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**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION**

CITY OF CHICAGO, an Illinois municipal corporation,

Plaintiff,

v.

WESTFORTH SPORTS, INC.,

Defendant.

Case No. 21 CH 01987

Judge: Clare J. Quish

**PLAINTIFF’S MOTION TO MODIFY THE MAY 25, 2023 ORDER
AND FOR LEAVE TO FILE AN AMENDED COMPLAINT**

Plaintiff, the City of Chicago (“the City”), by and through its attorneys, requests that the Court modify its order of May 25, 2023 (“Order”) pursuant to 735 ILCS 5/2-1203, to make the Order a dismissal without prejudice. The City also requests the Court’s leave to file an Amended Complaint, attached as **Exhibit A**,¹ pursuant to 735 ILCS 5/2-616. In support of this Motion, the City states as follows:

FACTUAL BACKGROUND

1. The City sued Defendant Westforth Sports, Inc. (“Westforth”), an Indiana gun store located ten miles from Illinois, for contributing to a public nuisance in the City of Chicago by knowingly engaging in illegal firearms sales through the sale of hundreds of guns to traffickers and straw purchasers in violation of federal law. *See* Compl. ¶ 1. The Complaint highlighted Westforth’s decades of disregard for federal firearms laws, for which the store had been repeatedly cited by the Bureau of Alcohol, Tobacco, Firearms and Explosives. *Id.* ¶¶ 3, 20, 43–47, 58, 105.

¹ A redline reflecting the changes between the Complaint and the Amended Complaint is attached as **Exhibit B**.

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2. On August 16, 2021, Westforth filed a Section 2-619 Motion to Dismiss for Lack of Personal Jurisdiction (“Motion to Dismiss”), arguing that the activity identified in the Complaint involved sales at Westforth’s Indiana store to residents of Indiana, and that the store lacked sufficient contacts with Illinois to be subject to personal jurisdiction there. Mot. to Dismiss at 1. The Motion to Dismiss did not seek dismissal with prejudice.

3. The City sought jurisdictional discovery to respond to Westforth’s Motion to Dismiss. Aug. 24, 2021 Order Granting Jurisdictional Discovery, attached as **Exhibit C**. In April 2022, the Court granted the City’s motion to compel certain discovery, holding, among other things, that records pertaining to Westforth’s direct sales to Illinois customers were discoverable because Westforth had placed these sales at issue in its Motion to Dismiss, and because “the records relate to whether Westforth directed its activities at the forum state of Illinois and whether the causes of action alleged by the City in its complaint arise out of such contacts[.]” Apr. 8, 2022 Order Granting City’s Motion to Compel, attached as **Exhibit D**, at 8.

4. Jurisdictional discovery revealed that Westforth engaged in frequent firearm sales to Illinois residents, and that many of these sales were illegal. For example, Westforth produced documents demonstrating that the store repeatedly sold assault weapons to Chicago residents in violation of a City ordinance that prohibits the possession, purchase, or sale of these weapons. *See* Mot. to Dismiss Opp. Brief (“Opp. Brief”) at 7, 9–10; Aff. of Greg Lickenbrock ISO Mot. to Dismiss Opp. Brief (“Lickenbrock Aff.”) ¶¶ 6–8; *see also* MCC § 8-20-075; 18 U.S.C. § 922(b)(3). Furthermore, Westforth produced records demonstrating that it sold certain handguns to Illinois residents that violate an Illinois law prohibiting the sale or possession of handguns with low-quality alloy component parts. Lickenbrock Aff. ¶¶ 12–14; *see also* 730 ILCS 5/24-3(A)(h).

5. The City filed its opposition to the Motion to Dismiss on September 15, 2022 and submitted these records of Westforth's illegal sales directly to Illinois residents as additional evidence of Illinois contacts. *See, e.g.*, Opp. Brief at 7, 9–10, 14–15, 17. The City also stated in its brief that it intended to amend the Complaint to include allegations regarding these additional illegal sales, which further support the City's claims that Westforth was negligent and contributed to a public nuisance. *Id.* at 25 n.10.

6. During the January 31, 2023 hearing on the Motion to Dismiss, the City again expressed its intention to amend the Complaint to incorporate allegations regarding these unlawful sales. Transcript of January 31, 2023 Hearing on Motion to Dismiss, attached as **Exhibit E**, at 17:19–19:16, 35:18–40:19; *see also* Order, attached as **Exhibit F**, at 4 n.1.

