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

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| CITY OF KANSAS CITY, MISSOURI,<br><br>Plaintiff,<br><br>v.<br><br>JIMENEZ ARMS, INC., a Nevada Corporation;<br>SUZETTE NELSON, an individual,<br>f/d/b/a CONCEAL & CARRY;<br>MIKE AND SUE ENTERPRISES, INC.,<br>A Missouri Company, f/d/b/a<br>CONCEAL & CARRY;<br>CR SALES FIREARMS LLC,<br>A Missouri Company;<br>HERB WILLIAM BUTZBACH III,<br>d/b/a/ MISSION READY GUNWORKS;<br>JAMES SAMUELS, an individual; and<br>IESHA BOLES, an individual,<br><br>Defendants. | ) | Case No. 2016-CV00829 |

**REPLY IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT**

Defendant, CR Sales Firearms, LLC ("CR Sales"), by and through counsel and in accordance with Rule 74.04(c)(3), submits the following as its Reply in Support of the Motion for Summary Judgment.

## I. BACKGROUND

The City of Kansas City's (the "City") lawsuit against CR Sales must be dismissed because the legal basis for maintaining this action is absent. The City claims that this is a trial-worthy case while correspondingly evading the flagrant fact it is statutorily prohibited from maintaining this lawsuit. Section 21.750, RSMo. prohibits the City from civilly suing CR Sales. The City's sole argument in its brief is that this lawsuit falls outside the purview of section 21.750 because it is suing CR Sales for its allegedly unlawful conduct. *See* Pl.'s Opp'n to Mot. for Summ. J. at 18 ("[S]ince the City's claim is that CR Sales acted *unlawfully* . . . , Mo. Rev. Stat. § 21.750.5 does not apply to the City's lawsuit." (emphasis

in original)). Nevertheless, this argument was precisely rejected by the Court of Appeals when the City of St. Louis proposed the argument twenty years ago. This Court is bound by the Court of Appeals' interpretation of section 21.750, when it held that the statute prohibits political entities from civilly suing the firearms industry for both lawful and unlawful conduct. Moreover, as demonstrated in this brief, the City's interpretation of section 21.750 is misguided and relies upon an unfounded understanding of the interpretative canon against superfluity.

Section 21.750 prohibits the City from maintaining this lawsuit. Subsection 5 of section 21.750, acts as a statutory barrier to prohibit political entities in Missouri from bringing civil lawsuits against the firearms industry. Here, the City claims that subsection 5 only prohibits suits against the gun industry for lawful conduct and that this lawsuit is not prohibited because its action is premised on CR Sales' unlawful conduct. The City's understanding of section 21.750 is misguided and was expressly rejected by the Missouri Court of Appeals. As the Court in *City of St. Louis v. Cernicek* held, if subsection 5 of section 21.750 was interpreted only to prohibit suits against lawful conduct, "subsection 4 would have no meaning." 145 S.W.3d 37, 43 (Mo. App. E.D. 2004). In applying the interpretative rule against surplusage, the Court properly held that subsection 5 of section 21.750 prohibits suits against both lawful and unlawful conduct. *Id.* This Court cannot differ as it is bound by this precedent.

In the alternative, the Protection of the Lawful Commerce in Arms Act ("PLCAA") prohibits the City's negligence, civil conspiracy, and public nuisance causes of action. To bypass the PLCAA's statutory prohibition, the City must allege and prove that CR Sales "knowingly" violated a predicate statute. In its attempt to create a genuine dispute, the City's brief mischaracterizes evidence and intentionally misrepresents CR Sales' arguments. In doing so, the City has failed to put forth any evidence that CR Sales knowingly violated a predicate statute when it facilitated private firearm transfers with Samuels. Because the City cannot put forth any evidence, it cannot bypass the PLCAA and prohibited from bringing these causes of action to a jury. In similar circumstances, the City's

negligent entrustment action fails as a matter of law because it cannot show there was an incompetent entrustee nor that CR Sales knew or should have known about the incompetence. Finally, the City's negligence per se cause of action fails as a matter of law because the Federal Gun Control Act—the statute the City relies upon—does not create a private cause of action, as held by the Missouri Court of Appeals in *Elkins v. Acad. I, LP*, 633 S.W.3d 529, 539 (Mo. App. S.D. 2021).

