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

| | | |
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| CITY OF CHICAGO, an Illinois municipal corporation, | ) | |
| *Plaintiff*, | ) | |
| v. | ) | Case No. 21 CH 01987 |
| WESTFORTH SPORTS, INC., | ) | Judge: Clare J. Quish |
| *Defendant*. | ) | |

# PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO MODIFY THE MAY 25, 2023 ORDER AND FOR LEAVE TO FILE AN AMENDED COMPLAINT

In Illinois, public policy strongly favors the free and liberal amendment of pleadings so that cases can be decided on their merits instead of on procedural technicalities. *See* Mot. ¶ 18. This is particularly true where, as here, a plaintiff can cure any jurisdictional defects in its initial complaint through amendment. *See id.* ¶¶ 20-22. Indeed, Westforth does not dispute—and thereby concedes—the City's argument that amendment would cure the jurisdictional deficiency identified in the May 25 Order.

In cases like this, where a court identifies a curable pleading defect in deciding a Section 2-619 motion, the case is typically dismissed without prejudice and the plaintiff is given either leave to amend as a matter of course or a deadline within which to seek that relief. *See, e.g.*, *Polites v. U.S. Bank Nat. Ass'n*, 361 Ill. App. 3d 76, 80 (1st Dist. 2005) (trial court "granted [defendant's] motion to dismiss but granted [plaintiff] leave to amend his complaint" where plaintiff named and served wrong corporate entity); *Shroat v. Robins*, 7 Ill. App. 3d 293, 294 (5th Dist. 1972) ("Motion to dismiss allowed. Plaintiff given twenty days to file amended complaint."); *Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 62 (1992) (describing trial court ruling "striking and dismissing the claims which stated that the ruling was 'without prejudice' and granted leave to amend"), *overruled on*

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*other grounds by ABN AMRO Mortg. Grp., Inc. v. McGahan*, 237 Ill. 2d 526 (2010); *see also 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."). The City asked this Court to follow that procedure at the May 25, 2023 hearing granting Westforth's motion to dismiss. *See* May 25, 2023 Hr'g Tr., Ex. G,[1] at 5:2-10.

Instead, the Court dismissed the Complaint with prejudice. Order, Ex. F, at 7. As the City explained in its opening brief, this was error. As a result, the City must now first ask the Court to modify its Order, pursuant to 735 ILCS 5/2-1203, to be a dismissal without prejudice, and then by concurrent motion seek leave to file the Amended Complaint, pursuant to 735 ILCS 5/2-616(a). While Westforth opposes both motions, it fails to meaningfully address either the City's arguments or the legal precedent marshalled in support. Instead, Westforth offers only irrelevant cases where the propriety of dismissal with prejudice was not at issue and no amendment was sought, or cases applying Section 2-616(c) concerning post-trial conformance of pleadings that has no bearing on the City's motion to amend under Section 2-616(a). Finally, Westforth's argument that the City has unfairly delayed amendment distorts the discovery record and does not overcome the other factors relevant to deciding a motion to amend—factors that Westforth entirely fails to contest. These factors all favor amendment: a curable pleading defect, the lack of any prejudice, and no prior amendment of the Complaint. Accordingly, the City's combined motion should be granted.

[1] Exhibits A through G are attached to the June 23, 2023 Affidavit of James Miller filed concurrently with the City's opening brief.

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# ARGUMENT

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

In its opening brief, the City explained that the Court erred in granting Westforth's motion to dismiss for lack of personal jurisdiction with prejudice for two reasons. First, under Rule 273 and related state and federal case law, involuntary dismissal for lack of jurisdiction does not adjudicate the merits of a plaintiff's claims and therefore should be without prejudice. *See* Mot. ¶¶ 12-14 (collecting cases). Second, given Illinois' strong policy preference that leave to amend should be freely granted, it was error for the Court to dismiss with prejudice when doing so would foreclose the City's ability to cure the jurisdictional defects identified in the May 25 Order via amendment. *See id.* ¶ 15. Westforth makes no effort to meaningfully engage with either of these two arguments and fails to even mention (let alone distinguish) the numerous cases the City cites in support of these points.

Instead, Westforth makes a series of irrelevant arguments with little or no bearing on the issues raised in the City's motion.