7. On May 25, 2023, the Court granted Westforth's Motion to Dismiss, finding that Westforth's contacts with Illinois were not sufficient for it to exercise personal jurisdiction over Westforth in this case. While the Court acknowledged the City's intention to amend its pleading to add allegations of assault weapon and handgun sales to Illinois residents, the Court did not consider them for the purpose of determining whether the City's claims arose out of these Illinois sales. Order, Ex. F, at 4–5 & n.1. The Court granted the Motion to Dismiss with prejudice and disposed of the City's case by written order. *Id.* at 7.

8. At the May 25, 2023 hearing to announce the Court's decision, counsel for the City requested leave to file an amended complaint. Transcript of May 25, 2023 Hearing on Order Granting Motion to Dismiss, attached as **Exhibit G**, at 5:2–10. The Court stated that its decision was with prejudice and that the City should file a written motion for relief. *Id.* at 5:14–22. The City does so here.

9. The proposed Amended Complaint includes allegations that address the jurisdictional defects identified by the Order in two ways. *First*, the Amended Complaint includes allegations pertaining to direct sales to Illinois residents, including illegal sales to Chicago residents of assault weapons and handguns containing low-quality alloy component parts. *See* Amend. Compl., Ex. A, at ¶¶ 1, 3, 8, 11, 102–114, 125. These direct sales to Chicago residents are part and parcel of a business model at Westforth that maximizes sales and profits by facilitating illegal gun sales. *Id.* at ¶¶ 3, 109–114. *Second*, the Amended Complaint includes new allegations demonstrating that Westforth employees knew that guns were being straw-purchased at the store for the purpose of re-sale in Chicago and that employees were discouraged by management from asking questions of straw buyers so that the store could profit from such sales. *Id.* at ¶¶ 4, 60, 82.

ARGUMENT

10. The City respectfully requests that the Court grant its Motion and (i) modify the Order to be without prejudice and (ii) allow the City to file the Amended Complaint.

A. The Court Should Modify Its Order to Reflect Dismissal Without Prejudice.

11. Section 2-1203 of the Illinois Rules of Civil Procedure provides a party the opportunity to move for modification, or reconsideration, of a judgment within 30 days of the entry thereof. One of the purposes of a motion to modify “is to alert the trial court to errors it has committed and thereby afford it an opportunity for their correction.” *In re Marriage of Stuart*, 141 Ill. App. 3d 314, 316 (5th Dist. 1986). The power to grant the motion to modify rests in the discretion of the trial court. *Id.* Here, the Court’s decision to dismiss a case for lack of personal jurisdiction with prejudice constitutes error and modification of the Order is appropriate.

12. Westforth moved to dismiss the City’s claims under 735 ILCS § 5/2-619, solely on the basis of an alleged lack of personal jurisdiction. Illinois law is clear that a dismissal on jurisdictional grounds does not adjudicate the merits of a plaintiff’s claims and therefore must be

without prejudice. *See People v. Smith*, 2017 IL App (3d) 150265, ¶ 19 (“Once the circuit court determines there is no personal jurisdiction over [the defendant], the court has no power to dismiss the petition on the merits.”); *see also Cohen v. Salata*, 303 Ill. App. 3d 1060, 1066 (1st Dist. 1999) (vacating the trial court order dismissing claims “with prejudice” and holding dismissal “for want of jurisdiction[,] by its very nature, is not an adjudication on the merits and is, therefore, ‘without prejudice’”); *Johnson v. Du Page Airport Auth.*, 268 Ill. App. 3d 409, 418 (2d Dist. 1994) (“The term ‘merits’ has been defined as, ‘the real or substantial grounds of [an] action or defense as distinguished from matters of practice, procedure, jurisdiction, or form. Where there is no adjudication on the merits, a dismissal should be granted *without* prejudice, as opposed to granting dismissal *with* prejudice.”) (cleaned up); *Ryburn v. People*, 349 Ill. App. 3d 990, 994 (4th Dist. 2004) (“[A] dismissal for lack of personal jurisdiction does not operate as a disposition on the merits.”); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 20 cmt. e (AM. L. INST. 1982) (“[J]udgment should not operate as a bar [to another action by the plaintiff on the same claim] if one of the determinations is that the court in which the action was brought lacked subject matter or personal jurisdiction to adjudicate the claim.”).²

