicated. Citations to "S&W Br.," "Bud's Br.," and "Red Dot Br." are to the motion-to-dismiss briefs filed by Smith & Wesson, Bud's, and Red Dot, respectively, on September 16, 2024.

by the U.S. military, even though the rifles are marketed through domestic civilian consumer channels and are not used by on-duty U.S. service personnel. ¶¶ 63–71, 75. As just one example, Smith & Wesson uses promotional images of individuals dressed to look like U.S. military personnel holding what appear to be M&P rifles, even though Smith & Wesson's "Military and Police" rifles have never been used by the military. ¶¶ 63–66, 74–75. As the U.S. House of Representatives Committee on Oversight & Reform found, "Smith & Wesson's marketing campaigns have consistently contained dangerous themes and messages," its "advertisements emphasize the AR-15-style rifle's military roots and seeks to appeal to customers' masculinity," and "Smith & Wesson has also claimed military and law enforcement endorsements for its product in advertisements." ¶ 61. Smith & Wesson's former CEO has referred to this strategy as the "halo effect," meant to confer credibility to the M&P line of products in the eyes of civilian customers. ¶ 69.

Smith & Wesson further markets its assault weapons to impulsive young men by appealing to their propensity for risk and excitement, including by mimicking first-person shooter games—in which players shoot at human targets. ¶¶ 76–81. Smith & Wesson knows that adolescents and young men between the ages of 15 and 24—like the Shooter—are highly susceptible to advertising and are more likely than other age groups to engage in thrill-seeking, violent, and impulsive behavior. ¶¶ 92–102. Thus, Smith & Wesson has set its sights on young boys, with the intent of hooking them on assault rifles at an early age so that they will become consumers later in life. ¶¶ 83–84. To do this, Smith & Wesson advertises its assault rifles on social media, through official accounts and affiliated influencers, and notably does not employ any age gates to prevent minors from accessing its marketing materials. ¶¶ 85–88.

Upon information and belief, the Shooter purchased the M&P assault rifle used in the Shooting because he consumed and was influenced by Smith & Wesson's unfair and deceptive marketing, which targeted Illinois consumers and reasonably appeared to support and encourage civilians to act out militaristic fantasies against other civilians. ¶ 125. The Shooter was exactly the type of unstable and impressionable young consumer susceptible to Smith & Wesson's marketing and more likely to engage in dangerous behavior because of that marketing. ¶ 103. He was obsessed with violence and filled with hatred and depressive thoughts. ¶¶ 103–17. The Shooter documented his obsession with violence and weapons in social media posts and music videos, posted photos holding guns while wearing military fatigues, played first-person shooter games like Call of Duty, and gave himself the rank of "Master Gunnery Sergeant" on message boards. ¶¶ 108–17.

One medium through which the Shooter was exposed to Smith & Wesson's M&P marketing was the website for online retailer Bud's. ¶ 126. In early 2020, the Shooter purchased the M&P rifle used in the Shooting from Bud's' website. ¶ 124. To purchase this weapon, the Shooter provided Bud's with his current address in Highwood. ¶ 127. However, Highwood's Code of Ordinances prohibits residents from acquiring or possessing assault weapons (the "Ordinance").[3] ¶¶ 127, 245. As a federally licensed gun dealer, Bud's is charged with knowing relevant firearms laws, including the Ordinance. ¶ 253. But Bud's sold the M&P rifle to the Shooter despite knowing that it was illegal for him to possess it where he lived. ¶¶ 127, 266.

Bud's then shipped the M&P rifle to dealer Red Dot in Lake County, Illinois. ¶ 133. As a federally licensed gun dealer, Red Dot is likewise obligated to know relevant firearms laws,

[3] *See* Highwood Code Ord. § 6-7-2(A) ("No person shall manufacture, sell, offer or display for sale, give, lend, transfer ownership of, acquire or possess any assault weapon or large capacity magazine.").

including the Ordinance. ¶ 253. Red Dot ultimately transferred the assault rifle to the Shooter in February 2020 after conducting a background check and verifying the Shooter's ID, both of which disclosed to Red Dot that the Shooter's current residence was in Highwood. ¶¶ 128–29. Red Dot thus transferred the M&P rifle to the Shooter despite knowing that it was illegal for the Shooter to possess it where he lived. ¶¶ 127, 268–70.

On July 4, 2022, the Shooter took his M&P rifle to Highland Park's annual Fourth of July Parade—the first one after two years of cancellations due to COVID-19. ¶¶ 1, 139. While he owned numerous firearms by that point, he chose the M&P rifle because of its militaristic qualities—as advertised—and its perceived fit for carrying out his mission of inflicting the most violence possible. ¶ 140. And that is exactly what he did to the paradegoers, including Plaintiffs:

C.R., just an eight-year-old boy at the time, who loved soccer and playing with his twin brother, was shot and nearly died at the scene. CPR from a first responder saved C.R.'s life, but he will never walk again. Sheila Gutman fled the Shooting on one leg, helped along by her husband and son, because one of the bullets destroyed her foot. She has since endured more than ten surgeries and a months-long hospitalization. Jacki Sundheim, Stephen Straus, and Nicolas Toledo were shot and killed, leaving behind their grief-stricken families. And still other Plaintiffs were shot and wounded in front of their families and friends: Lauren Bennett and Alan Castillo, shot in the back; Lorena Rebollar Sedano, Keely Roberts, and Dana Ring, each shot in the foot; Mirna Rodriguez, shot in the backside; C.M., Sylvia Vergara, Zoe Kolpack, and Stephen Kolpack, each shot in the leg; Michael Zeifert, shot in the chest; Adan Aguilar, shot in the stomach; Ashlee Jaffe, shot in the hand; Debbie Samuels and Michael Joyce, grazed by bullets while trying to help their families flee the mayhem. Castelia Castellanos broke her knee when she fell running for her life with her young granddaughter in her arms, and Barbara Medina fell and fractured her elbow in the

stampede that followed the Shooting. Plaintiffs witnessed scenes of unspeakable horror, experienced life-changing and catastrophic injuries, and continue to suffer from the physical and emotional trauma of the Shooting. Many will need expensive, specialized medical care for the rest of their lives; all recount stories of fleeing a battlefield.[4]

LEGAL STANDARD

Defendants seek dismissal of Plaintiffs' Complaints under Section 2-615 and 2-619 of the Illinois Code of Civil Procedure. A Section 2-615 motion tests "the legal sufficiency of the complaint based on defects apparent on its face," *Marshall v. Burger King Corp*., 222 Ill.2d 422, 429 (2006), while Section 2-619(a)(9) calls for dismissal when the movant "admits the legal sufficiency of the complaint but asserts another affirmative matter that defeats the claim." *Am. Fam. Mut. Ins. Co. v. Krop*, 2018 IL 122556, ¶ 13. In ruling on such motions, a court must consider the complaint as a whole and interpret all pleadings and supporting documents in the light most favorable to the non-moving party. *Doe v. Catholic Diocese of Rockford*, 2015 IL App (2d) 140618, ¶ 27; *Marshall*, 222 Ill.2d at 429. Disputed questions of fact are not to be decided on a motion to dismiss. *Henderson Square Condo. Ass'n v. Lab Townhomes LLC*, 2014 IL App (1st) 130764, ¶ 81. In determining whether to grant a Section 2-615 or Section 2-619 motion to dismiss, "a court must accept as true all well-pleaded facts and reasonable inferences drawn therefrom." *Aboufariss v. City of de Kalb*, 305 Ill. App. 3d 1054, 1067 (2d Dist. 1999).

ARGUMENT

I. Plaintiffs Have Stated Claims for Relief Under Illinois Law

Plaintiffs have stated claims under ICFA and IUDTPA, for negligence, for in-concert liability, and for intentional and negligent infliction of emotional distress. Smith & Wesson moves

[4] *See generally* Roberts, Joyce and Jaffe Plaintiffs' Complaints.

to dismiss these claims, asserting that (1) Plaintiffs do not have standing to bring ICFA and IUDTPA claims; (2) Smith & Wesson owed no affirmative duty to Plaintiffs; and (3) Plaintiffs fail to sufficiently allege proximate cause. S&W Br. 3–10. The Gun Store Defendants make similar arguments with respect to duty and proximate cause and additionally argue that Plaintiffs have not pled in-concert liability.[5] As shown below, however, Defendants rely on inapposite case law and improperly ignore the well-pleaded allegations of the Complaints, which this Court is required to accept as true at the motion-to-dismiss stage. *Aboufariss*, 305 Ill. App. 3d at 1067.

A. Plaintiffs Have Standing to Bring, and Sufficiently Allege, ICFA Claims

Plaintiffs bring claims under ICFA, which provides that "unfair or deceptive acts or practices . . . in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby." 815 ILCS 505/2. ICFA should "be liberally construed." *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 503 (1996). Although ICFA always permitted suits against the gun industry, in 2023, the Illinois General Assembly amended ICFA through FIRA, which provides that it is unlawful for

> any firearm industry member, through the sale, manufacturing, importing, or marketing of a firearm-related product, to . . .
>
> (2) Advertise, market, or promote a firearm-related product in a manner that reasonably appears to support, recommend, or encourage individuals to engage in unlawful paramilitary or private militia activity in Illinois, or individuals who are not in the National Guard, United States armed forces reserves, United States armed forces, or any duly authorized military organization to use a firearm-related product for a military-related purpose in Illinois.
>
> ***
>
> (4) Otherwise engage in unfair methods of competition or unfair or

[5] Defendants do not contest that the elements of the emotional distress claims are adequately pled; therefore, these claims are not addressed in this section.

> deceptive acts or practice declared unlawful under Section 2 of [ICFA].

815 ILCS 505/2DDDD(b).[6] The General Assembly provided that these provisions "are declarative of existing law and shall not be construed as new enactments" and "shall apply to all actions commenced or pending on or after August 14, 2023." *Id.* 505/2DDDD(c).[7] Plaintiffs have sufficiently stated ICFA claims against Smith & Wesson for both deceptive and unfair conduct.

1. Plaintiffs Have Standing to Bring ICFA Claims[8]

Smith & Wesson argues that Plaintiffs lack standing because "a plaintiff bringing a CFA action must be the intended target of the alleged deception." S&W Br. 9–10. But Smith & Wesson's argument ignores the plain meanings of ICFA and FIRA and the Illinois General Assembly's clear pronouncements to the contrary. ICFA expressly confers a private right of action on "[a]ny person who suffers actual damage as a result of a violation of [ICFA] committed by any other person." 815 ILCS 505/10a(a). Reading the plain text—which affords standing to "any person" and not just to "consumers" or "purchasers" of the product—Illinois courts have broadly permitted both consumers and non-consumers to bring ICFA claims against defendants that engage in deceptive or unfair conduct that caused them harm. *See*, *e.g.*, *Bank One Milwaukee v. Sanchez*, 336 Ill. App. 3d 319, 324 (2003) (holding that non-consumer had standing because defendants' conduct "implicate[d] consumer protection concerns").

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[6] The Complaints and Smith & Wesson's brief cite this provision as 815 ILCS 505/2BBBB. In July 2024, the statute was renumbered as § 2DDDD by P.A. 103-605, § 630.

[7] *See* 103rd Gen. Assemb., 43rd Leg. Day 102 (Ill. 2023) ("House Bill 218 amends [ICFA] to clarify that the firearm industry is subject to the Act. This legislation takes preexisting standards of conduct in Illinois common law and [ICFA] regarding responsible sales and marketing practices and makes clear that they are applicable to the sale and marketing of firearm products.").

[8] As discussed in Section II(A), even if Smith & Wesson were correct that Plaintiffs lack standing under ICFA or IUDTPA, Plaintiffs' negligence claims still may proceed because PLCAA does not bar common law claims predicated on underlying statutory violations—whether or not those predicate statutes provide a private right of action.

Moreover, although ICFA always applied to the gun industry, 815 ILCS 505/2DDDD(b)(4), FIRA amended ICFA specifically to clarify that a member of the gun industry may violate ICFA by engaging in marketing "that reasonably appears to support, recommend, or encourage individuals to engage in unlawful paramilitary or private militia activity in Illinois, or [civilians] to use a [firearm] for a military-related purpose in Illinois." *Id*. 505/2DDDD(b)(2). Smith & Wesson's argument that only the *target* of its deceptive marketing—*i.e.*, the "consumers of its firearms," S&W Br. 10—may sue under ICFA is premised on a nonsensical reading of FIRA. Such a reading would lead to the absurd result that the *only* plaintiff with standing to sue a firearms manufacturer whose marketing encouraged a consumer to purchase a firearm to engage in unlawful activity *is the consumer who engaged in the unlawful activity*. That is plainly not what FIRA was intended to accomplish, as the legislative history makes clear. During a May 2023 House of Representatives debate, the bill's co-sponsor, Representative Jennifer Gong-Gershowitz stated that FIRA was "designed to hold gun manufacturers accountable and ensure that families devastated by gun violence have a path forward to justice in Illinois civil courts." 103rd Gen. Assemb., 43rd Leg. Day 102 (Ill. 2023). She further noted that FIRA "would enable victims of gun violence to bring a claim as well [as counties and the Attorney General]." *Id.* at 103. There can be no doubt that FIRA was meant to provide recourse to individuals like Plaintiffs, who are *victims* of gun violence perpetrated by the target of gun companies' deceptive marketing, and permits them to bring the kinds of claims Plaintiffs assert here.