*First*, Westforth contends that there was no error, for purposes of a Section 2-1203 motion, with the "substance" of the May 25 Order. *See* Opp. Br. at 4. That is entirely beside the point. The City's motion contends that the grant of dismissal *with prejudice* constitutes the error for which modification is warranted under Section 2-1203. *See* Mot. ¶ 16. While the City also respectfully disagrees with the substance of the May 25 Order, the underlying merits are not at issue in this motion and are appropriately reserved for appeal.

*Second*, Westforth identifies three cases that it claims stand for the proposition that it is proper to dismiss with prejudice for lack of personal jurisdiction. Opp. Br. at 4. But none of these cases involve parties even raising—let alone the courts grappling with—the precise question at issue here: whether a court may dismiss a case with prejudice when it rules on a jurisdictional

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motion. *See generally Sheikholeslam v. Favreau*, 2019 IL App (1st) 181703 (affirming dismissal with prejudice, but with no indication that plaintiff challenged the "with prejudice" designation); *Longo v. AAA-Michigan*, 201 Ill. App. 3d 543 (1st Dist. 1990) (same); *Rios v. Bayer Corp.*, 2020 IL 125020. Nor did the plaintiffs in any of these cases raise the possibility of curing the jurisdictional defects through an amended pleading, as the City does here. And the third case, *Rios*, does not support the proposition that Westforth cites it for. In *Rios*, trial courts denied a defendant's motion to dismiss with prejudice in coordinated cases[2] and the intermediate appellate court affirmed. The Supreme Court then reversed and remanded—without specifying whether such dismissal should be with or without prejudice. 2020 IL 125020, ¶¶ 34-35. In short, nothing that Westforth cites undercuts the cases on which the City relies, all of which show that it is error for a court to dismiss a complaint with prejudice for lack of jurisdiction where, like here, the issue of prejudice is actually contested.

More instructive is *Norris v. Estate of Norris*, which the City cites in its opening brief. There, the plaintiffs originally appealed the dismissal of their complaint to the First District. 143 Ill. App. 3d 741, 743 (1st Dist. 1986). The First District held that the complaint had been properly dismissed, but that it was not clear from the trial court's order whether the dismissal was with or without prejudice. *Id.* Notably, the First District sent the case back to the trial court for a decision on that issue. *Id.* at 746. On remand, the trial court held that the dismissal was with prejudice, and the plaintiffs appealed again, arguing that the dismissal should have been without prejudice. *Id*. at 743, 746. Relying on Rule 273, the First District held that, because the complaint had been dismissed for lack of jurisdiction (in that case, subject matter jurisdiction), the dismissal order

[2] *Rios* is also distinguishable because Westforth did not move for dismissal with prejudice and did not ask for the Complaint to be dismissed with prejudice until *after* the motion to dismiss had been granted—a fact that it also fails to address in its opposition. *See* Mot. ¶ 13 n.3.

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"does not operate as an adjudication on the merits" and "should have been dismissed without prejudice." *Id.* at 748; *see also Johnson v. Du Page Airport Auth.,* 268 Ill. App. 3d 409, 418-19 (2d Dist. 1994) (where lawsuit was dismissed without reaching merits, "the dismissal. . . *with* prejudice was error" because absent "adjudication on the merits, a dismissal should be granted *without* prejudice, as opposed to granting dismissal *with* prejudice").

*Third*, Westforth argues that the City misunderstands the Court's order and the impact of the dismissal with prejudice, claiming that the issue is a "red herring." Opp. Br. at 4. But under Illinois law, "a dismissal with prejudice denotes an adjudication on the merits and is res judicata." 1 Nichols Ill. Civ. Prac. § 4:25 (Prejudice defined). Westforth points to the decision in *Colucci v. Whole Foods Mkt Services*, 2021 WL 1222804 (N.D. Ill. Apr. 1, 2021), in which a federal district court dismissed a complaint "with prejudice as to refiling in any Illinois court but without prejudice as to the merits of the plaintiffs' claim." *See* Opp. Br. at 5, n.2. But that is not what the Court did here; it dismissed the entire case with prejudice. Thus, the City has no choice but to seek modification of the May 25 Order.[3]

In any event, *Colucci* is not helpful to Westforth because dismissal with prejudice is erroneous here for an additional reason: the Court made no finding that the identified jurisdictional defect cannot be cured. *See Lake Point Tower Condo. Ass'n*, 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."); *Ruklick v. Julius Schmid, Inc.*, 169 Ill. App. 3d 1098, 1102, 1113 (1st Dist. 1988) (reversing and holding that trial

[3] As the City indicated in its opening brief, the City does not concede that its claims would be barred in another jurisdiction if the Order remains unmodified. Mot. ¶ 16 n.5. Westforth agrees that an unmodified Order should not impact the City's ability to bring these claims in a different jurisdiction. *See* Opp. Br. at 4-5.