## II. ARGUMENTS AND AUTHORITIES

### A. Section 21.750, RSMo. confers statutory immunity against all of the City's claims.

Section 21.750, RSMo. statutorily prohibits the City from bringing or maintaining a civil action against a gun retailer "resulting from or relating to the lawful design, manufacture, marketing, distribution, or sale of firearms or ammunition to the public." The purpose of the statute is to provide immunity to the firearms industry when political entities "attempt to apply theories of tort liability to the significantly regulated industry of manufacturers, distributors, and dealer of firearms." *City of St. Louis*, 145 S.W.3d at 43. As an attempt to bypass this statutory prohibition, the City argues that the statute prohibits only suits against the *lawful* design, manufacture, marketing, distribution, or sale of firearms or ammunition to the public. *See* Pl.'s Opp'n to Mot. for Summ. J. at 17. According to the City, it is entitled to maintain its lawsuit against CR Sales because its lawsuit is predicated on *unlawful* conduct—correspondingly removing it from the purview of section 21.750. *See id.* at 17–20.

The City's arguments fail as a matter of law. The City, respectfully, submits an erroneous interpretation of the plain text and resulting scope of section 21.750, and a misguided and unfounded understanding of *City of St. Louis v. Cernicek*—binding precedent on this Court. As enumerated more fully below, the plain text of section 21.750 prohibits political entities from bringing civil suits against the firearms industry for both *unlawful* and *lawful* conduct. As the *City of St. Louis v. Cernicek* Court explained, interpreting section 21.750.5 as only prohibiting lawsuit against *lawful* conduct would render

the statute superfluous and expressly contradict the intent of the legislature. *See City of St. Louis*, 145 S.W.3d at 43 (holding section 21.750 prohibits suits against lawful *and* unlawful conduct).

1. *The plain text of section 21.750 must be interpretated in a manner that does not result in superfluous provisions.*

When interpreting section 21.750, "[t]he primary objective . . . is to ascertain the intent of the legislature and give effect to that intent as it is reflected in the plain language of the statute." *State v. Meyers*, 333 S.W.3d 39, 47 (Mo. App. W.D. 2010) (internal quotation marks omitted). Although more encompassing, there are three subsections of section 21.750 that govern this action; provided in whole:

> 4. The lawful design, marketing, manufacture, distribution, or sale of firearms or ammunition to the public is not an abnormally dangerous activity and does constitute a public or private nuisance.
>
> 5. No county, city, town, village or other political subdivision nor the state shall bring suit or have any right to recover against any firearms or ammunition manufacturer, trade association or dealer for damages, abatement or injunctive relief resulting from or relating to the lawful design, manufacture, marketing, distribution, or sale of firearms or ammunition to the public. This subsection shall apply to any suit pending as of October 12, 2003, as well as any suit which may be brought in the future. Provided, however, that nothing in this section shall restrict the rights of individual citizens to recover for injury or death caused by the negligent or defective design or manufacture of firearms or ammunition.
>
> 6. Nothing in this section shall prevent the state, a county, city, town, village or any other political subdivision from bringing an action against a firearms or ammunition manufacturer or dealer for breach of contract or warranty as to firearms or ammunition purchased by the state or such political subdivision.

Section 21.750.4–6, RSMo.

The interpretative question in this matter is relatively straightforward: does section 21.750 prohibit the City from bringing suits against both unlawful and lawful conduct, or only lawful conduct? The one appellate court to address this precise question sided with the former, holding it prohibits suits against both unlawful and unlawful conduct. The *City of St. Louis v. Cernicek* Court held it prohibits suits against unlawful conduct because any other interpretation would render other provisions of the statute superfluous and meaningless. *See City of St. Louis*, 145 S.W.3d at 43. This interpretation of the

statute—which is binding precedent on this Court—is the correct and appropriate analysis that should be employed.

It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988). In doing so, "the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (internal quotation marks omitted); *see also T.V.N v. Mo. State. Highway Patrol Crim. Just. Info. Servs.*, 592 S.W.3d 74, 81 (Mo. App. W.D. 2019) ("Courts never presume that our legislature acted uselessly and should not construe a statute to render any provision meaningless."). Accordingly, when interpretating a statute, "no portion of the statute is read in isolation, but rather the portions are read in context to harmonize all of the statute's provisions." *Rasmussen v. Ill. Cas. Co.*, 628 S.W.3d 166, 175 (Mo. App. W.D 2021).