Smith & Wesson cites no authority that supports a different conclusion. The only case on which it relies, *Tri-Plex Technical Services, Ltd. v. Jon-Don, LLC*, 2024 IL 129183, S&W Br. 9–10, addresses proximate cause, not standing, and is in any event inapposite. In *Tri-Plex*, a seller of carpet cleaning products sued competitor sellers under ICFA, alleging that its competitors had

failed to disclose that the chemicals that gave their products superior cleaning ability were "illegal in Illinois," and that the plaintiff allegedly lost sales as a result of its competitors' conduct. *Id.* ¶¶ 3–4. The Court dismissed the plaintiff's claims against its competitors, overruling its prior "consumer nexus" test for certain business disputes under ICFA[9] and holding that in order for a business plaintiff to state a competitive-injury claim under ICFA, it must "plead that it was the intended recipient of the defendants' alleged deceptions." *Id.* ¶ 38.

Tri-Plex does not bar Plaintiffs' ICFA claims, and Smith & Wesson's attempt to extend the reach of *Tri-Plex* should be rejected. S&W Br. 9–10. *Tri-Plex* eliminated the consumer nexus test only in disputes in which a "business plaintiff" sued another business under ICFA to *redress competitive injury* arising from the defendant deceiving its own customers. *Tri-Plex Tech. Servs.,* 2024 IL 129183, ¶¶ 34–38. Plaintiffs bring no such claims here. This is not a "business" dispute, and Plaintiffs' injuries are not "competitive." Given its narrow focus on "competitive" injuries, *Tri-Plex* did not even eliminate the consumer nexus test for all ICFA claims. *Id.* ¶ 33 ("[W]e make no ruling on the validity of the consumer nexus test . . . in the context of a complaint arising out of an alleged breach of contract.").[10] *Tri-Plex* certainly made no mention of the consumer nexus test or standing requirements in the context of ICFA claims brought under FIRA by victims of gun violence whose injuries were a foreseeable result of a firearms manufacturer's deceptive marketing practices. As previously stated, a conclusion to the contrary would mean that perpetrators of gun

[9] That test required a business plaintiff to allege that the defendant business's conduct "involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns" and conferred standing on businesses "to sue under the [ICFA] to redress competitive injury they suffer when other businesses deceive customers." 2024 IL 129183, ¶¶ 32–35 (citing *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 190 Ill. App. 3d 524, 532 (1989)).

[10] There is no indication that *Tri-Plex* has any applicability to unfairness claims. As discussed below at Section I(A)(3), the elements of an unfairness claim under ICFA differ from the elements of a deception claim, such as the one analyzed by the *Tri-Plex* court.

violence, but not victims of gun violence, could sue the gun industry—an absurd result certainly not intended by the General Assembly. *See Dawkins v. Fitness Int'l, LLC*, 2022 IL 127561, ¶ 27 ("When a proffered reading of a statute leads to absurd results or results that the legislature could not have intended, courts are not bound to that construction, and the reading leading to absurdity should be rejected").

2. Plaintiffs State a Deceptive Practices Claim under ICFA

To state a claim for deceptive practices under ICFA, a plaintiff must plead (1) a deceptive act or practice by the defendant; (2) the defendant's intent that consumers rely on the deception; and (3) that the deception occurred during a course of conduct involving trade or commerce. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417 (2002). A plaintiff must also plead actual damages proximately caused by the defendant's deception. 815 ILCS 505/2; *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 155 (2002).

First, Plaintiffs plausibly plead a deceptive act or practice. The Complaints allege that Smith & Wesson's marketing falsely associates its line of rifles with U.S. military personnel in order to "create the false impression that its rifles [are] utilized and/or endorsed by these reputable users," when they are not, and that "the M&P rifles are of a same standard, quality, or grade that the U.S. military uses." ¶¶ 181–83, 187. These advertisements, marketing, and promotions are text-book examples of deceptive acts under ICFA, by which the firearms industry is bound. *See* 815 ILCS 505/2 (deceptive act includes any "misrepresentation or the concealment, suppression or omission of any material fact"); *Smith v. Prime Cable of Chi.*, 276 Ill. App. 3d 843, 857 (1st Dist. 1995) (advertisement is deceptive if it "creates a likelihood of deception or has the capacity to deceive"); *see also* 815 ILCS 505/2DDDD(b)(4) (prohibiting gun companies from engaging in deceptive acts declared unlawful under Section 2 of ICFA); *id.* 505/2DDDD(b)(2)(prohibiting marketing appearing to support or encourage civilian use of firearms for military-related purposes).

Second, Plaintiffs sufficiently pled the required intent by Smith & Wesson. As explained more above in Section I(A)(1), a non-consumer plaintiff who suffers damages from a defendant's deceptive conduct states a claim under ICFA if the defendant intended to deceive consumers and the deception had a demonstrated connection to plaintiff's injuries. *See, e.g.*, *Marvellous Day Elec. (S.Z.) Co., Ltd. v. Ace Hardware Corp.*, 2013 WL 4565382, at *5–6 (N.D. Ill. Aug. 27, 2013) (collecting cases) ("Illinois state courts . . . have approved [I]CFA claims by non-consumers where the plaintiff alleges that the defendant intended to deceive *consumers*, not the plaintiff itself."); *see also Woodfold Mfg., Inc. v. EMI Porta OPCO, LLC*, 2020 WL 13889769, at *7 (N.D. Ill. Nov. 30, 2020). This is precisely what happened here. Plaintiffs allege that Smith & Wesson targets consumers by "deceptively and unfairly market[ing] its assault rifles in a way designed to appeal to the impulsive, risk-taking tendencies of civilian adolescent and post-adolescent males." ¶ 6. Plaintiffs allege numerous examples of such deceptive marketing by Smith & Wesson aimed at consumers like the Shooter, and allege that the Shooter saw Smith & Wesson's marketing, which induced him to buy a Smith & Wesson M&P15 rifle and subsequently use that rifle to carry out his deadly assault on Plaintiffs. ¶¶ 6–8, 77–80, 86, 88, 125. These allegations sufficiently plead Smith & Wesson's intent and consumers' reliance at this stage of the litigation. *See Martinez v. AMPCO Sys. Parking, Inc.*, 2016 IL App (1st) 150687-U, ¶ 25 ("[I]ntent is generally a question best left to the trier of fact"); *Havaco of Am., Ltd. v. Shell Oil Co.*, 629 F.2d 549, 553 (7th Cir. 1980) ("[T]he factual, subjective questions of intent and purpose are properly resolved only after discovery and trial[.]"); *City of Chi. v. DoorDash, Inc.*, 2022 WL 704837, at *3 (N.D. Ill. Mar. 9, 2022) (factual questions are "inappropriate for resolution on a motion to dismiss" ICFA claims).

Third, there is no dispute that Plaintiffs adequately allege that Smith & Wesson's deception occurred in a course of conduct involving "trade or commerce" and that Plaintiffs suffered actual

damages. Smith & Wesson "advertis[ed]" and "offer[ed] for sale" its rifles in Illinois and targeted its deceptive marketing at Illinois consumers, 815 ILCS 505/1(f); as a result, Smith & Wesson's marketing reached the Shooter, who purchased the assault rifle and committed the Shooting. ¶¶ 1, 125, 128. The proximate cause element of the claim is addressed in Section I(E) below.

3. Plaintiffs State an Unfairness Claim under ICFA

Plaintiffs also plead ICFA claims under an unfairness theory, which requires a plaintiff to allege that a practice either (1) offends public policy; (2) is immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to consumers. *Robinson*, 201 Ill. 2d at 417–18. All three criteria need not be present, *id*., but are here. ¶ 157.

Plaintiffs plausibly allege that Smith & Wesson's false marketing of its M&P rifles offends public policy. ¶¶ 157–64. The Complaints contain detailed allegations concerning Smith & Wesson's false association of its rifles with U.S. military personnel and U.S. military quality. ¶¶ 202–09. Such false advertising is "unethical" and "offends public policy." *Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639, 647 (7th Cir. 2019); *see also Bonahoon v. Staples, Inc.*, 2021 WL 1020986, at *5 (N.D. Ill. Mar. 17, 2021) ("False advertising alone is an unfair practice under the ICFA."). In addition, Plaintiffs allege that Smith & Wesson's marketing campaigns reasonably appear to promote the use of firearms by civilians in unlawful military, paramilitary, and militia activity—conduct that expressly violates FIRA, 815 ILCS 505/2DDDD(b)(2). ¶ 158. Such a "practice offends public policy under ICFA" because "it violates statutory or administrative rules establishing a certain standard of conduct." *Saccameno v. Ocwen Loan Servicing, LLC*, 372 F. Supp. 3d 609, 630 (N.D. Ill. 2019) (citation omitted); *see also, e.g.*, *Kahn v. Walmart Inc.*, 107 F.4th 585, 602 (7th Cir. 2024) (holding that plaintiff plausibly alleged that defendant's conduct offended public policy because ICFA expressly prohibited it). Smith & Wesson's conduct is also immoral, unethical, and unscrupulous because Smith & Wesson has marketed—and continues to

market—its M&P rifles without regard for public safety. ¶ 169. Notwithstanding its knowledge that the individuals it targets with its advertising "are more likely to engage in risky, thrill-seeking, violent, and impulsive behavior," including committing mass shootings, Smith & Wesson persists in using marketing that preys on the "impulsive, risk-taking tendencies of civilian adolescent and post-adolescent males" to sell more weapons and increase its profits. ¶¶ 6, 101, 166–71.

In a tragically similar case, the Connecticut Supreme Court found that the victims of the massacre at Sandy Hook Elementary School could bring an unfairness claim under the Connecticut Unfair Trade Practices Act against a firearms manufacturer for marketing that "magnified the lethality of the Sandy Hook massacre by inspiring [the shooter] or causing him to select a more efficiently deadly weapon for his attack." *Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 98 (2019). The same result is warranted here.

B. Plaintiffs Have Standing to Bring, and Sufficiently Allege, an IUDTPA Claim

Plaintiffs also state a claim against Smith & Wesson under IUDTPA, which prohibits a person from engaging in "deceptive trade practices . . . in the course of his or her business, vocation or occupations," and permits "person[s] likely to be damaged by a deceptive trade practice of another [to obtain] injunctive relief[.]" 815 ILCS 510/2, 3.

1. Plaintiffs Have Standing to Bring an IUDTPA Claim.

Smith & Wesson's argument that Plaintiffs lack standing to bring an IUDTPA claim fails. Smith & Wesson claims that, "to have standing under the [IU]DTPA for injunctive relief, a plaintiff must allege facts demonstrating that the defendant's conduct both deceived and harmed him, and that it is likely to deceive and harm him in the future." S&W Br. 10–11 (citing *Aliano v. Louisville Distilling Co.*, 115 F. Supp. 3d 921, 928–29 (N.D. Ill. 2015)). But Smith & Wesson misstates the law. IUDTPA requires plaintiffs to allege only that they are likely to be injured by the defendant's deceptive practice, not that they are likely to be "deceived by" the practice. The

plain text of IUDTPA makes this clear: any person "*likely to be damaged* by a deceptive trade practice of another may be granted injunctive relief." 815 ILCS 510/3 (emphasis added); *see also Specht v. Google, Inc*., 660 F. Supp. 2d 858, 867 (N.D. Ill. 2009) ("[IU]DTPA broadly confers standing 'to any injured party.'"); *People ex rel. Daley v. Datacom Sys. Corp.*, 146 Ill. 2d 1, 35 (1991) (holding that plaintiffs who were not competitors or consumers could state IUDTPA claim because they were "persons likely to be damaged by [the] purported deceptive trade practices").