13. As the First District has explained, “[Illinois] Supreme Court Rule 273 provides that unless an order of dismissal or a statute otherwise specifies, an involuntary dismissal, *other than dismissal for lack of jurisdiction*, improper venue, or failure to join an indispensable party, operates as an adjudication on the merits.” *Norris v. Estate of Norris*, 143 Ill. App. 3d 741, 748 (1st Dist. 1986) (emphasis added). “It is apparent from this rule that dismissal for lack of subject matter jurisdiction does not operate as an adjudication on the merits.” *Id.* Accordingly, Westforth

² Illinois courts look to the Restatement (Second) of Judgments § 20 for guidance on the preclusive effect of judgments. *See, e.g., Hudson v. City of Chicago*, 228 Ill. 2d 462, 494 (2008) (Killbride, J. dissenting); *cf. id.* at 472-73, 476 (discussing other sections of Restatement).

did not move to dismiss the City’s claims with prejudice, and no case law would support such a request.³

14. Dismissals in federal courts on jurisdictional grounds are likewise limited to dismissals without prejudice. *See, e.g., Murray v. Conseco, Inc.*, 467 F.3d 602, 605 (7th Cir. 2006) (“‘No jurisdiction’ and ‘with prejudice’ are mutually exclusive. A court that lacks subject matter jurisdiction cannot dismiss a case with prejudice.”) (internal citations omitted); *Lichtenheld v. Juniper Features, Ltd.*, No. 94 C 4385, 1996 WL 685443, at *2 (N.D. Ill. Nov. 21, 1996) (modifying order dismissing for lack of personal jurisdiction and holding that “a lack of jurisdiction renders the court powerless to make a decision on the merits and to dismiss the case with prejudice”). This authority is persuasive, as Illinois Supreme Court Rule 273 was modeled after the Federal Rules of Civil Procedure.⁴

15. Dismissal with prejudice is also unwarranted unless it is apparent that any defects—be they jurisdictional or substantive—cannot be cured. *See Lake Point Tower Condo. Ass’n v. Waller*, 2017 IL App (1st) 162072, ¶ 21 (“A complaint should be dismissed with prejudice under section 2–615 or section 2–619 only where it is clear that the plaintiff can prove no set of facts that would entitle it to relief.”); *Bank of N. Ill. v. Nugent*, 223 Ill. App. 3d 1, 13 (2d Dist. 1991) (“[T]he court's finding that the complaint did not provide sufficient facts to state a cause of action does not

³ During the May 25, 2023 hearing, Westforth stated for the first time that the motion was seeking dismissal with prejudice *after* the Court gave its ruling. *See* Transcript of May 25, 2023, Ex. G, at 5:14–17.

⁴ The Illinois Supreme Court has recognized that Illinois Supreme Court Rule 273 was modeled after Federal Rule of Civil Procedure 41(b). *Leow v. A & B Freight Line, Inc.*, 175 Ill. 2d 176, 185 (1997). Thus, it is appropriate for Illinois courts to “examine (Fed. R. Civ. P.) Rule 41(b) and its history to guide [the court’s] interpretation of Rule 273.” *Id.*; *see also Owens v. VHS Acquisition Subsidiary No. 3, Inc.*, 2017 IL App (1st) 161709, ¶ 27 (“Where a provision of the Illinois Code of Civil Procedure is patterned after a Federal Rule of Civil Procedure, federal cases interpreting the federal rule are persuasive authority with regard to the application of the Illinois provision.”).

necessarily mean those facts do not exist. The sufficiency of the complaint was considered only once, and it was not clear that the defect could not be cured. An amendment would have been in furtherance of justice in this case.”). Here, there was no finding by the Court that the jurisdictional defects identified in the Order could not be cured. Instead, with respect to direct sales to Illinois customers, the Court concluded that it could not consider such allegations for the purpose of determining whether the City’s claims arose out of such sales because they were not included in the Complaint. Order, Ex. F, at 4 & n.1.