Subsection 5 of section 21.750 must be read to prohibit suits against both unlawful and lawful conduct otherwise subsection 4 would be superfluous and meaningless. The Missouri General Assembly promulgated subsection 4 to expressly declare that the "lawful design, marketing, manufacture, distribution or sale of firearms" are not abnormally dangerous activities and do not constitute public or private nuisance. If the Court were to adopt the City's proposed interpretation (i.e., that subsection 5 only prohibits lawsuits against lawful conduct), then subsection 4 would be left meaningless because subsection 4 already proscribes this concept. The City's lawsuit presents five civil causes of action—all of which are presupposed and premised on tort liability. The City cannot abruptly re-characterize its tort causes of actions as "unlawful" as a means of avoiding the statutory prohibition proscribed in subsection 5 because it would leave subsection 4 superfluous and redundant.

The City's proposed interpretation was unmistakably rejected by the court in *City of St. Louis v. Cernicek*. There, the City of St. Louis brought civil tort causes of action against numerous gun industry entities alleging firearms were being diverted into illegal markets through straw purchases. *See City of St. Louis*, 145 S.W.3d at 39. Identical to the City's attempts here, the City of St. Louis argued its tort causes of action were addressing "unlawful" conduct—thus bringing it outside of the purview of subsection 5 of section 21.750 because it only prohibits suits against "lawful" conduct. *Id.* at 42. ("As a result, they argue this suit is not barred by the statute, which only prohibits suits relating to the 'lawful' design, manufacturing, marketing, distribution, and sale."). The Court of Appeals squarely rejected this argument, holding:

> If we were to accept the City's contention that this statute *only prohibits suits based on the lawful* design, manufacturing, marketing, distribution, and sale of firearms *and not the unlawful or tortious* design, manufacturing, marketing, distribution, and sale, subsection 4 would have no meaning.

*Id.* at 43 (emphasis added).

The court further held that section 21.750 prohibits suits against unlawful conduct because the "enactment of this statute seems to be in response to suits like this one, which attempt to apply theories of tort liability to the significantly regulated industry of manufacturers, distributors, and dealers of firearms." *Id.* The Court's reasoning resonates soundly. If subsection 5 is read *only* to prohibit suits against *lawful* conduct, then "subsection 4 would be mere idle verbiage," which, according to the Court of Appeals, "the legislature did not intend such a redundant result." *Id.* Despite the City's disagreement, there is in fact no material difference between the lawsuit here, and the lawsuit brought by the City of St. Louis twenty years ago. In both circumstances, there is a political entity attempting to impute tort liability upon gun industry entities. In doing so, both cities brought civil suits that were entirely premised on the defendants' alleged tortious conduct in facilitating firearms trafficking. The City of St. Louis tried to avoid section 21.750 by alleging its civil suit could proceed because its suit was predicated on the defendants' "unlawful" conduct; the Court of Appeals disagreed.

*Id.* Here, the City makes the identical argument. *See* Pl.'s Opp'n to Mot. for Summ. J. at 18 ("[S]ince the City's claim is that CR Sales acted *unlawfully* . . . , Mo. Rev. Stat. § 21.750.5 does not apply to the City's lawsuit." (emphasis in original)). This Court must disagree as it is bound by the Court of Appeals' interpretation.

2. *The City submitted a misguided interpretation of section 21.750.*

This Court cannot adopt the City's interpretation of section 21.750 because the City's interpretation is unfounded and misstates applicable law. The City's principal argument is that subsection 5 of section 21.750 only prohibits suits against *lawful* conduct—thus, since its suit is premised on *unlawful* conduct, section 21.750 is inapplicable. As support for this argument, the City claims that *City of St. Louis v. Cernicek* supports its position because "*Cernicek* stands for the proposition that *tortious* conduct is not necessarily *unlawful* within the meaning of Section 21.750.5." Pl.'s Opp'n to Mot. for Summ. J. at 18 (emphasis in original). In doing so, however, the City misstates the applicable holding of *City of St. Louis v. Cernicek*, ultimately resulting in its misguided interpretation of section 21.750.

First, the City's argument that *City of St. Louis v. Cernicek* involved a "distinct legal theory" that makes its core holding nonbinding is a misstatement of law. The City attempts to distinguish this precedent by arguing, "[t]he City's claim here, by contrast, is that CR Sales' conduct was *illegal*—i.e., it violated federal firearms law—in addition to being tortious. *Cernicek's* core holding, therefore, does not bind this Court." *Id.* at 19 (emphasis in original). In doing so, however, the City mirrors the precise argument the City of St. Louis made when it attempted to distinguish section 21.750 in its own argument. On appeal, the City of St. Louis argued section 21.750 did not prohibit its tort cause of action because:

> Defendants' conduct violates Missouri law, including public nuisance negligence, product liability, and § 11.58.010 et seq. of the City's Revised Code. **Defendants' tortious conduct also circumvented criminal laws. Defendant Cernicek violated criminal laws, and discovery may reveal that other Defendants violated regulatory or criminal laws**.