None of the authority on which Smith & Wesson relies holds otherwise. Smith & Wesson cites *Aliano* for the proposition that a plaintiff must allege facts demonstrating that the plaintiff *was deceived* by defendant's conduct and *may be deceived* in the future. S&W Br. 10. But the plaintiff in *Aliano* lacked standing to bring a IUDTPA claim because "there [was] no likelihood of future *damage*" given that plaintiff, a whiskey buyer, was unlikely to be harmed in the future by deceptive trade practices of which plaintiff was now aware. *Aliano*, 115 F. Supp. at 929 (emphasis added). Here, by contrast, Plaintiffs allege that Smith & Wesson continues to employ deceptive trade practices and misleadingly market its M&P rifles to dangerous persons like the Shooter, and accordingly, Smith & Wesson's products continue to pose a threat to the public, including Plaintiffs. ¶ 219. Those allegations are sufficient to confer standing under IUDTPA at the motion-to-dismiss stage. *Kurowski v. Rush Sys. for Health*, 659 F. Supp. 3d 931, 942–43 (N.D. Ill. 2023); *see also Trove Brands, LLC v. Cal. Innovations Inc.*, 2021 WL 5320408, at *7 (N.D. Ill. Nov. 16, 2021) (plaintiff "does not rely *solely* on past exposure, alleging that Arctic Zone's sale of the AZ Pro Shaker Bottle will continue to cause [harm]. This suffices at the pleading stage to suggest a likelihood of future harm").

Smith & Wesson's other authority fares no better. In *Howard v. Chicago Transit Authority*, a passenger sued the Chicago Transit Authority under IUDTPA to enjoin the CTA's practice of

allowing transit cards to expire one year after issuance while retaining any unused money left on the cards. 402 Ill. App. 3d 455, 456 (1st Dist. 2010). And in *Popp v. Cash Station, Inc.*, a customer sued the owner of automated teller machines seeking an injunction to require that defendant provide customers notice regarding, or protection against, third-party crimes against customers. 244 Ill. App. 3d 87, 89 (1st Dist. 1992). In both cases, the court held that plaintiffs could not bring IUDTPA claims because they were aware of the deceptive trade practices and therefore could not allege future harm. *Id*. at 98–99; *Howard*, 402 Ill. App. 3d at 461–62. But like *Aliano*, both cases applied this principle where the plaintiff was a *consumer* of the defendant's product. Here, Plaintiffs are not consumers of Smith & Wesson's firearms, so the fact that they are aware of Smith & Wesson's deceptive trade practices does not prevent them from potentially sustaining future harm as a result of those practices.

Notably, the only third-party IUDTPA case Smith & Wesson cites—*Lawyers Title Insurance Corp. v. Dearborn Title Corp.—rejected* Smith & Wesson's narrow view of standing and explicitly stated that "[a]lthough plaintiffs under the [IUDTPA] are typically competitors or customers of the defendant, *the Act does not limit standing to those parties*." 904 F. Supp. 818, 822 (N.D. Ill. 1995) (emphasis added). Instead, as discussed *supra*, IUDTPA requires only that "a plaintiff . . . minimally allege that he is likely to be damaged by another's deceptive trade practice." *Id.* (internal citation omitted). Plaintiffs' well-pled allegations meet that standard here. *See* ¶ 219 ("Smith & Wesson continues . . . to perpetuate the misleading marketing of its assault rifles, and these products continue to pose a threat to all members of the public, including Plaintiffs").

2. Plaintiffs State an IUDTPA Claim

Plaintiffs' Complaints sufficiently plead a claim under IUDTPA, which requires a plaintiff to "allege both a deceptive trade practice and a 'likelihood of confusion or misunderstanding' on

the part of customers." *Norix Grp., Inc. v. Corr. Techs., Inc.*, 2018 WL 3729324, at *6 (N.D. Ill. Aug. 6, 2018). Plaintiffs plausibly allege both elements.

First, Plaintiffs have sufficiently pleaded a deceptive trade practice. IUDTPA states that a defendant engages in a deceptive trade practice when, in the course of its business, it "causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services," 815 ILCS 510/2(a)(2); "represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have," *id.* 510/2(a)(5); "represents that goods or services are of a particular standard, quality, or grade or that goods are a particular style or model, if they are of another," *id.* 510/2(a)(7); or "engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding," *id.* 510/2(a)(12).

Plaintiffs allege that Smith & Wesson violated each of these subsections of IUDTPA by falsely associating its line of rifles with U.S. military personnel and marketing its "civilian line of rifles by promoting its militaristic uses." ¶ 205. Smith & Wesson's practices "create the false impression that its rifles [are] utilized and/or endorsed by these reputable users" and that "the M&P rifles are of a same standard, quality, or grade that the U.S. military uses" when neither is true. ¶¶ 202, 209. Plaintiffs also allege that Smith & Wesson uses "imagery and messaging" to falsely associate its products with the military to "exercise[] undue influence over a population that is particularly at risk to fall prey to this deceptive marketing" and increase its profits. ¶¶ 204, 207. These acts are deceptive because they "cause a likelihood of confusion and misunderstanding as to any military sponsorship, use, or approval of the company's M&P rifles." ¶ 208. These allegations suffice to state a IUDTPA claim at this stage of the litigation. The Complaints

"contain[] specific factual allegations . . . and identif[y] specific actions undertaken by . . . defendants in contravention of the provisions of the [IUDTPA]." *People ex rel. Alvarez v. Rd. Am. Auto., Inc.*, 2014 IL App (1st) 120825-U, ¶ 31 (affirming denial of motion to dismiss IUDTPA claim).

Second, Plaintiffs sufficiently allege that a likelihood of confusion is plausible, which satisfies their burden at the pleading stage. "[P]leading a likelihood of customer confusion merely requires alleging that a party made a misleading statement about a product" and does not require allegations of deceptive intent. *Norix Grp.*, 2018 WL 3729324, at *6. As discussed above, Plaintiffs allege that Smith & Wesson used branding and imagery in its marketing to draw a false and misleading association between its M&P rifles and the U.S. military, ¶¶ 202, 204–05, 207–09, generating a likelihood of confusion as to "any military sponsorship, use, or approval of the company's M&P rifles." ¶ 208. Thus, the elements of an IUDTPA claim are met.

C. Plaintiffs Sufficiently Allege In-Concert Liability Against the Gun Store Defendants

Plaintiffs state a claim for in-concert liability against the Gun Store Defendants. A plaintiff may plead in-concert liability by alleging that a defendant (1) "knew [that a third party's] conduct constituted a breach of duty" and (2) "gave substantial assistance or encouragement to [the third party] in committing that breach." *Simmons v. Homatas*, 236 Ill. 2d 459, 477 (2010). Plaintiffs have pled both elements against the Gun Store Defendants.

As to the first element, it is undisputed that the Shooter breached a legal duty by purchasing an assault rifle that he intended to, and did, possess in a jurisdiction that prohibited such possession. *See* ¶¶ 16–17, 127–29, 264, 271–73 (alleging that the Shooter stored and possessed M&P rifle in either Highwood or Highland Park prior to the Shooting, both of which have ordinances outlawing assault weapons); *see also Flores v. Aon Corp*., 2023 IL App (1st) 230140, ¶¶ 23–24 (holding that

plaintiff's negligence claim was supported by both common law and statutory duties); *Saunders v. Orbitz Worldwide*, *LLC*, 2023 IL App (1st) 221018, ¶ 20 ("A legal duty necessary to prove tortious conduct …. . . may be based either on common law or on a standard of conduct imposed by statute."); *Harnischfeger Corp. v. Gleason Crane Rentals, Inc*., 223 Ill. App. 3d 444, 452 (5th Dist. 1991) ("[T]he legislature and the courts are the primary sources of legally recognized duties").

In addition, Plaintiffs satisfy the knowledge requirement because the Gun Store Defendants knew that the Shooter sought to buy an assault rifle that was illegal to possess where he lived. Based on the information provided by the Shooter during both the online purchase and the in-person transfer, the Gun Store Defendants knew that he lived in Highwood, which has an ordinance outlawing the possession or use of automatic weapons. ¶¶ 127–29, 253, 262–67.

Bud's argues that the Shooter "could have" stored the assault rifle "outside of Highwood, such as at a hunting cabin, family member or friend's house, or a storage locker, in which case the Ordinances would not have been violated." Bud's Br. 10. But this argument fails for two reasons. *First*, such far-fetched hypotheticals have no basis in the Complaints and should be disregarded because they contradict the "well-pleaded facts and reasonable inferences drawn therefrom." *Aboufariss*, 305 Ill. App. 3d at 1067. There is simply nothing in the Complaints to suggest that the Shooter communicated to the Gun Store Defendants that he intended to store the rifle outside his place of residence. *Second*, under Illinois law, "[k]nowledge of a material fact includes awareness of the *substantial probability* that the fact exists." 720 ILCS 5/4–5(a) (emphasis added). If a customer presents identification stating that he resides at an address, and provides no information to the contrary, then there is a substantial probability that the goods he purchases will be possessed at that address. The Gun Store Defendants cannot avoid liability by sticking their heads in the sand to avoid the most obvious conclusion. *See, e.g.*, *Butler Bros. Supply Div., LLC v. HN Precision*

Co., 2022 Ill App (2d) 220418-U, ¶ 66 ("knowledge . . . may be satisfied by demonstrating either actual knowledge or willful ignorance."); *People v. Johnson*, 35 Ill. 2d 624, 626 (1966) (where accomplice joined principal knowing only that principal was planning on "getting some money" from man walking down the street around 10:30 p.m., "[t]he inference is clear that the [principal] intended to obtain the money by unlawful means").

As to the second element, Plaintiffs also sufficiently allege that the Gun Store Defendants gave "substantial assistance" to the Shooter. Assault weapons ordinances like Highwood's exist for the *precise* reason of preventing mass shootings by local residents. *See Friedman v. City of Highland Park*, 68 F. Supp. 3d 895, 898, 908–09 (N.D. Ill. 2014) (rejecting Second Amendment challenge to Highland Park's assault weapon ordinance and noting that ordinance was "intended to address the potential threat of mass shootings"), *aff'd*, 784 F.3d 406, 412 (7th Cir. 2015) ("Local crimes are most likely to be committed by local residents, who are less likely to have access to firearms banned by a local ordinance"). The Shooting took place just over one mile from the Shooter's residence, where the Gun Store Defendants knew it was illegal to possess an assault rifle. The Gun Store Defendants directly enabled the Shooter to violate the Ordinance and caused the Shooter to gain unlawful possession of the assault rifle that he used to shoot and terrorize Plaintiffs. Additionally, the Complaints allege that by enabling the Shooter to gain unlawful possession of the assault weapon that he used to carry out the Shooting, the Gun Store Defendants directly and proximately caused Plaintiffs' harm. ¶ 281. This suffices to state an in-concert liability claim. *See Simmons*, 236 Ill. 2d at 477–79.

Bud's asserts that the in-concert liability claim is defective because the Ordinance does not provide or imply a private right of action. Bud's Br. 11–12. This argument misunderstands Plaintiffs' claim. Plaintiffs have not brought a cause of action under the Ordinance; rather, they

bring a *tort* claim for in-concert liability against the Gun Store Defendants for knowingly assisting the Shooter in violating the Ordinance. ¶¶ 269–84. The lone case Bud's cites, *Abbasi ex rel. Abbasi v. Paraskevoulakos*, 187 Ill. 2d 386 (1999), undermines Bud's argument. While Bud's is correct that the *Abbasi* court found that no private right of action existed for the statute or ordinance at issue, Bud's Br. 11–12, the Court also agreed with the circuit court that negligence claims based on a violation of both the statute and ordinance should proceed. *Compare Abbasi*, 187 Ill. 2d at 389–90 (describing claims, including negligence based on violation of statute and ordinances), with *id*. at 397 ("Plaintiff's common law negligence action pending in the circuit court constitutes an adequate remedy without need to create a private cause of action under the [ordinance]"). Just as the negligence claims premised on a violation of a statute and ordinance were able to procced in *Abbasi*, so too should Plaintiffs' claims against the Gun Store Defendants.

D. Defendants Owe a Duty to Plaintiffs

Each of the Defendants argues that it owes no duty to protect Plaintiffs from criminal conduct. *See* S&W Br. 7–9, Bud's Br. 11–12, Red Dot Br. 11–12. But the Illinois Supreme Court has "long recognized that every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act[.]" *Doe v. Coe*, 2019 IL 123521, ¶ 37 (cleaned up). Here, Defendants acted in contravention of the law and failed to guard against the foreseeable consequences of their unlawful actions. Thus, under black-letter tort law, they can be held accountable.