16. For all the above reasons, the City requests that the Court modify the Order to be without prejudice pursuant to longstanding case law and rules of civil procedure. *See J.M. Process Sys., Inc. v. W.L. Thompson Elec. Co.*, 218 Ill. App. 3d 350, 356 (1st Dist. 1991) (affirming that trial court had authority to modify whether its order dismissed case with or without prejudice). Modification of the Order is particularly appropriate here because failure to do so may frustrate the City’s efforts to seek adjudication of its claims on their merits—whether through an amended pleading before this Court or by refileing its claims before a different court of competent jurisdiction. *Compare Johnson*, 268 Ill. App. 3d at 418 (explaining that because “dismissal *with* prejudice constitutes an adjudication on the merits,” it “bars the plaintiff from maintaining another action on the same claim”) *with Guerrero v. Piotrowski*, 67 F. Supp. 3d 963, 968 (N.D. Ill. 2014) (“A dismissal for lack of jurisdiction is not an adjudication on the merits. As such, where a prior action is dismissed for lack of jurisdiction, *res judicata* does not preclude the second action.”).⁵

⁵ The City does not concede that its claims would be barred in another jurisdiction, should the Court’s Order remain unmodified. The City seeks modification, in part, for the avoidance of doubt on this issue.

B. The Court Should Grant the City Leave to File an Amended Complaint.

17. After the Order is modified, the City requests that the Court grant leave for the City to file an Amended Complaint that includes new allegations addressing the jurisdictional deficiencies noted in the Court's Order.

18. The Illinois Code of Civil Procedure allows a party to amend its pleadings "on just and reasonable terms" prior to final judgment under 735 ILCS 5/2-616(a). "In Illinois . . . the policy is to 'remove barriers which prevent the resolution of a case on its merits.'" *County Of Peoria v. Couture*, 2022 IL App (3d) 210091, ¶ 46 (citing *Scala/O'Brien Porsche Audi, Inc. v. Volkswagen of Am., Inc.*, 87 Ill. App. 3d 757, 762 (1st Dist. 1980)). "To that end, permission to amend pleadings should be freely and liberally given so that cases are decided on their merits instead of on procedural technicalities." *Id.* (citing *Droen v. Wechsler*, 271 Ill. App. 3d 332, 336 (1st Dist. 1995)) (internal quotation marks omitted).

19. When determining whether to allow an amended pleading, Illinois courts consider four factors: (i) whether the proposed amendment would cure the defective pleading; (ii) whether the other party would sustain prejudice or surprise by virtue of the proposed amendment; (iii) whether the proposed amendment is timely; and (iv) whether previous opportunities to amend the pleading could be identified. *See, e.g., Kupianen v. Graham*, 107 Ill. App. 3d 373, 377 (1st Dist. 1982). All four factors are satisfied here.

20. As to the *first* factor, allegations that Westforth made illegal firearms sales directly to Illinois residents addresses the Court's concerns that the City's cause of action does not "arise out of or relate to" Westforth's contacts with Illinois. Order, Ex. F, at 3-5. The proposed Amended Complaint details how Westforth repeatedly and illegally sold guns directed at the Illinois market: either by selling guns directly to Illinois residents (in-person or through an Illinois gun store) or

via straw purchasers and traffickers who acted as conduits for illegal possessors in Illinois. Am. Compl., Ex. A, at ¶¶ 1, 3, 8, 11, 102–114, 125. These sales have created a public nuisance in Chicago where many of these illegal guns are recovered in crimes, and many others are yet to be recovered—impinging on Chicago residents’ sense of safety, making the jobs of law enforcement more difficult, and interfering with the resident’s use of public property, such as parks, roadways and mass transportation. *Id.* at ¶¶ 107, 109–114. The proposed Amended Complaint also details how Westforth has deliberately violated Illinois state law and Chicago local ordinances, including 720 ILCS 5/24-3(A)(h), and MCC § 8-20-075. *Id.* at ¶¶ 104–105, 110–114, 125. Violation of these statutes endangers residents in Chicago every day.