Appellant's Reply Brief, *City of St. Louis v. Cernicek*, No. ED83830 (May 27, 2004) (Attached as Exhibit "AA.")

As presented, when the City of St. Louis attempted to argue that section 21.750 did not apply to its own case, it argued that because it was coupling together tortious and illegal conduct, it could avoid the prohibition contained in subsection 5. Here, the City has mirrored this precise argument as a means of attempting to avoid the statutory prohibition. Accordingly, *City of St. Louis v. Cernicek* is not a "distinct legal theory" that is not binding on this Court. The underlying conclusion remains: the City cannot avoid section 21.750 by arguing its cause of action is premised on tortious and illegal conduct because section 21.750, regardless, prohibits suits against both unlawful and lawful conduct.[1] The City's attempt to avoid binding precedent is meritless because the sole argument it raises here was already raised by the City of St. Louis and flatly rejected by the Court of Appeals. This Court must reject the City's argument. In doing so, the Court will adhere to precedent and properly uphold the purpose of the statute, which is to prohibit political entities from "attempt[ing] to apply theories of tort liability to the significantly regulated industry of manufacturers, distributors, and dealers of firearms." *City of St. Louis*, 145 S.W.3d at 43.

Second, the City misunderstands the purpose underlying the rule against surplusage. The City argues that if subsection 5 is interpreted in a manner that would prohibit this current lawsuit, it would effectively "read[] the word 'lawful' right out of the statute." Pl.'s Opp'n to Mot. for Summ. J. at 20.

[1] Furthermore, the City cannot abruptly claim its bringing this civil lawsuit against CR Sales for its allegedly "illegal" conduct. The Federal Gun Control Act and its implementing regulations—the laws that the City now claim CR Sales violated—provide criminal penalties for violations. CR Sales' owner and employees were never charged or prosecuted with any criminal violations. Remarkably, the City claims that its bringing a civil action against CR Sales and that this Court should hold that the City's civil Petition is premised on CR Sales' alleged violation of federal criminal laws.

As an initial matter, CR Sales contends this Court need not address this point because it is bound by the Court of Appeal's interpretation on this issue; notwithstanding, this argument should be flatly rejected. "[T]he well-established rule against superfluity dictates that statutes should be construed to avoid redundancy, so that when there are two overlapping terms, each should be construed to have independent meaning." Anita Krishnakumar & Victoria Nourse, *The Canon Wars*, 97 TEX L. REV. 163, 187 (2018). As the Court of Appeals explained in *City of St. Louis v. Cernicek*, if subsection 5 of section 21.750 is read only to prohibit suits against lawful conduct, then it would effectively render subsection 4 surplusage. *City of St. Louis*, 145 S.W.3d at 43. In applying the rule against surplusage, the Court held that subsection 5 prohibits suits against both lawful and unlawful conduct. *Id.* In doing so, it correctly applied the statutory canon because it proscribed two independent meanings to subsection 4 and subsection 5 that fulfilled the statutory purpose of section 21.750. By proscribing two independent meanings to both of the subsections, it did not arbitrarily ignore either section, but instead, expounded an interpretation consistent with the statutory purpose while correspondingly maintaining two independent meanings to subsections 4 and 5.

Here, the City effectively argues the opposite. It argues that if subsection 5 is interpreted to prohibit suits against both lawful and unlawful conduct, it would read the word "lawful" out of the statue. The City is wrong. Interpretating subsection 5 to prohibit suits against lawful and unlawful conduct does not "read the word 'lawful' right out of the statute;" rather it maintains the "lawfulness" component of the statute fixed in both subsections—while at the same time proscribing two independent and consistent meanings to subsection 4 and subsection 5. The word "lawful" remains in the statute in both of the subsections. Instead, the City's position would undoubtedly make subsection 4 superfluous—as expressly recognized by the court in *City of St. Louis v. Cernicek*. The City's interpretation is entirely misguided because it would create two redundant provisions and effectively make subsection 4 superfluous. This interpretation cannot be adopted by this Court.