As to Smith & Wesson, the question of duty is straightforward: the General Assembly declared in FIRA that gun companies (like all other companies) have a duty not to engage in deceptive and unfair conduct, and Smith & Wesson breached this duty. As discussed in Section I(C), a legal duty necessary to prove tortious conduct may be based either on common law or on a standard of conduct imposed by statute. *See Flores*, 2023 IL App (1st) 230140, ¶¶ 23–24 (reversing

order dismissing negligence claim where defendant had common law and statutory duties under the Personal Information Protection Act—a violation of which is unlawful under ICFA[11]); *Pilotto v. Urb. Outfitters W., L.L.C.*, 2017 IL App (1st) 160844, ¶ 18 ("A statute may create a duty expressly, or… impliedly where it is 'designed to protect human life or property") (cleaned up). In enacting FIRA, the General Assembly clarified that deceptive and unfair marketing by gun companies is a basis for liability. *See* 815 ILCS 505/2DDDD[12]; *see also* 103rd Gen. Assemb., 43rd Leg. Day 103 (Ill. 2023) (explaining that FIRA allows "victims of gun violence to bring a civil claim"). Thus, Smith & Wesson owes a duty to Plaintiffs.

Even if the General Assembly had not explicitly declared this duty by enacting FIRA, a common-law duty exists for each defendant. The presence of a common-law duty "is shaped by public policy considerations." *Grant v. South Roxana Dad's Club*, 381 Ill. App. 3d 665, 669 (5th Dist. 2008). When determining whether there is a common-law duty of care, courts consider "(1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant." *Flores*, 2023 IL App (1st) 230140, ¶ 24.

With respect to Smith & Wesson, it is both foreseeable and likely that deploying marketing practices purposely targeted at putting assault weapons in the hands of thrill-seeking young men would lead to gun violence. Smith & Wesson knew that assault rifles—particularly its M&P rifles—had been repeatedly used by mass shooters. ¶¶ 90–92. Moreover, Smith & Wesson is a "sophisticated company" that has been manufacturing and selling firearms since 1852, so "it is

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[11] *See* 815 ILCS 530/20 ("A violation of [the Personal Information Protection Act] constitutes an unlawful practice under [ICFA].").

[12] *Walker v. Agpawa,* 2021 IL 127206, ¶¶ 25, 30 (2021) (holding statutory amendment that is "a declaration of existing law" can apply to actions occurring prior to legislative clarification).

well aware of the risks" of marketing assault weapons to purchasers who are unfit to own them. *Flores*, 2023 IL App (1st) 230140, ¶ 24. Refraining from deceptive marketing practices "would not be a large burden for defendant, given its experience and expertise" in the industry, *id*., particularly since all companies are expected to refrain from deceptive and unfair practices.

With respect to the Gun Store Defendants, by (at least 2020)—after the mass shootings at Sandy Hook, Aurora, and Parkland (to name a few)—it was foreseeable that selling an assault rifle to a 19-year-old man who was prohibited from possessing it created an unacceptable risk of harm. The magnitude of the burden and the consequences of placing the burden on the Gun Store Defendants are minimal, since all gun companies are already required to comply with federal, state, and municipal regulations that prohibit the sale of assault weapons. Thus, the Gun Store Defendants also owes Plaintiffs a duty.

Chicago v. Beretta, 213 Ill. 2d 351 (2004), on which each Defendant relies, is inapposite. In *Beretta*, Chicago sued a large swath of the gun industry for creating a public nuisance in the city. *Id.* at 355–56. Critically, the city did not allege that defendants had violated any laws, which was central to the Court's decision to cut off liability.[13] *See id.* at 370 ("[W]e consider the argument that the lawful sale of a nondefective product cannot, as a matter of law, constitute a public nuisance"); *id.* at 379 (describing plaintiff's claim as "based on the alleged effects of defendants' lawful manufacture and sale of firearms[.]") (emphasis added); *id.* at 432 (declining to expand liability where General Assembly had not acted). Thus, in applying the four-factor common-law duty analysis to manufacturers and wholesalers, the Court concluded that the magnitude and

[13] For this reason, Smith & Wesson's reliance on *Riordan v. Int'l Armament Corp.*, 132 Ill. App. 3d 642, 647 (4th Dist. 1985), is also misplaced. S&W Br. 8. In *Beretta*, the Illinois Supreme Court describes *Riordan* as concerning "a products liability claim against one who *lawfully manufactures and sells* a nondefective product[.]" 213 Ill. 2d at 379 (emphasis added).

consequence of the burden weighed against recognizing the broad duty that plaintiffs sought. *Id.* at 392–93. But here, Smith & Wesson *already has a duty* not to engage in deceptive and unfair acts under ICFA. Thus, recognizing a corollary common-law duty would not impose a new burden on it. With respect to the remaining factors, *Beretta* held that "[i]t is reasonably foreseeable . . . that criminals will obtain guns, and it is not only likely, but inevitable that injuries and death will result." *Id.* at 393. It simply concluded that it was "less foreseeable" that the conduct at issue "will result in the creation of a public nuisance. *Id*. But public nuisance is not at issue in this case. Thus, these two factors also weigh in favor of Plaintiffs.

Moreover, the *Beretta* Court explained that it was reluctant to recognize a duty where the legislature had not acted, particularly in the firearms context. "[A]lthough courts frequently weigh [harm versus utility] in other contexts, an analysis of the harm caused by firearms versus their utility is better suited to legislative fact-finding and policymaking than to judicial assessment." *Id*. at 384. In passing FIRA, the General Assembly made this precise determination: any utility gained by a gun company's unlawful marketing is outweighed by its harm. Thus, *Beretta*'s ultimate conclusion with respect to manufacturer liability does not apply here.[14]

Beretta's holding is even less helpful to the Gun Store Defendants. In conducting the four-factor duty test with respect to the dealer defendants in that case, the Court held that "[o]nly the fourth factor, the consequences of placing [the] burden on the defendant, weighs heavily against imposing a duty upon the dealer defendants." *Id.* at 394 (citation omitted). It left the four-factor

[14] To the extent there was any question whether *Beretta* is binding on this Court, the First District answered it in *Flores*, holding that it was not bound by precedent finding that no duty exists since the legislature later recognized a duty under a statute. 2023 IL App (1st) 230140, ¶ 23. In *Beretta*, the Court held that gun manufacturers had no duty to prevent a public nuisance when otherwise acting in compliance with the law. But FIRA makes clear that gun companies that engage in unlawful marketing owe a duty to prevent foreseeable harm to the public resulting from its conduct.

test undecided and ultimately answered the question of duty on foreseeability, *id*., holding that the injury complained of by Chicago was simply too remote from the sales of the weapons, *id.* at 412 ("In the present case, the existence of the alleged nuisance… is several times removed from the initial sale of individual weapons by [the dealer] defendants[.]"). Thus, the Court explained:

> [W]e are not faced with the question of whether a gun dealer might be held liable for negligently entrusting a weapon to an individual buyer…. Instead, plaintiffs argue that it is foreseeable to these defendants that **the aggregate effect of numerous sales transactions occurring over time and in multiple different locations operated by businesses with no ties to each other will result in the creation of a public nuisance in another city**."

Id. at 412–13 (emphasis added).

In this case, unlike in *Beretta*, Bud's interacted directly with the Shooter by selling him the weapon online. Red Dot completed the transfer to the Shooter at its retail location. Thus, the remoteness issue that concerned the *Beretta* Court is simply not present here. Furthermore, the Gun Store Defendants' reliance on *Linton v. Smith & Wesson*, 127 Ill. App. 3d 676 (1st Dist. 1984), and *Riordan v. International Armament Corporation* to disclaim the existence of a duty, *see* Bud's Br. 12, Red Dot Br. 11–12, is particularly unwarranted since the "decisions in *Riordan* and *Linton* are not relevant because neither case involved a defendant who was a retailer of firearms." *Beretta*, 213 Ill. 2d at 394.

Defendants' focus on "the absence of a 'special relationship,'" S&W Br. 8, Bud's Br. 12, Red Dot Br. 11-12, is a red herring. Plaintiffs do not allege that Defendants had a duty "to protect them from the Shooter's deliberate criminal acts," S&W Br. at 8–9, but contend that Defendants had a duty not to engage in unlawful conduct that endangers the public. Thus, *none* of the cases cited by Defendants is dispositive. In *Vesely v. Armslist LLC*, the complaint did not "cite to any federal or state law breached by [the defendant] in posting the advertisement." 762 F.3d 661, 665 (7th Cir. 2014). Similarly, *Young v. Bryco Arms* involved claims against firearms manufacturers,

wholesale distributors, and retail gun dealers for "engag[ing] in conduct designed to increase their sales of certain types of firearms that, *while legal*, are particularly appealing to the criminal element." 213 Ill. 2d 433, 444 (2004) (emphasis added). Finally, in *Linton*, the plaintiff "ha[d] made no allegations that defendant circumvented any of the[] regulations" that "control the distribution of a [non-defective firearm] to the general public." 127 Ill. App. 3d at 678–79 (1984).[15]

E. Defendants Proximately Caused the Shooting

Defendants' argument that Plaintiffs fail to sufficiently allege proximate cause is based on a misreading of the Complaints and the relevant case law. In Illinois, "the term 'proximate cause' describes two requirements, cause in fact and legal cause." *McKenna v. AlliedBarton Sec. Services, LLC*, 2015 IL App (1st) 133414, ¶ 37. Cause in fact is established "if a defendant's conduct can be deemed to be a substantial factor in bringing about the injury." *Id*. Legal cause "is essentially a question of foreseeability, where one determines whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct. *Id.* ¶ 38. "[I]t is axiomatic that proximate cause is ordinarily a question of fact to be decided by the jury." *Id*.; *see also Kramer v. Szczepaniak*, 2018 IL App (1st) 171411, ¶ 4 ("Proximate cause is typically a question of fact.").

Here, Plaintiffs plead both cause in fact and legal cause. The Complaints allege that Smith & Wesson targeted young, disaffected men like the Shooter through deceptive and unfair marketing; the Shooter was exposed to and influenced by Smith & Wesson's marketing; and the Shooter selected an M&P rifle to carry out his heinous act in significant part due to Smith & Wesson's marketing. *See* ¶¶ 125, 126, 140. Furthermore, the Gun Store Defendants directly sold

[15] Defendants' remaining cases are even further removed from the facts here. In *Iseberg v. Gross*, a shooting victim sued his business partners for failing to warn him about threats against his life; there was no statute that created such a duty and there were no allegations that the business partners acted unlawfully. 227 Ill. 2d 78, 84–85, 93 (2007). Similarly, in *Marshall v. Burger King Corp.*, there was no allegation that a statutory duty that had been violated. 222 Ill. 2d 422, 438 (2006).

and transferred the murder weapon to the Shooter. ¶¶ 16, 17, 128. Thus, at this threshold stage of the litigation, cause in fact is sufficiently pled. *McKenna*, 2015 IL App (1st) 133414, ¶ 37 ("If reasonable minds could differ on whether the conduct was a substantial factor, the question is for the jury to decide.") (citations omitted); *Young*, 213 Ill. 2d at 447 ("[A] reasonable jury could find that that the manufacture of [the weapon] by Smith & Wesson, its subsequent sale . . . along with at least three different transfers of ownership . . .were causes in fact of the shooting[.]").

Plaintiffs have also pled legal cause. As the Illinois Supreme Court has explained, "the proper inquiry regarding legal cause involves an assessment of foreseeability." *Young*, 213 Ill. 2d at 446. "The question is one of public policy—how far should a defendant's legal responsibility extend for conduct that did, in fact, cause the harm?" *Id.* It is eminently foreseeable that each Defendant's unlawful conduct would result in precisely what happened here: a mass shooting.

Smith & Wesson's arguments fail because, by enacting FIRA, the General Assembly made clear that public policy favors holding gun companies accountable for engaging in unfair and deceptive marketing that leads to gun violence, and that it is foreseeable that such conduct will lead to exactly the sort of tragedy that Plaintiffs suffered. Thus, Smith & Wesson's reliance on *Young*'s and *Beretta*'*s* ultimate holdings on the existence of "legal cause," *see* S&W Br. 4–5, is misplaced. The Illinois Supreme Court's overriding concern in both cases—both of which predate FIRA—was that the General Assembly *had not acted* to regulate the firearms industry in the way envisioned by plaintiffs, noting that "ultimately" its conclusion was a "public policy determination." *Young*, 213 Ill. 2d at 455. As the Court in *Young* explained:

> [W]e have no indication from the legislature that it would be inclined to impose public nuisance liability for the manufacture and sale of a product that may be possessed legally by some persons . . .**We therefore conclude that there are strong public policy reasons to defer to the legislature in the matter of regulating the manufacture, distribution, and sale of firearms**.