21. These allegations make clear the direct causal connection between Westforth’s deliberate targeting of Illinois customers and the creation and maintenance of a public nuisance of illegal guns on the streets of Chicago. Thus, the proposed Amended Complaint satisfies the requirements of specific jurisdiction. *See Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1024-25 (2021) (for a court to have specific jurisdiction over an out-of-state defendant, the defendant must have “deliberately reached out beyond its home” and the plaintiff’s claims “must arise out of or relate to the defendant’s contacts with the forum”); *Ill. v. Hemi Grp. LLC*, 622 F.3d 754, 758 (7th Cir. 2010) (explaining that a corporation purposefully avails itself of the privilege of doing business in Illinois by indicating it is “ready and willing to do business with Illinois residents.”). While the Court held that it could not consider direct sales to Illinois residents when evaluating whether the City’s claims “arose out” of such sales because they were not part of the City’s Complaint, the proposed Amended Complaint removes that impediment. Order, Ex. F, at 4 n.1; *see also id.* at 7 (“Here, the City’s claims alleged in its complaint relate solely to the actions of straw purchasers, Indiana residents who purchase guns from Westforth in Indiana.”).

Furthermore, permitting a party to amend a complaint with allegations stemming from documents that a court ordered produced in discovery is particularly appropriate.

22. While the addition of allegations pertaining to direct sales to Illinois customers is sufficient in and of itself to establish personal jurisdiction over Westforth, the proposed Amended Complaint also includes new allegations that Westforth employees and its management knew that straw purchasers were coming to its store for the purpose of buying guns to re-sell them in Chicago. *See* Am. Compl., Ex. A, at ¶¶ 4, 82 (alleging that an employee did not want to make a sale to a suspected straw purchaser because it was clear that the purchaser intended to re-sell the guns in Chicago, but that Westforth’s owner instructed another employee to consummate the sale). The proposed Amended Complaint also details how Westforth took purposeful steps to continue its sales to straw purchasers and protect its profits from such sales. *See id.* at ¶ 82 (alleging that Westforth provided a substantial discount to a straw purchaser who bought five guns at the same time and that two of those guns were recovered in Chicago the next day); *id.* at ¶ 73 (alleging that Westforth provided false statements to the ATF with respect to a straw purchaser who purchased 19 guns at Westforth); *id.* at ¶ 60 (alleging that employee was discouraged from asking questions of suspected straw purchasers that could derail the sale). These allegations, in conjunction with those alleged in the original Complaint, demonstrate that Westforth’s business with straw purchasers was not “random” or “fortuitous,” *see Ford Motor Co.*, 141 S. Ct. at 1025, but the result of a bilateral and profitable decision by the store to serve the market for illegal firearms in Chicago.

23. Importantly, while a court “may consider the efficacy of a claim in deciding whether or not to allow an amendment to the pleadings, any doubt should be resolved in favor of an amendment.” *Jeffrey M. Goldberg & Ass’n, Ltd. v. Collins Tuttle & Co.*, 264 Ill. App. 3d 878, 885 (1st Dist. 1994); *Avakian v. Chulengarian*, 328 Ill. App. 3d 147, 154 (2d Dist. 2002) (same);

Am. Nat. Bank & Trust Co. of Chi. v. Dozoryst, 256 Ill. App. 3d 674, 679 (1st Dist. 1993) (same). Given Illinois’ strong policy preference to liberally allow amendment so that “cases are decided on their merits instead of on procedural technicalities,” *Couture*, 2022 IL App (3d) 210091, ¶ 46 (internal quotation marks omitted), the Court should allow the City to amend its complaint, so that—if necessary—an appellate court may determine whether jurisdiction exists based on the full record of illegal gun sales by Westforth. *See Kupianen*, 107 Ill. at 377 (reversing trial court decision and directing the court to allow amendment where “the denial of the motion to amend [] effectively prevented [the plaintiff] from fully presenting her claim”). The policy preference in favor of amendment is particularly acute here given that this case pertains to the public safety of Chicagoans.

24. The *second* factor is also satisfied because Westforth will not sustain any prejudice or be surprised by an Amended Complaint that includes allegations pertaining to its illegal firearms sales to Illinois residents and its purposeful facilitation of straw purchases. This factor—which has been described as “[t]he most important” of the four factors—looks to determine whether a party would be hindered in its ability to present its case on the merits. *Miller v. Pinnacle Door Co., Inc.*, 301 Ill. App. 3d 257, 261 (4th Dist. 1998) (explaining that “[p]rejudice may be shown where delay before seeking an amendment leaves a party unprepared to respond to a new theory at trial”); *Graham*, 107 Ill. App. 3d at 377 (“No prejudice or surprise could have resulted to the other parties since the case was still at the pleading stage.”); *Couture*, 2022 IL App (3d) 210091, ¶ 44 (finding no prejudice where trial was in two months because the defendant “did not have to frantically scramble for evidence to meet a last-minute amendment” in that time period); *Vance v. Hudson Gen. Aviation Serv.*, 199 Ill. App. 3d 736, 764 (1st Dist. 1990) (“Prejudice may not be claimed as the result of filing an amendment if the party’s attention is directed, within the time prescribed or