3. *City of St. Louis v. Cernicek is binding precent on this Court.*

As enumerated in this brief, *City of St. Louis v. Cernicek* is binding precedent on this Court. The City's arguments, here, are mirror arguments to the arguments made by the City of St. Louis in an identical lawsuit twenty years ago. Accordingly, this Court cannot deviate from the interpretation set forth by the Court of Appeals. Notwithstanding, the City heavily relies on a 2020 Jackson County Circuit Court Order in arguing that section 21.750 only prohibits suits against lawful conduct. With respect to Judge Campbell, his 2020 Order has no bearing on this current litigation for several reasons. First, this Court is bound by the Court of Appeals interpretation of section 21.750 because the arguments and issues involved here, are identical to the arguments and issues in *City of St. Louis v. Cernicek*. Because it is binding precedent, this Court cannot consider circuit court orders as superseding authority. Second, the referenced circuit court order involves a different issue with different arguments. The 2020 Order was in response to Jimenez Arms, Inc.'s Motion to Dismiss the City's public nuisance lawsuit because "[t]he Legislature, through exactment of § 21.750.4, has directly abrogated [the City's public nuisance claim]." *See* Jimenez Arms, Inc.'s Motion to Dismiss, at 2. *Crawford v. Jimenez Arms*, 1916-CV17245 (Oct. 29, 2019). In response, Judge Campbell held that subsection 4 of section 21.750 "has not abrogated a claim of public nuisance for the *unlawful* design, marketing, manufacture, distribution, or sale of firearms or ammunition." Order, *Crawford v. Jimenez Arms*, 1916-CV17245 (Feb. 2, 2020). The briefing is entirely silent on the issue at hand here. The 2020 Order and corresponding arguments do not address the issue of whether subsection 5 of section 21.750 prohibits suits against unlawful conduct. Rather, the Court of Appeals in *City of St. Louis v. Cernicek* has already addressed this precise question. Instead of considering unrelated and unauthoritative trial court orders, this Court must adhere to the Court of Appeal's interpretation on this issue.

### B. In the alternative, the PLCAA prohibits the City's lawsuit.

The City's lawsuit is prohibited by section 21.750, RSMo., however, in the alternative, the PLCAA statutorily prohibits all five causes of action the City has raised.

#### 1. *The PLCAA bars the City's public nuisance, civil conspiracy, and negligence causes of action because the predicate exception does not apply.*

Under the predicate exception of the PLCAA, in order for the City to maintain its common law causes of action of publica nuisance, civil conspiracy, and negligence, it must establish a prima facie case that CR Sales "knowingly" violated a federal statute applicable to the sale of firearms. Contained within the City's Petition, the City alleges that CR Sales "knowingly" violated 17 different statutes that it claims can qualify as a "predicate statute." The City has failed to establish *any* of the 17 alleged statutes and regulations can qualify as a predicate statute, and if it can, it has failed to establish a prima facie case that CR Sales "knowingly" violated any of the alleged statutes and regulations.

First, the following plead regulations cannot apply as "predicate statutes": 21 C.F.R. §§ 478.29, 478.99(a), 478.123(b), 478.123(d), and 478.124(a). These regulations cannot serve as predicate statutes because they are not "State or Federal statute[s] applicable to the sale or marketing of:" firearms. *See* 15 U.S.C. § 7903(5)(A)(iii). Indeed, regulations and statutes can serve similar purposes in other contexts; however, the PLCAA cannot be interpretated in such an expansive way. It is undisputed that the PLCAA was enacted by Congress to prevent political entities from bringing civil lawsuits against the firearms industry. *See id.* § 7901(b)(1) (stating the purpose of the statute is to "prohibit causes of action against [the firearms industry] for the harm solely caused by the criminal or unlawful misuse of firearms."). Otherwise put, the PLCAA was meant to narrow available means for political entities to bring these suits. If this Court were to adopt an expansive definition of what can serve as a "predicate statute," it would be entirely contrary to the purpose of the statute. The PLCAA provides clear identification for when a suit can proceed—unsupportable judicial expansion is not necessary. Moreover, the City entirely fails to cite one source of authority that permits federal regulations to serve

as a "predicate statute" under the PLCAA.[2] The City cannot be permitted to blindly proceed on an unsupported theory of liability, accordingly, these regulations cannot serve as "predicate statutes."