Id. at 455–56 (emphasis added); *see also Beretta*, 213 Ill. 2d at 384. The opposite is true here: the General Assembly has acted, and thus public policy weighs in favor of finding legal cause.[16]

The Gun Store Defendants' arguments on foreseeability fail for the reasons discussed at 25–27. This case is not about "the aggregate effect of numerous sales transactions occurring over time and in multiple different locations operated by businesses with no ties to each that [eventually create] a public nuisance." *Beretta*, 213 Ill. 2d at 412–13. It is about the liability of the Gun Store Defendants that sold and transferred a weapon to an individual buyer knowing that he was likely to do something illegal with it: bring it to a jurisdiction that prohibited possession of the firearm. *See id*. The *Beretta* Court expressed no concern with finding liability in such contexts. Moreover, it is undisputed that municipalities like Highwood and Highland Park passed their assault weapons ordinances for the precise reason of preventing mass shootings. *See Friedman*, 68 F. Supp. 3d at 898 (noting Highland Park's ordinance was passed due to "the belief that certain designated weapons pose an undue threat to public safety" and was "intended to address the potential threat of mass shootings"). Thus, there is no serious argument that the harm to Plaintiffs was unforeseeable.

Defendants argue that their actions cannot be a proximate cause of Plaintiffs' harm "[b]ecause the Shooter's actions were undeniably criminal, and because there were multiple intervening acts by third parties." *See, e.g.,* S&W Br. 5. This is incorrect. It is black-letter law that,

[16] For similar reasons, Smith & Wesson's reliance on *Young*'s distinction between a "condition" and "cause" is incorrect. *See* S&W Br. 4–5. The Court's decision that the gun companies' actions "merely create[d] a condition that ma[de] the eventual harm possible" was based on the notion that it is "unreasonable to expect defendants to foresee that the aggregate effect of the *lawful* manufacture and sale of firearms will be the creation of a public nuisance in a distant city." *Young*, 213 Ill. 2d at 455 (emphasis added). Here, Plaintiffs have alleged that Smith & Wesson acted *unlawfully*, and the General Assembly has determined that the harm it caused is reasonably foreseeable.

where a third party's resulting criminal actions were foreseeable at the time of the defendant's own negligent conduct, the third-party criminal act is not a superseding cause of harm. *See, e.g.*, *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 224 (1988) ("If the criminal act is reasonably foreseeable at the time of the negligence, the causal chain is not necessarily broken by the intervention of such an act") (citations omitted); *see also* Restatement (Second) of Torts §§ 302B, 448–49 (1965); *Mack v. Ford Motor Co.*, 283 Ill. App. 3d 52, 60 (1st Dist. 1996) ("Moreover, the law is clear that conduct does not become an unforeseeable intervening cause solely because it violates the law") (citing *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 78 (1954)); *McKenna*, 2015 IL App (1st) 133414, ¶¶ 1, 36–46 (finding plaintiffs sufficiently pled proximate cause when it should have been foreseeable to defendants that armed individual may seek to enter workplace to commit act of violence). Here, the Shooter's actions should have been foreseeable to Defendants, as this kind of tragedy has played out repeatedly. Thus, the Shooter's criminal acts do not defeat proximate cause. *Kramer*, 2018 IL App (1st) 171411, ¶ 4.[17]

In *Soto v. Bushmaster Firearms*, the Connecticut Supreme Court found that causation was sufficiently alleged at the pleadings stage where plaintiffs had alleged that "the defendants' wrongful advertising magnified the lethality of the Sandy Hook massacre by inspiring [the shooter] or causing him to select a more efficiently deadly weapon for his attack." 331 Conn. 53, 98 (2019). There, the court allowed the victims of the Sandy Hook shooting to proceed with their lawsuit

[17] Smith & Wesson's argument that the actions of the Shooter's father and the Gun Store Defendants are superseding intervening acts fares no better. *See* S&W Br. 1, 4. The Shooter's father signed the FOID application *prior* to the Shooter's purchase of the weapon; thus, this could not be an intervening cause. The Gun Store Defendants' actions in selling Smith & Wesson's products should have been entirely foreseeable to Smith & Wesson, as Smith & Wesson places its rifles into the stream of commerce hoping they will be sold by gun stores. And, in any case, Plaintiffs allege that Smith & Wesson's marketing influenced the Shooter until the moment of the Shooting, long after the completion of the FOID application and the rifle purchase. *See* ¶¶ 136–40.

against Bushmaster for engaging in a marketing campaign that "extoll[ed] the militaristic and assaultive qualifies of their AR-15 rifles and, specifically, the weapon's suitability for offensive combat missions." *Id.* at 73–75. Similarly, at this threshold stage, Plaintiffs have sufficiently alleged that Smith & Wesson's conduct is a proximate cause of their injury.

Smith & Wesson relies on *Lowy v. Daniel Defense*, an unpublished trial court decision that is currently on appeal, to argue lack of proximate cause. *See* S&W Br. 6 (citing *Lowy*, 2024 WL 3521508 (E.D. Va. July 24, 2024), *appeal docketed*, No. 24-1822 (4th Cir. 2024)). Smith & Wesson argues that the *Lowy* court found that the plaintiffs "relied on speculation only . . . and the complaint was devoid of any allegations to support proximate cause." S&W Br. 6 (citing *Lowy*, 2024 WL 3521508 at *5–6). But any argument that Plaintiffs here "relied on speculation only" is belied by the Complaints' detailed allegations to support proximate cause. Plaintiffs allege that "the Shooter purchased an M&P15 because he consumed and was influenced by Smith & Wesson's unfair and deceptive marketing" and that he specifically chose the M&P15 to commit the Shooting because of "its perceived fit for carrying out his mission of inflicting the most violence possible." ¶¶ 125, 140; *see also* ¶ 126 (alleging that Shooter was exposed to Smith & Wesson's marketing on Bud's website).

Lastly, Smith & Wesson argues that Plaintiffs cannot meet the proximate cause element of ICFA's deception prong because neither Plaintiffs nor the Shooter saw Smith & Wesson's advertising and thus, Plaintiffs' theory is a rejected ""market theory' of causation." S&W Br. 6–7. This is false. Plaintiffs allege that the Shooter saw, and was influenced by, Smith & Wesson's marketing. ¶¶ 125–126. At the motion-to-dismiss stage, Smith & Wesson cannot avoid well-pleaded allegations in the Complaints. Furthermore, as discussed above in Section I(A)(1), FIRA made clear that victims of gun violence can sue the gun industry under ICFA. Thus, the General

Assembly did not intend that plaintiffs themselves had to be deceived by the advertising, as that would allow only the customer who committed the unlawful gun violence to sue—an absurd reading of FIRA and ICFA that would erase the protections for victims of gun violence. Accordingly, the cases on which Smith & Wesson relies are all inapplicable. And they have even less relevance to Plaintiffs' ICFA unfairness claim, which does not require anyone to rely on the deception.

II. PLCAA Does Not Bar Plaintiffs' Claims

The Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-03 ("PLCAA"), allows actions against gun companies to proceed if the defendant knowingly violated a state law applicable to the "sale or marketing" of firearms, and the violation was a proximate cause of the Plaintiffs' harm. That is exactly what Plaintiffs have alleged. Thus, PLCAA is no bar to this case.

A. Statutory Background

PLCAA requires the dismissal of claims against gun companies when the plaintiff is harmed by the unlawful misuse of a firearm and the allegations in the complaint do not fit one of PLCAA's exceptions. *See Adames v. Sheahan*, 233 Ill. 2d 276, 308–09 (2009) (applying PLCAA in product defect case). Specifically, PLCAA provides that "[a] qualified civil liability action may not be brought in any Federal or State court," 15 U.S.C. § 7902(a), and a "qualified civil liability action" is defined as:

> [A] civil action . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages . . . or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. . . .

Id. § 7903(5)(A). As relevant here, a "qualified product" includes a firearm. *Id.* § 7903(4).

There are six exceptions to PLCAA's protection, *id.* § 7903(5)(A)(i-vi), and at issue in this litigation is the so-called "predicate exception," which allows a plaintiff to bring a case against a

manufacturer or seller of firearms that has knowingly violated a state or federal statute "applicable to the . . . marketing of" firearms:

> The term "qualified civil liability action" . . . shall not include **an action in which a manufacturer or seller of a qualified product 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[.]

Id. § 7903(5)(A)(iii) (emphasis added).

"This exception has come to be known as the 'predicate exception,' because a plaintiff not only must present a cognizable claim, he or she also must allege a knowing violation of a 'predicate statute.'" *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132 (9th Cir. 2009) (citations omitted). In some cases, this means that the statute itself provides the cause of action; in others, the cause of action is a common law claim predicated on a statutory violation. *Compare Soto*, 331 Conn. at 67, 121 (violation of Connecticut Unfair Trade Practice Act served as both predicate violation and cause of action), *with Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123, 1129, 1134, 1137–38, 1139 n.9, 1140–43 (D. Nev. 2019) (permitting negligence claim based on violation of Nevada Deceptive Trade Practices Act to proceed).

The plain text of the predicate exception easily dispenses with Defendants' argument that Plaintiffs' common-law claims must be dismissed under PLCAA. *See* S&W Br. 14, Bud's Br. 8–9, Red Dot Br. 10–11. As described below, Plaintiffs have sufficiently alleged that each of the Defendants knowingly violated a predicate statute. And the predicate exception makes clear that PLCAA does not apply to "***an action in which*** a manufacturer or seller of a qualified product knowingly violated a State or Federal statute." 15 U.S.C. § 7903(5)(A)(iii) (emphasis added);

compare with id. §7903(5)(A)(ii) (permitting action "for negligent entrustment").[18] For this reason, every court to consider the question has held that common law claims may go forward, as long as they are predicated on violations of statutes applicable to the sale and marketing of firearms. *See, e.g.*, *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 336–39 (N.Y. App. Div 2012) (permitting negligence and public nuisance claims predicated on alleged violation of Gun Control Act); *Corporan v. Wal-Mart Stores E., LP,*, 2016 WL 3881341, at *3–4 (D. Kan. July 18, 2016) (permitting negligence claim where defendant's alleged conduct, with anticipated amendments to complaint, violated Gun Control Act); *Brady v. Walmart Inc.*, 2022 WL 2987078, at *6–10 (D. Md. July 28, 2022) (denying motion to dismiss negligence claims where plaintiff alleged violation of statute prohibiting firearms possession by individuals with certain mental health disorders).

The cases that Defendants cite for the proposition that negligence and emotional distress claims are barred by PLCAA are inapplicable, since none alleged a valid predicate statute. *See* S&W Br. 14, Bud's Br. 8–9, Red Dot. Br. 11–12 (collecting cases). Plaintiffs have; therefore, PLCAA is no bar to Plaintiffs' common-law claims.

B. Smith & Wesson Knowingly Violated Predicate Statutes, Which Proximately Caused Plaintiffs' Harm

1. ICFA and IUDTPA Are Predicate Statutes

PLCAA's predicate exception permits actions based on state or federal statutes "applicable to the . . . marketing" of firearms. 15 U.S.C. § 7903(5)(A)(ii). ICFA and IUDTPA are two such statutes. ICFA, on its face, prohibits all business from engaging in "unfair or deceptive acts or practices . . . in the conduct of any trade or commerce[.]" 815 ILCS 505/2. Similarly, IUDTPA

[18] Thus, regardless of whether Plaintiffs' ICFA or IUDTPA claims proceed, the negligence claims may go forward because there is no requirement that the underlying predicate violation provide a private right of action. *See, e.g.*, 15 U.S.C. § 7903(5)(iii)(I-II) (listing provisions of Gun Control Act, which does not have private right of action, as illustrative examples of predicate statutes).

prohibits all companies from engaging in "deceptive trade practices." *Id.* 510/2. Thus, on a plain reading of the statutes' text, they are "applicable to the marketing" of firearms. *Rosenbach v. Six Flags Entm't Corp*., 2019 IL 123186, ¶ 24 ("[Legislative] intent is best determined from the plain and ordinary meaning of the language used in the statute.").

Moreover, any potential doubt to as to the statutes' applicability to the firearms industry was erased when the General Assembly enacted FIRA, which made clear that it is a violation of ICFA for gun companies to encourage unlawful military and paramilitary activity through their marketing and that ICFA's standards of unlawfulness apply to the firearms industry. 815 ILCS 505/2DDDD(b)(2), (b)(4).[19] Thus, as Smith & Wesson admits, ICFA, as clarified by FIRA, is a predicate statute. *See* S&W Br. 14 n.10.