limited, to the facts that form the basis for the asserted claim.”).⁶ Here, there can be no argument that Westforth would be surprised or unable to prepare a defense, given that this case is far from trial and the majority of the new allegations come from Westforth’s own records.

25. The *third* factor—timeliness of the request to amend—overlaps significantly with the second factor and also weighs in favor of granting the City leave to amend the complaint. *See Jeffrey M. Goldberg & Ass’n, Ltd.*, 264 Ill. App. 3d at 886 (holding that both the second and third factor were met where the case was only at the pleading stage and only limited discovery had been completed). Here, the City seeks leave to amend within the requisite 30 days of the of the Court’s Order, and the case is in its earliest stage (substantive discovery has not even commenced). Although seeking leave to amend after a court has entered a judgment may weigh in favor of untimeliness, *see* 735 ILCS 5/2–616(a), here the City first timely seeks to modify the Court’s entry of the dismissal with prejudice for the reasons outlined in Section A, while concurrently seeking leave to amend.

26. The *fourth* factor also weighs in favor of granting leave, as this is the City’s first attempt to amend its Complaint. *Nugent*, 223 Ill. App. 3d at 13 (holding that trial court abused its discretion by denying leave to amend where “[t]he sufficiency of the complaint was considered only once, and it was not clear that the defect could not be cured.”); *Jeffrey M. Goldberg & Ass’n, Ltd.*, 264 Ill. App. 3d at 886 (fourth factor was satisfied where there was no need to amend the complaint until a claim had been dismissed). Thus, this is far from the case where a court has given a plaintiff multiple opportunities to amend its pleadings before finding that the fourth factor weighs in favor of a denial of a motion to amend. *See e.g., Stringer Const. Co., Inc. v. Chicago Hous.*

⁶ Notably, defending a lawsuit does not constitute prejudice. *See Couture*, 2022 IL App (3d) 210091, ¶ 46 (“[O]f course defendants are prejudiced when they are *sued*. ‘Prejudice’ to the defendant has to mean more than being sued by the plaintiff on a legally cognizable theory.”).

Auth., 206 Ill. App. 3d 250, 260–61 (1st Dist. 1990) (noting that the plaintiff had had previous opportunities to amend, where the case had been litigated for eight years and the complaint had been amended four times before trial).

CONCLUSION

For the foregoing reasons, the City respectfully asks that the Court modify the Order granting the Motion to Dismiss to be without prejudice and grant the City leave to file an Amended Complaint substantially in the form of Exhibit A.

Dated: June 23, 2023

Mary B. Richardson-Lowry
Stephen J. Kane
Rebecca A. Hirsch
CITY OF CHICAGO DEPT. OF LAW
121 North LaSalle Street, Room 600
Chicago, Illinois 60602
(312) 744-6934
stephen.kane@cityofchicago.org
Rebecca.Hirsch2@cityofchicago.org

Alla Lefkowitz *
EVERYTOWN LAW
P.O. Box 14780
Washington, DC 20044
Phone: 202-545-3257
alefkowitz@everytown.org

James E. Miller*
EVERYTOWN LAW
450 Lexington Ave.
P.O. Box # 4184
New York, NY 10017
Phone: (646) 324-8220
jedmiller@everytown.org

* Admitted pro hac vice

Respectfully submitted,

By: s/Michael J. Gill
Michael J. Gill
Michael A. Scodro
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
Firm No. 43948
mgill@mayerbrown.com
mjscodro@mayerbrown.com

Mark G. Hanchet*
Robert W. Hamburg*
Victoria D. Whitney*
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500
mhanchet@mayerbrown.com
rhamburg@mayerbrown.com
vwhitney@mayerbrown.com

**ATTORNEYS FOR PLAINTIFF
CITY OF CHICAGO, ILLINOIS**