Second, the City primarily claims that two pieces of evidence foreclose CR Sales' claim to summary judgment: (1) Samuels testified during his deposition that he told CR Sales he was buying and transferring guns for money; and (2) CR Sales transferred three guns to Samuels on November 2, 2016. According to the City, these primary pieces of evidence create a prima facie case that CR Sales "knowingly" violated federal gun laws. In doing so, the City has misunderstood its burden in creating a genuine dispute in compliance with Rule 74.04(c). The City's primary piece of evidence that "Samuels testified at this deposition that he told CR Sales that he was reselling guns" is merely an allegation that supported by insufficient evidence. *See* Pl.'s Statement of Fact ¶ 68. By merely citing vague deposition testimony as a means of creating a substantive material fact, the City is effectively requiring CR Sales to engage "in the meaningless activity of admitting or denying whether [the City] accurately quoted deposition testimony." *Custer v. Wal-Mart Stores, E. I, LP*, 492 S.W.3d 212, 215 (Mo. App. S.D. 2016). Finally, just because CR Sales became suspicious of Samuels on November 2, 2016, does not mean it was suspicious of him prior to transferring firearms to him. The City's primary contention that CR Sales knew that Samuels was an alleged gun trafficker, but nevertheless transferred him firearms on November 2, 2016, is an allegation that is entirely unsupported by evidence.

For these three causes of action to proceed through the predicate exception of the PLCAA, the City must put forth prima facie evidence that CR Sales knowingly violated a statute associated with firearms. The only evidence the City has put forth is conclusory allegations that CR Sales knew Samuels was a gun trafficker. Merely citing deposition testimony that CR Sales became suspicious of

[2] The City's brief convolutedly claims that "a violation of the federal record keeping regulations that the City cites in its petition is a violation of a federal statute." As support, the City cites two New York state court opinions and claims that "[t]his principle has been applied in the context of the predicate exception." Contrary to the City's claims, neither of the cited cases indicate that a federal regulation could serve as a "predicate statute" under the PLCAA.

Samuels on November 2, 2016, does not correspondingly establish evidence that CR Sales knew it was violation a statute associated with firearms. The City has failed to put forth sufficient substantive evidence that CR Sales—at any point—knew or should have known its activity was illegal. Accordingly, the PLCAA prevents these three common law causes of action from proceeding.

### C. The City's negligence per se cause of action undoubtedly fails as a matter of law.

The City's negligence per se cause of action fails as a matter of law because the City's action is entirely presupposed on violations of federal law. In *Elkins v. Acad. I, LP*, 633 S.W.3d 529, 539 (Mo. App. S.D. 2021), the Missouri Court of Appeals squarely held a plaintiff "cannot rely on a federal criminal statute related to the sale of firearms and ammunition as establishing a duty or standard of care for a negligence per se claim in Missouri's state courts." Despite this clear holding, the City attempts to distinguish *Elkins* in two ways: (1) *Elkins* involved private plaintiffs as opposed to a political entity; and (2) the *Elkins* alleged a violation of a different provision of 18 U.S.C. § 922. The City continues to claim that *Elkins* is inapplicable in the present case because *Elkins* did not consider "whether provisions of federal firearms law were intended to protect the interests of a municipality, as opposed to individual private citizens." Pl.'s Opp'n to Mot. for Summ. J. at 38.

The City's brief correctly cites the four elements necessary to establish a negligence per se cause of action in Missouri state court and that the relevant framework must be premised on Missouri state law. However, the City's fatal error is that it seemingly ignored that in order to maintain a negligence per se cause of action, the relied upon statute used to create a standard of care must provide a private cause of action. *See Lowerdermilk v. Vescovo Bldg. and Realty Co., Inc.*, 91 S.W.3d 617, 628 (Mo. App. E.D. 2002) ("Before we reach the question of a violation, we must first examine the statute itself to determine if it is a statute on which negligence per se may be premised."). Accordingly, in order for the City to rely on the Gun Control Act and its implementing regulations, it must show the relied upon statutory provisions allow for a private cause of action for the City to seek civil liability and

monetary damages. *See Ryno v. Hillman*, 641 S.W.3d 385, 391 (Mo. App. S.D. 2022) ("The primary issue is whether [the statute] allows a private cause of action based on negligence per se[.]"); *Bradley v. Ray*, 904 S.W.2d 302, 314 (Mo. App. W.D. 1995) ("Because this Court finds no private cause of action can be implied under the Child Abuse Reporting Act, section 210.115, the alleged breach of the Act also does not amount to negligence per se.").