Even before the passage of FIRA, ICFA and IUDTPA would have been considered predicate statutes—and had been applied to the unlawful selling or marketing of firearms in Illinois. *See, e.g.,* Assurance of Voluntary Compliance, *In the Matter of Cook Bros, Inc.*, No. 2019-CONSL-00000673 (Jan. 7, 2020) (settlement of ICFA claims brought by Illinois Attorney General related to sale of replica firearms sold in violation of Chicago's municipal code and federal law) (attached hereto as Exhibit A). Smith & Wesson is incorrect that "Congress did not intend for broad, generalized unfair trade practice state statutes directed at marketplace activities generally, such as the CFA and DTPA, to serve as predicate statutes." S&W Br. 14. PLCAA does not define "applicable to," but "the princip[al] definition of 'applicable' is simply 'capable of being applied,'" *Soto*, 331 Conn. at 119, and certainly statutes that are intended to be applied to the sale and

[19] FIRA also clarified IUDTPA by extension. Section 2 of ICFA explicitly incorporates IUDTPA, *see* 815 ILCS 505/2, and FIRA declares that members of the gun industry cannot engage in "deceptive acts or practices declared unlawful under Section 2 of [ICFA]." *Id.* 505/2DDDD(b)(4).

marketing of goods fit into the predicate exception. *Id.* at 129, 157–58; *see also Adames*, 233 Ill. 2d at 309, 314 (applying dictionary definitions to undefined language in PLCAA).

Smith & Wesson asserts that predicate statutes must "s*pecifically* regulate firearm sales or marketing[.]" S&W Br. 14. But if Congress had meant "specifically applicable," "it could easily have used such language" rather than the word Congress chose, "'applicable,' which is susceptible to a broad reading." *Soto*, 331 Conn. at 120; *Brady*, 2022 WL 2987078, at *7 ("The text of the predicate exception requires that the federal or state statute cited by the Plaintiff be 'applicable' to the sale of a firearm; it does not require that the state statute explicitly penalize the sale of a firearm."). There is simply no basis to graft the word "specifically" on to the predicate exception's "applicable to" language. *See Shawnee Cmty. Unit Sch. Dist. No. 84 v. Ill. Prop. Tax Appeal Bd*., 2024 IL 128731, ¶ 45 ("The [party] is asking this court to read language into the Code that is not there. This, of course, we may not do."); *see also Adames*, 233 Ill. 2d at 310–11 (refusing to graft narrowing language onto PLCAA's definition of "qualified civil liability action").

Moreover, the predicate exception, by its express terms, applies to statutes regulating the "marketing of" firearms. At the time PLCAA was passed, there was no federal law specifically regulating the marketing of firearms (nor is there one now). *See Soto*, 331 Conn. at 121–22. "It would have made little sense for the drafters of the legislation to carve out an exception for violations of laws applicable to the marketing of firearms if no such laws existed." *Id.* at 122. But the FTC Act—on which ICFA is modeled—had been repeatedly applied to firearms manufacturers at the time PLCAA was passed. *Id.* at 126; *see also* 815 ILCS 505/2 ("In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.").

In *Soto*, the Connecticut Supreme Court evaluated this question in the context of the Connecticut Unfair Trade Practices Act, which is also "modeled after the FTC Act." *Soto*, 331 Conn. at 85–87, 113–14. After a detailed analysis of PLCAA, the court concluded that the statute qualifies as a predicate statute." *Id.* at 157–58. Other cases have reached the same conclusion. *See Prescott*, 410 F. Supp. 3d at 1137–39 (finding that Nevada Deceptive Trade Practices Act qualifies as predicate statute); *Goldstein v. Earnest*, No. 37-2020-00016638, slip op. at *3–5 (Cal. Super. Ct. San Diego Cnty. July 2, 2021) (holding that California Unfair Competition Law is predicate statute) (attached hereto as Exhibit B). Thus, even if the General Assembly had not clarified ICFA to declare that it applies to firearms marketing, ICFA still would qualify as a predicate statute.

In support of its argument, Smith & Wesson misstates the holdings of two cases that interpreted the phrase "applicable to" in the predicate exception. *First*, Smith & Wesson relies on *City of N.Y. v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008), but conspicuously omits key portions of that ruling, including that the court *rejected* the argument that the predicate exception applies only to statutes that "*specifically* regulate firearms," S&W Br. 14 (emphasis in original). In fact, the Second Circuit found "nothing in the statute that requires any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception," and therefore "decline[d] to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the [plaintiff] complains of, in which case such a statute might qualify as a predicate statute." *City of New York*, 524 F.3d. at 399–400. The court identified three categories of predicate statutes: (1) statutes "that expressly regulate firearms;" (2) statutes "that courts have applied to the sale and marketing of firearms;" and (3) statutes "that do not expressly regulate firearms but that clearly can be said to

implicate the purchase and sale of firearms." *Id.* at 404. ICFA and IUDTPA, even prior to FIRA, easily fall within the bounds of the second and third category.

Smith & Wesson's reliance on the Ninth Circuit's decision in *Ileto v. Glock*, 565 F.3d 1126 (9th Cir. 2009), is even more flawed. *See* S&W Br. 16. The plaintiffs in *Ileto* argued that California's tort law, which had been codified into statutes, "provide[d] both the cause of action and the requisite predicate statute under the PLCAA." *Ileto*, 565 F.3d at 1133. Examining PLCAA's context, the Ninth Circuit noted that "Congress clearly intended to preempt common-law claims," and plaintiffs' predicate statutes were simply codifications of "classic negligence and nuisance" torts. *Id.* at 1135–36. Thus, the court concluded that PLCAA preempted these "general tort theories of liability." *Id*. at 1135. Here, Plaintiffs' predicate statutes are *not* a codification of the common law, but long-established marketing statutes. Notably, the *Ileto* court rejected the defendant's argument that the predicate exception was limited to statutes that exclusively pertained to firearms. *Id.* at 1136. Indeed, a district court in the Ninth Circuit applying *Ileto* concluded that Nevada's consumer protection statute was a predicate statute. *Prescott*, 410 F. Supp. 3d at 1137–39 ("[U]nlike the general common law tort theories of negligence and nuisance at issue in *Ileto* . . . the [Nevada Deceptive Trade Practices Act] specifically regulates the sale and marketing of goods.").

2. Smith & Wesson's Knowing Violations of ICFA and IUDTPA Were a Proximate Cause of Plaintiffs' Harm

At this threshold stage, Plaintiffs have sufficiently alleged that Smith & Wesson violated both ICFA and IUDPTA and that Smith & Wesson's violations were knowing and a proximate cause of their harm. *See* Sections I(A–B); 15 U.S.C. § 7903(5)(A)(iii).

Turning first to knowledge, Plaintiffs need only allege that Smith & Wesson knew the factual underpinnings giving rise to its violation of ICFA and IUDTPA, not that those laws

proscribed its conduct. *Bryan v. United States*, 524 U.S. 184, 193 (1998) ("Knowingly" under federal law "merely requires proof of knowledge of the facts that constitute the offense."); *United States v. Stein*, 712 F.3d 1038, 1041 (7th Cir. 2013) ("[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the [violation]."). Here, Plaintiffs allege, among other things, that Smith & Wesson (i) misleadingly implies that its M&P rifles are used or endorsed by the military, when it knows that this is not true; (ii) intentionally models its marketing after first-person shooter games, promises young men "more adrenaline," and uses social media influencers to show young consumers how to use the M&P rifle in combat situations; and (iii) knows that "young men like the Shooter are generally more susceptible to advertising than adults, and that these young men are disproportionately prone to irresponsible, impulsive thrill-seeking behavior," yet focuses its branding strategy for M&P rifles "on reaching the 'Hardcore' and 'Young Gun' segments of the market." ¶¶ 74, 82, 83, 92, 100–02, 161–67. Thus, the knowledge requirement is met.

As described more fully in Section I(E), Plaintiffs also sufficiently allege that Smith & Wesson's violations of ICFA and IUDTPA were a proximate cause of their harm. Contrary to Smith & Wesson's portrayal, PLCAA—just like Illinois tort law—contemplates that a shooting may have more than one proximate cause. This is because PLCAA applies only to actions seeking damages for harms "resulting from the criminal or unlawful misuse" of a firearm by a third party, yet it permits six types of actions in which a gun company's wrongful conduct *also* contributed to the alleged harm. *See* 15 U.S.C. § 7903(5)(A) (defining qualified civil liability actions and including six exceptions). These exceptions would have no meaning if proximate cause were automatically defeated by a third party's criminal shooting. For this reason, cases involving criminal shootings have repeatedly survived a PLCAA challenge. *See supra* at 31, 34–35.

C. The Gun Store Defendants Aided and Abetted the Shooter's Violation of a Predicate Statute, Which Proximately Caused Plaintiffs' Harm

1. The Highwood Ordinance is a Predicate Statute

The Highwood Ordinance constitutes a "State [] statute" for purposes of PLCAA's predicate exception. Bud's' argument to the contrary, Bud's Br. 9, ignores PLCAA's plain text, which defines the term "State" to mean "each of the several States of the United States, the District of Columbia, [any territories or possessions], *and any political subdivision of any such place*." 15 U.S.C. 7903(7) (emphasis added). Thus, legislation passed by a municipality such as Highwood—a "political subdivision of" Illinois—qualifies as a predicate statute. *See Landis v. Marc Realty, L.L.C.*, 235 Ill.2d 1, 12 (2009) (noting that, absent alternative indication from legislature, the term "'statutory' encompasses municipal ordinances as well as state statutes").

Bud's reliance on *City of Chicago v. Janssen Pharmaceuticals., Inc*., 2017 IL App (1st) 150870, is therefore misplaced. *See* Bud's Br. 9. There, the court evaluated the meaning of the phrase "State law" without the aid of an explicit definition of either word. Absent additional statutory language, the court ruled that the phrase must be afforded its "plain and ordinary meaning, which excludes municipal ordinances." *Janssen Pharms., Inc.,* 2017 IL App (1st), ¶ 24. It would be wrong to follow that approach here, where the "plain statutory language" in PLCAA's definition of "State" evinces the "legislature's objective" that "State" includes municipalities. *Id.* ¶ 16; *see Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 59 (2024) ("When Congress takes the trouble to define the terms it uses, a court must respect its definitions as virtually conclusive. This Court will not deviate from an express statutory definition merely because it varies from [the] term's ordinary meaning." (quotations and citations omitted)).

2. The Gun Store Defendants Aided and Abetted the Shooter's Violation of the Ordinance

For the reasons outlined in Sections I(C) and I(E) above, Plaintiffs sufficiently allege that the Gun Store Defendants knowingly aided and abetted the Shooter's violation of the Ordinance, and this conduct was a proximate cause of Plaintiffs' harm.[20]

The Gun Store Defendants argue that they could not possibly have violated the Ordinance because it only prohibits possessing or acquiring an assault weapon "within the borders of" Highwood and their sale/transfer of the rifle to the Shooter took place outside of Highwood. Bud's Br. 10; Red Dot Br. 8. This argument fundamentally misconstrues Plaintiffs' allegations. Plaintiffs do not allege that the Gun Store Defendants directly violated the Ordinance by selling or transferring the assault rifle in Highwood, but that they aided and abetted *the Shooter's* violation of the Ordinance by selling and transferring an assault weapon to him while knowing that he lived in a city where possession of that weapon was illegal. *See supra* at 20–22. The predicate exception expressly allows liability not only where the defendant directly violated a statute, but also where the defendant "*aided, abetted*, or conspired with any other person" to violate the statute at issue. 15 U.S.C. § 7903(5)(A)(iii)(I)-(II) (listing as example of permitted action, a case in which seller aids and abets possession of gun by person prohibited from having it) (emphasis added). This is precisely what Plaintiffs have alleged.

For the reasons previously explained, *see supra* at 20–21, the argument that the Gun Store Defendants are not liable for aiding and abetting the Shooter's violation of the Ordinance because he theoretically "could have" kept the assault rifle outside his city of residence is of no help to

[20] Under Illinois law, there is significant overlap between aiding-and-abetting and in-concert liability. In both, defendant knows of the principal actor's intent to commit a wrongful act, but nevertheless provides substantial assistance to the wrongdoer. *See Thornwood, Inc. v. Jenner & Block,* 344 Ill. App. 3d 15, 27–28 (1st Dist. 2003), *as modified on denial of reh'g* (Nov. 10, 2003).

Defendants. *See, e.g.,* 720 ILCS 5/4–5(a) ("Knowledge of a material fact includes awareness of the *substantial probability* that the fact exists." (emphasis added)).