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court "abused its discretion in denying plaintiffs' motion to vacate the dismissal with prejudice and to allow filing of their amended complaint" where "the proposed amendment would apparently cure the pleading defect"). Westforth neither disputes this case law, nor argues that the identified jurisdictional defect cannot be cured.

Indeed, a case that Westforth cites elsewhere in its brief provides actually shows that a court commits reversible error when it dismisses with prejudice despite the possibility that an amendment will cure pleading defects. *See Muirfield Vill.-Vernon Hills, LLC v. K. Reinke, Jr. & Co.*, 349 Ill. App. 3d 178, 195 (2d Dist. 2004). Although Westforth cites this case for the proposition that "it is not abuse of discretion for a trial court to refuse to allow an amended complaint after it had dismissed the cause with prejudice," Opp. Br. at 7 n.5, *Muirfield* holds precisely the opposite. There, the trial court dismissed a third amended pleading with prejudice for failure to properly allege a contribution claim and denied a combined post-judgment motion for relief under Section 2-1203 and leave to file an amended pleading. 349 Ill. App. 3d at 180-81. The appellate court reversed in relevant part, explaining that "a complaint should not be dismissed with prejudice unless it is apparent that no set of facts can be proved under the complaint that would entitle the plaintiff to relief." *Id.* at 195. Thus, the appellate court continued, "the trial court abused its discretion in dismissing the third amended complaint with prejudice. It should have allowed plaintiffs another opportunity to amend their complaint." *Id.*[4] This Court should avoid making the same error and should modify its May 25 Order to be without prejudice.

[4] Westforth's misreading of *Muirfield* appears to stem from the fact that the appeals court affirmed the rejection of a proposed fourth amended complaint that shared the same pleading defect as the third. *See id.* at 196. But in separate portion of the opinion Westforth apparently ignores, the appeals court went on to explain that it was error to deny plaintiffs a *further* opportunity to cure the defect. *See id.* at 197.

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Westforth's final argument against modification is that the City cannot "plead new claims" through a Section 2-1203 motion. Opp. Br. at 5. But the City is not attempting to do so; rather, the City is asking this Court to modify the May 25 Order under Section 2-1203 and then grant leave to file the Amended Complaint under Section 616. Mot. ¶¶ 11, 17-18. It is unclear whether Westforth's objection is based on a misunderstanding of the procedural rules or Westforth's perception that the City's amended pleading is somehow "new and different." Opp. Br. at 5. Regardless, neither is a basis to deny the City's motion. Procedurally, the City's concurrent Section 2-1203 motion and motion to amend are both proper. The City's Section 2-1203 motion seeks modification of the May 25 Order to be without prejudice, based on the errors explained above and in the City's opening brief. That is a valid form of relief under Section 2-1203. *See, e.g.*, *Shutkas Elec., Inc. v. Ford Motor Co.*, 366 Ill. App. 3d 76, 81 (1st Dist. 2006) ("A proper section 2-1203 motion specifically seeks at least one of the forms of relief set out in section 2-1203, such as… a modification or vacation of the judgment, or other similar relief, and specifies the grounds warranting the relief requested.") The City also seeks separate relief in the form of leave to file an amended pleading through a concurrent motion under Section 2-616(a). That, too, is proper. *See, e.g.*, *Muirfield*, 349 Ill. App. 3d at 180-81, 197 (reversing trial court and granting combined motion for post-judgment relief under Section 2-1203 and for leave to amend pleading).

Nor does Westforth's amorphous claim that the City's Amended Complaint is "new" or "different" provide a basis to deny the City's requested relief. For one, Westforth does not bother to identify the portion of the Amended Complaint it contends is improperly "new" or "different," despite having both the Amended Complaint and a redline showing changes from the original Complaint. *See* Am. Compl., Ex. A; Redline, Ex. B. Westforth likewise fails to identify a single

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case articulating just how "new" and "different" is too new and different for an amended pleading.[5] This is unsurprising, because alleging new and different facts is the whole point of amending to cure a pleading defect. Accordingly, Section 2-616(a)—the basis for the City's motion for leave to amend—contemplates amendments up to and including "changing the cause of action or defense or adding new causes of action or defenses," as well as new parties. *See* 735 ILCS 5/2-616(a).