Although the City argues that it is tangentially part of the class that the Gun Control Act and implementing regulations is designed to protect in accordance with its legislative history, it is unable to provide support that there is a private cause of action that would properly allow it to maintain its negligence per se cause of action. *Elkins* precisely determined that the Gun Control Act cannot impliedly provide a private cause of action because of the enactment of the PLCAA. *See* 633 S.W.3d at 539. As the City correctly notes, the "touchstone inquiry" is legislative intent. As the *Elkins* Court correctly found, "Congress has expressed its intent for civil suits against firearm and ammunition sellers in the PLCAA." *Id.* at 538. Because the PLCAA expressly negates any sort of private cause of action, relying on violations of the Federal Gun Control Act cannot be a basis for asserting a negligence per se cause of action in Missouri state court. *Id.* at 538–39. Accordingly, the City's negligence per se cause of action fails a matter of law.

**D. The City's negligent entrustment cause of action fails as a matter of law because it has failed to put forth any evidence that CR Sales knew or should have known of any incompetent entrustee.**

In order for the City's negligent entrustment cause of action to proceed to a jury, it must have established a prima facie showing of all legally cognizable elements. In doing so, the City must present factual allegations that are supported by "pleadings, discovery, exhibits, or affidavits" that establish there is at least a genuine dispute of material fact. *See Great S. Bank v. Blue Chalk Constr., LLC*, 497 S.W.3d 825, 834 (Mo. App. S.D. 2016) (citing Rule 74.04(c)). In submitting a Response to CR Sale's Motion for Summary Judgment, the City—in order to survive summary judgment—was required to

"direct the trial court to a particular numbered paragraph in movant's statement of uncontroverted material facts that is denied in the non-movant's response," which would allow the trial court to "consider[] the non-movant's specific references to the discovery, exhibits, or affidavits attached to the response supporting the non-movant's denial of that material fact. . . . to ascertain the existence of a genuine issue as to that particular numbered paragraph material fact." *Id.*

Here, the City failed to create a genuine dispute of material fact as to whether the entrustees were incompetent and whether CR Sales knew or should have known of the entrustees' incompetence. In moving for summary judgment, CR Sales claimed it is entitled to judgment as a matter of law on the City's negligent entrustment claim because it failed to plead and prove that there were incompetent entrustees and that CR Sales knew or should have known about their incompetence. The City, for the first time, claims that Samuels and the prospective buyers were incompetent because "Samuels was a gun trafficker and (2) his buyers were inherently suspect because they were purchasing guns from a gun trafficker rather than legal channels for purchasing firearms." Pl.'s Opp'n to Mot. for Summ. J. at 32. Further the City claims that "[c]ases that have considered a negligent entrustment claim in the context of a sale to a trafficker and/or straw purchaser regularly allow the claim to go forward." *Id.* As support the City cites to three cases analyzing negligent entrustment claims at the initial pleading stage of litigation when faced with a motion to dismiss. Indeed, these courts allowed a negligent entrustment claim to survive a motion to dismiss. The City is faced with establishing a prima facie case sufficient to survive summary judgment—it is not faced with a motion to dismiss where it is entitled to rely on liberal pleading requirements at the initial stage of litigation.

The crux of the determination, here, is whether Samuels or the prospective buyers were "incompetent" under Missouri state law and whether CR Sales knew or should have known of said incompetence. The City's brief glosses over the issue as to whether Samuels and the prospective buyers were incompetent under Missouri law and merely conclusory claims that "Samuels was a gun trafficker

and . . . and his buyers were inherently suspect because they were purchasing guns from a gun trafficker rather than legal channels for purchasing firearms." *Id.* First, the prospective buyers undoubtedly cannot be considered "incompetent" entrustees nor did CR Sales know, or should have, known of their incompetence. The City's brief is entirely devoid of any citation to "specific references to the discovery, exhibits, or affidavits" showing there is a genuine dispute as their alleged incompetence. Instead, the City merely conclusory concludes that they were incompetent because they "were inherently suspect because they were purchasing guns from a gun trafficker rather than legal channels for purchasing firearms." Incompetence for purposes of negligence entrustment is a characteristic an entrustee possess—not the mere participation in an allegedly unlawful activity.