The fact that Bud's "did not transfer" the assault rifle directly to the Shooter, Bud's Br. 11, does not preclude Bud's liability. *See* 15 U.S.C. § 7903(5)(A)(iii)((II) (predicate exception applies to seller that "sell[s] or otherwise dispose[s] of a [firearm]"); *see also Englund v. World Pawn Exch.*, 2017 WL 7518923, at *2, 5–6 (Or. Cir. Ct. June 30, 2017) (holding that online retailer that sold firearm to shooter via an in-state gun store could be liable under predicate exception for violating, or aiding and abetting violation of, relevant firearm laws); *see also id.* at *7 (rejecting online retailer's defense that it did not transfer firearm to shooter directly, but to local gun store). By selling the assault weapon to a buyer who Bud's knew lived in a city with an assault weapons ban, Bud's substantially assisted the Shooter's violation of the Ordinance, whether or not Bud's consummated the sale through an intermediary. Bud's' reliance on an ATF "Quick Reference and Best Practices Guide" suggesting that Red Dot was responsible for the federally mandated "background check," Bud's Br. 11, gets Bud's nowhere because Bud's itself knew that the Shooter lived in Highwood. ¶ 127.

III. FIRA Is Not Preempted by PLCAA and Comports with the U.S. Constitution

Smith & Wesson asserts that FIRA is preempted by PLCAA and is unconstitutional. But the plain text of PLCAA permits lawsuits based on statutes like FIRA that regulate the firearms industry, and each of Smith & Wesson's constitutional challenges fails under clear precedent.

FIRA clarified that ICFA applies in the context of the sale and marketing of firearms and identifies specific prohibited business practices. 815 ILCS 505/2DDDD. As is relevant here, Section (b)(2) of FIRA prohibits advertising that reasonably appears to promote the use of firearms by civilians for military-related purposes and the encouragement of unlawful paramilitary activity, and Section (b)(4) incorporates by reference Section 2 of ICFA. Although Smith & Wesson aims

the vast majority of its arguments at Section (b)(1), which prohibits gun companies from creating a condition that endangers the health and safety of the public by unlawful or unreasonable conduct, Plaintiffs do not rely on Section (b)(1), and it is therefore irrelevant to this motion.

A. FIRA Is Not Preempted by PLCAA

As explained in Section II.B above, PLCAA's predicate exception does not bar an action based on a violation of a "State statute applicable to . . . the marketing of [firearms]." 15 U.S.C. § 7903(5)(A)(iii). This is *precisely* what FIRA is.

To show that PLCAA preempts FIRA, Smith & Wesson would need to show a "clear indication" of an intent to intrude on an area of traditional state authority. *Bond v. United States*, 572 U.S. 844, 859–60 (2014). Courts considering the scope of preemption "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Comm. v. Whiting*, 563 U.S. 582, 594 (2011) (internal quotation marks omitted). The plain text of the predicate exception shows that Congress preserved Illinois' power to regulate the firearms industry through FIRA by explicitly allowing actions based on violations of state statutes applicable to the marketing of firearms. Numerous courts have held that state laws permitting civil suits against gun companies—including statutes that have flexible standards of liability—are not preempted. *See, e.g.*, *Platkin v. FSS Armory*, No. MRS-C-000102-23, at 24 (N.J. Super. Ct. Aug. 28, 2024) (attached hereto as Exhibit C) (New Jersey's firearms industry accountability law not preempted because "the explicit language of the PLCAA . . . allows Plaintiff to bring the instant action"); *Nat'l Shooting Sports Found., Inc. v. James*, 604 F. Supp. 3d 48, 57–62 (N.D.N.Y. 2022), *appeal docketed*, No. 22-1374 (2d Cir. June 24, 2022) (same for New York law); *Soto*, 331 Conn. at 156–57 (Connecticut Unfair Trade Practices Act); *Prescott,* 410 F. Supp. 3d at 1138–39 (Nevada Deceptive Trade Practices Act); *see also Est. of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 389 (Alaska 2013) ("Although expressly preempting conflicting state tort

[common] law, the PLCAA *allows* Alaska's legislature to create liability for harms proximately caused by knowing violations of statutes regulating firearm sales and marketing.") (emphasis in original).

Smith & Wesson's arguments to the contrary are unavailing. *First*, Smith & Wesson argues that FIRA merely codifies common-law causes of action and is therefore preempted by PLCAA. S&W Br. 20, 22, 24. That argument is premised on a fundamental misunderstanding of FIRA and the Complaints. The Complaints allege that Smith & Wesson's actions constitute violation of Sections (b)(2) and (b)(4) of FIRA, which respectively prohibit illegal military marketing and apply ICFA to the firearms industry. These provisions bear no resemblance to common-law public nuisance or negligence claims. *See Prescott*, 410 F. Supp. 3d at 1138–39 (confirming that Nevada Deceptive Trade Practices Act is "unlike the general common law tort theories of negligence and nuisance. . .which can apply to any private conduct capable of being tortious" because it "specifically regulates the sale and marketing of goods").

Faced with the inescapable plain text of PLCAA and FIRA, Smith & Wesson invents a requirement that a predicate statute contain "concrete obligations or prohibitions." S&W Br. 20–21. PLCAA's text contains no such requirement, and even if it did, Sections (b)(2) and (b)(4) would amply satisfy that standard. Smith & Wesson points to what it admits are "illustrative" examples of predicate statutes in PLCAA to signify that PLCAA preempts FIRA. S&W Br. 21. Not so. As numerous courts have held, those examples do not set the outer bounds of qualifying predicate statutes. *See, e.g.*, *Soto*, 331 Conn. at 143–44.[21] Congress prefaced these examples with the permissive word "including," which indicates that they are illustrative (as Smith & Wesson

[21] PLCAA's legislative history demonstrates that these examples were added in 2005 because they were implicated in the sniper shootings that occurred in Washington, D.C. in 2002, not to limit the scope of the predicate exception. *See Soto*, 331 Conn. at 143.

admits), not exhaustive. 15 U.S.C. § 7903(5)(A)(iii). The predicate exception explicitly covers state or federal statutes applicable to the "marketing" of firearms, but the two examples listed in the statute do not address marketing at all, and instead concern only the sale or transfer of firearms. *Id.* § 7903(5)(A)(iii)(I)-(II). Thus, PLCAA expressly provides that there will be predicate statutes concerning "marketing" in addition to the two examples listed in the statute. The only contrary authority Smith & Wesson cites is inapposite or no longer in effect. *City of New York,* 524 F.3d at 400–02, and *Ileto*, 565 F.3d at 1134, both concern generally applicable statutes or tort laws, whereas FIRA specifically applies to firearm industry members. *National Shooting Sports Found., Inc. v. Platkin*, 2023 WL 1380388, at *6 (D.N.J. Jan. 31, 2023), has since been vacated. *Nat'l Shooting Sports Found., Inc. v. New Jersey,* 80 F.4th 215, 223 (3d Cir. 2023).

Smith & Wesson also incorrectly suggests that PLCAA's requirement of a "knowing" violation of a predicate statute requires the alleged violator to know that the conduct was *illegal*. S&W Br. 22. As discussed in Section II(B)(2), courts have held that "knowing" refers to knowledge of the facts giving rise to the violation, not the illegality of the conduct. And because the predicate exception requires scienter and causation, the underlying statute need not also require those elements.

B. Sections (b)(2) and (b)(4) of FIRA Are Constitutional

1. FIRA Does Not Violate the First Amendment

Smith & Wesson's arguments that FIRA violates the First Amendment falter under the clear weight of precedent. Smith & Wesson primarily focuses its First Amendment challenge on Sections (b)(1) and (b)(3) of FIRA,[22] although Plaintiffs assert claims only under Sections (b)(2) and (b)(4). The Illinois Supreme Court long ago affirmed the compatibility of Section 2 of ICFA,

[22] Section (b)(3) prohibits marketing of firearm-related products to minors.

which FIRA's Section (b)(4) incorporates, with the First Amendment, and Smith & Wesson does not argue to the contrary. *Scott v. Ass'n for Childbirth at Home, Int'l*, 88 Ill. 2d 279, 283–92 (1981) ("[T]he investigation and regulation of unfair or deceptive business practices under [ICFA] does not, because it cannot, impinge upon constitutionally protected speech."). Therefore, the only question before this Court is whether Section (b)(2), which prohibits marketing encouraging unlawful paramilitary activity, is constitutional under the First Amendment. It is.

Commercial speech that is "misleading" or "concerns unlawful activity . . . is not protected by the First Amendment." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002). Section (b)(2) declares it unlawful for any firearm industry member to "[a]dvertise, market, or promote a firearm-related product in a manner that reasonably appears to support, recommend, or encourage individuals to engage in unlawful paramilitary or private militia activity in Illinois" or to advertise, market, or promote a firearm-related product in a way that supports, recommends, or encourages a civilian "to use a firearm-related product for a military-related purpose in Illinois." 815 ILCS 505/2DDDD-(b)(2). All of the conduct covered by Section (b)(2) is already unlawful under existing Illinois law. The cases cited by Smith & Wesson (S&W Br. 25) concern speech about lawful products and conduct and are therefore inapposite.

Even if Smith & Wesson were able to show that Section (b)(2) was not limited to speech concerning unlawful activity, the provision would survive First Amendment scrutiny. The Illinois Supreme Court has held that "the Court refrains from approaching a constitutional challenge to commercial speech in the same manner as noncommercial speech." *Desnick v. Dep't of Pro. Regul.*, 171 Ill. 2d 510, 519 (1996). Government burdens on commercial "speech are scrutinized more leniently than burdens on fully protected noncommercial speech." *Jordan v. Jewel Food Stores*, 743 F.3d 509, 515 (7th Cir. 2014). When addressing restrictions on commercial speech,

courts consider whether (1) the speech concerns lawful activity and is not misleading, (2) the asserted government interest in regulating the speech is substantial, (3) the regulation directly advances the government interest asserted, and (4) the regulation is not more extensive than necessary to serve that interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). As explained above, Smith & Wesson's challenge to Section (b)(2) should end at the first step of the *Central Hudson* analysis, because the provision regulates speech concerning unlawful activity. *United States v. Benson*, 561 F.3d 718, 725 (7th Cir. 2009). Nevertheless, FIRA satisfies the remaining *Central Hudson* factors as well.

With respect to the second and third factors, Illinois has a substantial government interest in preventing untrained civilians from engaging in unregulated military and militia activities. *See Brown v. Glines*, 444 U.S. 348, 354 (1980) ("The military is, "by necessity, a specialized society separate from civilian society.") (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)). Prohibiting advertising and marketing that supports, recommends, or encourages unlawful paramilitary or private militia activity also furthers "Illinois's interest in protecting the public from firearms violence." *Horsley v. Trame*, 808 F.3d 1126, 1132 (7th Cir. 2015). Because "there is an immediate connection between advertising and demand," and FIRA "decreases advertising, it stands to reason that the policy of decreasing demand for [the activity] is correspondingly advanced." *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993). As for the fourth *Central Hudson* factor, Section (b)(2) is appropriately tailored to serve the state's interest in preventing private civilians from engaging in unlawful paramilitary activity.

Smith & Wesson does not address these clear state interests, arguing instead that FIRA does not do enough to reduce gun violence because it does not, for example, "police the conduct of criminals who misuse firearms" or regulate other types of speech that could encourage gun

violence. *See* S&W Br. 25–26. But there is no requirement that a state "address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015).

Finally, Smith & Wesson argues that Section (b)(2) is overinclusive and that FIRA is impermissibly vague. S&W Br. 26. Both arguments fail. *First*, "as a matter of law, the overbreadth doctrine does not apply to commercial speech in the first instance." *Native Am. Arts, Inc. v. Vill. Originals, Inc.*, 25 F. Supp. 2d 876, 880 (N.D. Ill. 1998). *Second*, "[a]s a matter of due process, a law is void if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Vuagniaux v. Dep't of Pro. Reg.,* 208 Ill. 2d 1156, 1168 (2003) (quotation marks omitted). "The burden is on the party challenging the statute to clearly establish any constitutional invalidity. The burden is a formidable one, and this court will uphold a statute's validity whenever it is reasonably possible to do so." *Id.* But Smith & Wesson's First Amendment vagueness argument is focused solely on Section (b)(3), which is not relevant to Plaintiffs' claims; it makes no specific arguments as to how Sections (b)(2) or (b)(4) are vague. Thus, it has not met its burden.[23]

2. FIRA Does Not Violate the Second Amendment

Smith & Wesson also argues that FIRA is unconstitutional under the Second Amendment because it imposes unspecified burdens on "all manner of commerce in arms." S&W Br. 28–29. But once again, its challenge is aimed exclusively at Section (b)(1); and it never explains how

[23] Plaintiffs do not separately address Smith & Wesson's Due Process argument, since it exclusively focuses on Section (b)(1), which is not at issue in these lawsuits. S&W Br. 27–28. In any case, "[e]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Vill. of Hoffman Ests. v. Flipside*, 455 U.S. 489, 498 (1982). Section (b)(2) and (b)(4) of FIRA meet this test.

(b)(2)'s prohibition on encouraging unlawful activity or (b)(4)'s incorporation of general ICFA standards implicates the Second Amendment, never mind violates it.