In any event, here the City's Amended Complaint does not add any new causes of action. Rather, it identifies a significant number of additional illegal firearm sales by Westforth Sports that contribute to the same public nuisance of illegal guns in Chicago set forth in the original Complaint. These additional illegal sales are directly between the store and City residents and are effectuated through numerous and deliberate contacts between Westforth and Illinois. *See, e.g.*, Am. Compl., Ex. A, at ¶¶ 1, 3, 4, 8, 11, 60, 82, 102-114, 125. The proposed Amended Complaint thus explains how the City's existing causes of action do in fact arise out of Westforth's contacts with Illinois—addressing the precise jurisdictional defect identified in the May 25 Order. *See* Order, Ex. F, at 4-5 ("The City admits that as the complaint is drafted, there's not a causal connection between Westforth's sales to Illinois customers and the City's claims.") (cleaned up).

The Court should grant the City's Section 2-1203 motion to modify the May 25 Order to be without prejudice.

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

Westforth's focus on irrelevant aspects of the law extends with equal force to its opposition to the City's Section 2-616(a) motion for leave to amend. There, Westforth's primary objection

[5] *Herr v. Morgan,* the only case that Westforth cites in support of this point, concerns amendment of pleadings after trial—the concept later codified as a Section 2-616(c) motion to conform pleadings to the proof at trial. 324 Ill. App. 16, 19 (4th Dist. 1944). As explained below, the City is not seeking post-trial amendment to conform to its proof at trial. *Herr* is therefore irrelevant.

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concerns a completely separate section of the statute—Section 2-616(c)—which concerns post-judgment motions to conform pleadings to the proof at trial. *See* Opp. Br. at 6. But the City is not moving to conform its pleadings to trial proof; it is moving first to modify the Court's May 25 Order so as to permit amendment, and then for leave to amend under Section 2-616(a)'s allowance for amendment "[a]t any time before final judgment amendment[]. . . on just and reasonable terms." 735 ILCS 5/2-616(a); *see* Mot. ¶¶ 18, 25 (articulating Section 2-616(a) as basis for motion).

As Westforth points out, there are distinct legal standards for pre-judgment amendment under Section 2-616(a) and post-judgment amendment to conform to trial proof under Section 2-616(c). *See* Opp. Br. at 6. As a result, the Section 2-616(c) cases that Westforth relies on are completely irrelevant because they evaluate the wrong legal standard. *See Mandel v. Hernandez*, 404 Ill. App. 3d 701, 707 (1st Dist. 2010) (motion "to amend . . . complaint to conform the pleadings to the proofs pursuant to [S]ection 2-616(c)"); *Compton v. Country Mut. Ins. Co.*, 382 Ill. App. 3d 323, 332 (1st Dist. 2008) (evaluating under Section 2-616(c) a motion to amend after dismissal on the merits for failure to state a claim); *Colgan v. Premier Elec. Const. Co.*, 92 Ill. App. 3d 407, 412 (3d Dist. 1981) (affirming denial of a post-trial motion to conform pleadings to proofs); *Hassan v. Yusuf*, 408 Ill. App. 3d 327, 357-58 (1st Dist. 2011) (same). Nor is *Folkers v. Drott Manufacturing Co.*, 152 Ill. App. 3d 58 (1st Dist. 1987), on point. *Folkers*, like *Compton*, involved an underlying dismissal for failure to state a claim—a dismissal on the merits under Rule 273 for which dismissal with prejudice was appropriate. *See* 152 Ill. App. 3d at 60. Moreover, the proposed pleading in *Folkers* was the propounding party's fourth attempt, was never submitted to the trial court, and did not articulate "previously unknown" facts. *Id.* at 67.