Furthermore, the City has not presented any evidence showing CR Sales should have known of the prospective buyers alleged incompetence. As the *Elkins* Court noted, the characteristics possessed by the allegedly incompetent entrustee must raise more than just some suspicion, it must provide a reason for the entrustor to check for the alleged incompetence. *See* 633 S.W.3d at 535–36. Here, every single prospective buyer filled out ATF Form 4473s.[3] In doing so, each buyer conveyed to CR Sales they were legally competent to purchase the firearm. There is no evidentiary support that shows any of the prospective buyers possessed characteristics that would put CR Sales on notice that they were incompetent to possess a firearm. The City's expanded theory of liability cannot be applied to CR Sales when there is no evidence that the prospective buyers were incompetent under Missouri law. CR Sales complied with applicable federal and state law when it facilitated the firearm transfers. If the City cannot establish that the prospective buyers were incompetent by putting forth evidence, through "pleadings, discovery, exhibits, or affidavits," then the City has failed to create a genuine

[3] Here, the City expounds another misguided representation of law. The City claims "the Missouri Supreme Court held that the gun store *could* be held liable for negligent entrustment despite the fact that the purchaser passed a background check." Pl.'s Opp'n to Mot. for Summ. J. at 35. This "holding" is nonexistent. The issue determine by the Supreme Court of Missouri in *Delana* was whether Missouri state law permitted a negligent entrustment action against a seller of a product—not whether a negligent entrustment action could proceed on the basis of the buyer passing a background check.

dispute sufficient to survive summary judgment. Instead, the City merely conclusory claims that the prospective buyers were incompetent "were inherently suspect because they were purchasing guns from a gun trafficker rather than legal channels for purchasing firearms."

18 U.S.C. 922(g) proscribes the nine categories of individuals who are prohibited under federal law to possess a firearm. When an individual attempts to purchase a firearm, that individual must fill out an ATF Form 4473. Every prospective buyer completed these ATF Form 4473 when they were at CR Sales. The City presents no evidence that the prospective buyers presented other characteristics that CR Sales should have known would make them "incompetent." The City cannot blindly argue that merely participating in an allegedly illegal activity intuitively qualifies them as "incompetent." Accordingly, the City has entirely failed to reach its burden to show that the prospective buyers were incompetent for purposes of negligent entrustment.

Finally, the City has provided no evidence that CR Sales knew or should have known about Samuels' alleged incompetency. The evidence undoubtedly indicates that CR Sales first became suspicious of Samuels on November 2, 2016. Through conclusory allegations, the City argues that CR Sales was aware of Samuels' alleged incompetence. The City has failed to present any evidence that CR Sales was aware of Samuels alleged incompetence prior to transferring him firearms on November 2, 2016. Indeed, this unsupported allegation is evident in the City's brief:

> Shortly after Samuels was arrested, Charlies Rice [*sic*], CR Sales' owner did an interview on local television in which he said: "I said something to [Samuels] about it. **Look, you can't be dealing in firearms without a license.** You're going to get yourself in trouble. And I'm not going to get myself in trouble." SODF ¶ 80(e) (emphasis added). During his deposition, Rice testified that he "formed [the] opinion on November 2, 2016" that Samuels was engaged in wrongdoing. SODF ¶ 80(c), Ex. 3, Rice Depo. 73:20-21. Assistant Manager Mr. Basso also testified that "it appeared that [Samuels] was doing business without a license and that he was, you know, getting people lined up to sell the guns and when it became *obvious* I told Charlie [Rice] . . . . " CR Sales' SUMF, EX. H at 63:24-64:14 (emphasis added); SODF ¶ 80(b).

Pl.'s Opp'n to Mot. for Summ. J. at 10.

According to the City, this purported evidence supports the notion that CR Sales was suspicious of Samuels prior to transferring the November 2, 2016, firearms. Nevertheless, the City's cited evidence—nor any evidence in the case—supports such a claim. In order for the negligent entrustment cause of action to proceed to a jury, there must have been evidence that CR Sales should have known that Samuels was allegedly incompetent. There has been no evidence presented that CR Sales was aware of Samuels incompetence until after all of the transfers had occurred. Thus, because the City has failed to present evidence that either the prospective buyers or Samuels were incompetent and that CR Sales was at least aware of the said incompetence, the City's negligence entrustment cause of action cannot proceed to a jury.

## III. CONCLUSION

Summary judgment must be granted in favor of CR Sales because section 21.750 prohibits the City from maintaining this lawsuit. As interpreted by the Court of Appeals, subsection 5 of section 21.750 prohibits political entities from brining civil lawsuits against the gun industry for either lawful or unlawful conduct. Accordingly, the City's claim that this lawsuit falls outside the purview of subsection 5 is meritless and was precisely rejected by the Court of Appeals. In the alternative, the City has failed to present evidence sufficient to survive summary judgment, accordingly, every cause of action raised by the City must be dismissed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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