There is a two-part test for determining whether the Second Amendment has been violated. *First*, the court "must decide whether the Second Amendment's plain text covers an individual's conduct." *Bevis v. City of Naperville, Ill.*, 85 F.4th 1175, 1191 (7th Cir. 2023) (internal citations omitted). If the conduct at issue is protected, then the government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* (quotation marks omitted). Smith & Wesson's Second Amendment challenge fails at the first step for the fundamental reason that there is no freestanding Second Amendment right to manufacture, market or sell firearms. *See, e.g.*, *United States v. Barrera-Esteves*, 2024 WL 3495156, at *2 (N.D. Ill. July 22, 2024) ("carrying on a business in the buying and selling of firearms" is not protected by Second Amendment); *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 690 (9th Cir. 2017) ("the Second Amendment does not independently protect a proprietor's right to sell firearms."); *Morehouse Enter., LLC v. ATF,* 2022 WL 3597299, at *8 (D.N.D. Aug. 23, 2022) ("There is a longstanding distinction between the right to keep and bear arms and commercial regulation of firearm sales."), *aff'd,* 78 F.4th 1011 (8th Cir. 2023)).

For this reason, the U.S. Supreme Court and courts around the country have repeatedly confirmed that "laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful regulatory measures." *District of Columbia v. Heller*, 554 U.S. 570, 627 & n.26 (2008); *McRorey v. Garland*, 99 F.4th 831, 836 (5th Cir. 2024) (affirming denial of preliminary injunction in part because "conditions and qualifications on the commercial sale of arms" are "presumptively lawful"). Although commercial regulation of the firearms industry may go too far by "banning outright the sale or transfer of common-use weapons and necessary

ammunition" thereby "eliminating the ability of law-abiding, responsible citizens to acquire firearms," *Gazzola v. Hochul*, 88 F.4th 186, 195 (2d Cir. 2023), FIRA's limitations on marketing that encourages unlawful paramilitary activity (Section (b)(2)) and deceptive business practices (Section (b)(4)) do not even come close to that line. Simply put, FIRA does not prohibit any individual from legally obtaining a firearm, and it therefore does not infringe on the individual right to keep or bear arms.

3. FIRA Does Not Violate the Dormant Commerce Clause

Finally, Smith & Wesson contends that FIRA violates the dormant Commerce Clause by imposing liability for out-of-state conduct and imposing excessive burdens on interstate commerce. S&W Br. 29–30. This exact argument was rejected by the U.S. Supreme Court last year in *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023). Therefore, to succeed on a dormant Commerce Clause argument, Smith & Wesson must show that FIRA is designed to benefit in-state economic interests by discriminating against out-of-state competitors. *See id.* at 373–74, 379–80. Smith & Wesson cannot, and does not even attempt to, make this showing.

In *National Pork Producers*, the U.S. Supreme Court rejected an "almost per se rule" against state laws that impact out-of-state conduct, i.e. laws that have an "extraterritorial effect." *Id.* at 373, 369–70 (rejecting dormant Commerce Clause challenge to California law that failed to allege "that California's law seeks to advantage in-state firms or disadvantage out-of-state rivals," and noting that this "antidiscrimination principle" forms "very core of our dormant Commerce Clause jurisprudence") (cleaned up); *see New Jersey Staffing All. v. Fais*, 110 F.4th 201, 205 (3d Cir. 2024) ("Although several prior dormant Commerce Clause opinions focused on the extraterritorial effect of challenged laws, the Court explained that those cases were still animated by the antidiscrimination principle."). Striking down a law based on extraterritorial effects alone would "cast a shadow over laws long understood to represent valid exercises of the States'

constitutionally reserved powers." *Nat'l Pork Producers Council*, 598 U.S. at 374–75 (listing tax laws, tort law, environmental laws, securities regulations, heath laws, among others) (cleaned up).

Consumer protection laws, like ICFA and IUDTPA, which exist in every state and inevitably have some impact on out-of-state businesses are *exactly* the kind of laws that the U.S. Supreme Court sought to protect against a dormant Commerce Clause challenge. Smith & Wesson's reliance on *Legato Vapors v. Cook* is unwarranted, given that *Legato*'s dormant Commerce Clause analysis relies on the exact type of "extraterritorial effects" analysis that the Supreme Court invalidated in *National Pork Producers.* 847 F.3d 825, 830 (7th Cir. 2017).

Similarly, Smith & Wesson's reliance on a footnote in *National Pork Producers*, which merely distinguishes a case that dealt with "a law that *directly* regulated out-of-state transactions by those with *no* connection to the State," *id*. at 376 n.1, is of no help since FIRA applies only to firearm industry members that have a connection to the state. *See* 815 ILCS 505/2DDDD(a)(1)-(3) (defining "firearm-related products as those that were "(1) "sold, made, or distributed in Illinois," (2) "intended to be sold or distributed in Illinois," or (3) "possessed in Illinois, and it was reasonably foreseeable that the item would be possessed in Illinois").[24]

Smith & Wesson's passing reference to *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 549 (2015), is similarly unpersuasive. There, the U.S. Supreme Court noted that states may not "discriminat[e] against or impos[e] excessive burdens on interstate commerce." *Id.* But FIRA does no such thing: it applies with equal force to intrastate and interstate activity, and

[24] Smith & Wesson's hypothetical Ohio dealer with no connection to Illinois who is held liable under FIRA is therefore irrelevant. S&W Br. 29. FIRA does not hold any out-of-state manufacturer liable merely where a gun "eventually finds its way into Illinois." *Id.* Instead, the law requires that the connection to Illinois be "reasonably foreseeable." 815 ILSCS 505/2DDDD(a)(3).

does not unduly burden interstate commerce, especially since every state in the country regulates deceptive trade practices.

C. Smith & Wesson's Advertisements Are Not Protected Speech

Smith and Wesson's advertisements are not protected by the First Amendment. It is well-settled that commercial speech "that promotes or encourages an unlawful activity does not enjoy the protection of the [F]irst [A]mendment." *Soto*, 331 Conn. at 133 n.56 (citing cases). The Illinois Supreme Court is unequivocal that regulating unfair and deceptive speech under ICFA presents no First Amendment issue. *Scott v. Ass'n for Childbirth at Home, Int'l*, 88 Ill.2d 279, 286–87 (Ill. 1981); *see also People ex rel. Hartigan v. Maclean Hunter Pub. Corp.*, 119 Ill.App.3d 1049, 1061 (1st Dist. 1983) ("[T]he [U.S.] Supreme Court has repeatedly recognized that the first amendment is not a bar to State regulation prohibiting false, misleading or deceptive commercial speech.").

Furthermore, whether a statement is deceptive under ICFA or IUDTPA is a question of fact not to be resolved on a motion to dismiss. *People ex rel. Daley v. Datacom Sys. Corp.*, 146 Ill.2d 1, 35 (1991) (holding that whether alleged statements were misleading under ICFA and IUDTPA was "a factual issue which must be decided by the trier of fact"). In *Maclean Hunter*, the First District reversed dismissal and found that the plaintiff had stated causes of action under ICFA and IUDTPA, emphasizing that plaintiff's allegations must be accepted as true at the motion-to-dismiss stage. 119 Ill. App. 3d at 1051.

Plaintiffs here have alleged that Smith & Wesson's marketing was unfair and deceptive by, among other things, suggesting that its M&P rifles are approved, endorsed, and used by the U.S. Military when they are not, ¶¶ 63–75, 182–87, 202–09; reasonably appearing to promote the use of firearms by civilians in unlawful military, paramilitary, and militia-related activity, ¶¶ 9, 67, 70, 158; and appealing to young, impulsive men with a propensity for risk and excitement by encouraging them to act out first-person shooter games in real life, ¶¶ 76–89, 159–65. These

allegations, taken as true at this stage of the cases, are "outside the ambit of first amendment protection, and within the scope of permissible State regulation." *Scott*, 88 Ill. 2d at 287.[25]

The cases cited by Smith & Wesson did not concern allegations that the speech was in any way deceptive, misleading, or unfair and are therefore irrelevant. *See Tracy Rifle & Pistol LLC v. Harris*, 339 F. Supp. 3d 1007, 1010 (E.D. Cal. 2018) ("All Plaintiffs wish to display truthful, nonmisleading on-site handgun advertising that is visible from the outside of their dealerships"); *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976) ("Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way."); *Nordyke v. Santa Clara Cnty.*, 110 F.3d 707, 712 (9th Cir. 1997) ("[T]he County has never alleged that the speech at issue is misleading.").[26]

Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 633 F. Supp. 3d 425 (D. Mass. 2022), which was reversed on other grounds by the First Circuit, 91 F.4th 511 (1st Cir. 2024), *cert. granted on other grounds*, --- S.Ct. ----, 2024 WL 4394115 (Oct. 4, 2024), is inapplicable as well. In that case, a federal district court applying Massachusetts law evaluated a case in which Mexico

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[25] If the Court finds that Smith & Wesson's advertisements fall within the scope of the First Amendment, then they are properly regulated as commercial speech under the *Central Hudson* test, for the same reasons discussed more fully in Section III(B)(1). The Court should disregard Smith & Wesson's attempts to import the First Amendment tests for obscenity and fighting words that incite imminent lawless action, two different categories of speech. *See Miller v. California*, 413 U.S. 15, 33 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (fighting words). Similarly, First Amendment cases that did not evaluate commercial speech are inapposite here. *See NRA v. Vullo*, 602 U.S. 175 (2024).

[26] Smith & Wesson misquotes *Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013). The Ninth Circuit did *not* say that "[t]he determinative question is whether the transactions proposed in the forbidden [communication] are themselves illegal in any way." S&W Br. 32. Instead, the Ninth Circuit said that "*[s]ome* [U.S. Supreme Court] decisions have expressly phrased the legality requirement as whether 'the transactions proposed in the forbidden [communication] are themselves illegal in any way,'" but "[o]ther decisions have used *Central Hudson*'s more general 'related to unlawful activity' language." 709 F.3d at 821 (emphasis added, citations omitted). Illinois courts take the latter approach. *See, e.g.*, *Maclean Hunter*, 119 Ill. App. 3d at 1060–61.

sued a large swath of the gun industry for a host of tortious conduct that led to gun violence in Mexico. The eighth count of the complaint, which concerned only two Smith & Wesson advertisements, alleged that the ads were misleading because they associate Smith & Wesson's "'civilian' products with the U.S. military and law enforcement' and its advertisements 'repeatedly emphasize its weapons' ability to function in combat-like scenarios and quickly dispatch a large number of perceived enemies with a torrent of fire.'" 633 F. Supp. 3d at 453. Based on these two advertisements, the court dismissed Mexico's deception claim, concluding that the allegations amounted to an assertion that Smith & Wesson's firearms "do exactly what they are advertised to do." *Id.*

Here, by contrast, Plaintiffs allege that Smith & Wesson's advertising implies that its M&P rifles are approved, endorsed, and "chosen" by the U.S. Military when they are not. *See* ¶¶ 63–75, 182–87, 202–09; *see also* ¶ 61 (explaining that investigation by U.S. House Oversight Committee found that Smith & Wesson has "claimed military and law enforcement endorsements for its products in advertisements"); ¶ 66 (collecting Smith & Wesson marketing that features individuals dressed to look like active U.S. military service members carrying M&P rifles).[27] The Complaints also allege that Smith & Wesson's marketing implies that its rifles are of "the same standard, quality, or grade that the U.S. Military uses," when they are not. ¶ 68. Under ICFA and IUDTPA, this *is* deception. And while it may be permissible in Massachusetts to decide that an advertisement

[27] Smith & Wesson is wrong that Plaintiffs "admit that Smith & Wesson firearms have been used by the military." Mot. 32 (citing ¶¶ 74–75). Those paragraphs allege that "in every single 10-K filing from 2009 to 2016, the company stated that it "ha[d] not [ ] secured any major contracts to supply firearms to any large domestic military agencies." ¶ 74. One contract in 2012 sent 250 revolvers—not M&P15 rifles—to the U.S. Army in Thailand. ¶ 75. There is no evidence that the military has ever used or endorsed any Smith & Wesson rifle.

is not deceptive at the motion to dismiss stage, that is not how Illinois courts evaluate deceptive ads. *Datacom Sys. Corp.*, 146 Ill. 2d at 34; *Maclean Hunter*, 119 Ill. App. 3d at 1058–59.

Similarly, the *Estados Unidos Mexicanos* court dismissed the plaintiff's consumer protection claim because Mexico "failed to identify any common-law or statutory authority that the advertisements violate." 633 F. Supp. 3d at 453. Here, by contrast, Plaintiffs allege that Smith & Wesson violates FIRA's statutory prohibitions.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' motions be denied in their entirety.

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Respectfully Submitted,

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