In focusing on Section 2-616(c) cases, Westforth fails to address the City's arguments that the factors favoring amendment under Section 2-616(a)—the appropriate standard—are all met

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here. All Westforth says about these factors is that "[t]hey do not apply." *See* Opp. Br. at 6 n.4. This is incorrect, as the cases granting Section 2-616(a) motions after modifying prior dispositive judgments show. *See, e.g.*, *Ruklick*, 169 Ill. App. 3d at 1113; *Muirfield*, 349 Ill. App. 3d at 197. And as the City set forth, the proposed amendment would cure the jurisdictional defects identified in the May 25 Order; Westforth is neither prejudiced nor surprised by the proposed amendment; and the City has not previously amended its pleading. *See* Mot. ¶¶ 19-26 (articulating factors in favor of amendment). By failing to address these factors, Westforth effectively concedes that they all support amendment here.

Westforth objects on the basis of supposed delay, arguing that the City knew of the store's illegal sales directly to Illinois residents "well over a year before the Court issued its May 25, 2023 decision" and therefore could have sought to add these allegations "[a]t any time during the pendency of its claims." Opp. Br. at 6-7. This is false and relies on distortions of the discovery record.

Contrary to Westforth's assertion, Westforth merely *began* its rolling production of Illinois transaction records on May 9, 2022, and then continued to supplement this production throughout the summer of 2022.[6] Specifically, Westforth made productions of Illinois transaction records on May 9, May 31, August 15, August 19, and September 9, 2022. It was not until September 9, 2022—six days before the City's opposition to the Motion to Dismiss was due—that Westforth completed its production of Illinois transaction records. With regard to Westforth's illegal assault weapon sales to Chicago residents, the City did not have a complete unredacted production of

[6] Production cover letters documenting these supplemental productions are attached as Exhibits H-L to the August 7, 2023 Affidavit of James Miller, filed concurrently with this reply. The links to the productions found in the production cover letters have been redacted to preserve the confidentiality of the underlying documents.

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acquisition and disposition records of these sales until August 19, 2022—less than a month before the City's opposition to the motion to dismiss was due.

The City wasted no time in bringing these illegal sales to the Court's, and Westforth's, attention. In its September 15, 2022 opposition brief, the City submitted these records of Westforth's illegal sales directly to Illinois residents as additional evidence of Illinois contacts and stated that it intended to supplement its public nuisance and negligence allegations to include these additional illegal sales.[7] Mot. ¶ 5; *see also* Mot. to Dismiss Opp. Br. at 7, 9-10, 14-15, 17. That motion was fully briefed as of October 31, 2022 and was decided on May 25, 2023.

The actual sequence of events demonstrates the City's lack of "gamesmanship." It was not improper strategic behavior for the City to avoid further delaying resolution of the Motion to Dismiss—which had been pending for over a year by the time Westforth finally completed production of records in August 2022 documenting its illegal gun sales to Chicago residents. Moreover, the City amassed a mountain of evidence of Westforth's intentional contacts with Illinois in its opposition to the Motion to Dismiss, which gave the City every reason to believe that it would prevail on the issue of personal jurisdiction and obviated the need for hasty amendment in the middle of dispositive briefing. In short, the City's decision-making was driven not by a desire to profit from undue delay, but rather by the timing of its knowledge and the desire to efficiently resolve Westforth's long-pending Motion to Dismiss. And even if the timing disfavored amendment, that would not offset the three other factors that the City has certainly met. *See Hiatt v. Illinois Tool Works,* 2018 IL App (2d) 170554, ¶ 38 (2018) (noting that the Illinois Supreme

[7] In its Opposition, Westforth suggests that the City first raised its intent to amend its Complaint during oral argument in January 31, 2023. *See* Opp. Br. at 2. That is incorrect. Westforth—and the Court—have been aware of the City's intent to amend since September 15, 2022 when the City filed its opposition to the Motion to Dismiss. Mot. ¶ 5.

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Court did "not say that a proposed amendment must meet all four factors" because the "factors are guidelines for the court's liberal exercise of its discretion, not strictures").

Finally, Westforth's proposal that the City split up its case and file part of it in Indiana and the other part of it in Illinois, *see* Opp. Br. at 7, is both unwarranted under the relevant standards and would waste judicial resources. Unsurprisingly, Westforth does not cite a single case showing that it is proper to split a plaintiff's public nuisance claim on arbitrary lines, much less that such bifurcation is properly addressed on a motion to amend. Instead, the Court should follow Illinois' strong policy preference for liberal amendment so that the City can litigate this case in Illinois—the state toward which Westforth directs its illegal conduct and where its harms are felt.

## 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: August 7, 2023

Respectfully submitted,

By: /s/ Michael J. Gill

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