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PROTHONOTARY
JUDICIAL DISTRICT OF PHILADELPHIA

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA

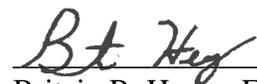
City of Philadelphia : CASE NO.: 230702394
: :
Plaintiff : CIVIL DIVISION
: :
v. : :
: :
Tanner Operations, LLC, *et. al.* : :
: :
Defendants :

CERTIFICATION OF SERVICE

I certify that a true and correct copy of the Defendants' Preliminary Objections was forwarded to all interested parties via the Court's electronic notification service on the date indicated below:

Respectfully submitted,

Date: _____



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<i>Plaintiff</i>	:	CIVIL DIVISION
	:	
v.	:	
	:	
Tanner Operations, LLC, <i>et. al.</i>	:	
	:	
<i>Defendants</i>	:	

**DEFENDANTS MAD MINUTE ENTERPRISES, LLC d/b/a DELIA’S GUN SHOP, and
DELIA’S GUN SHOP, INC.’S MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS’ PRELIMINARY OBJECTIONS TO PLAINTIFF’S AMENDED
COMPLAINT**

I. MATTER BEFORE THE COURT

Before the Court are Defendants Mad Minute Enterprises, LLC d/b/a Delia’s Gun Shop and Delia’s Gun Shop, Inc.’s (hereinafter collectively “Delia’s” or “Defendants”) Preliminary Objections to Plaintiff City of Philadelphia’s Amended Complaint (hereinafter “Philadelphia” or “Plaintiff”).

II. SUMMARY OF THE OPERATIVE FACTS

Plaintiff filed a complaint seeking to hold Delia’s liable under theories of public nuisance, negligence, negligence per se, negligent entrustment, and violation of 18 Pa.C.S.A. § 6111(g)(6), for the acquisition and misuse of firearms by third-party criminals beyond Defendants’ control. In support of its claims, Plaintiff attempts to lay at Defendants’ feet, through baseless claims,

generalizations and broad statistics, essentially the entirety of the City of Philadelphia's scourge of gun violence based on 31 alleged straw purchases over a three-year period. *Compl.*, ¶¶ 1, 2 and 3. Plaintiff among other relief, seeks the appointment of a special master for a minimum of five years to oversee Defendants' operations, asks that Defendants be ordered to undertake administrative practices in excess of those required by federal and state law, ask Defendants to post a bond against future violations, ask Defendants to pay into an abatement fund to address "continuing harms", and demand monetary damages from Defendants including incurred costs [i.e., Plaintiff's costs for providing police and first responders services to the City of Philadelphia] as well as pre- and post-judgment interest, punitive and exemplary damages, and attorney's fees. *Id.* at Prayer for Relief clause.

III. STATEMENT OF THE QUESTIONS PRESENTED

1. Should the Complaint be dismissed as pursuant to Pa.R.C.P. 1028(a)(4)?

Suggested answer: **Yes.**

2. Should Count I of the Complaint be dismissed pursuant to Pa.R.C.P. 1028(a)(4)?

Suggest answer: **Yes.**

3. Should Count II, III and IV of the Complaint be dismissed pursuant to Pa.R.C.P. 1028(a)(4)?

Suggest answer: **Yes.**

4. Should Count V of the Complaint be dismissed pursuant to Pa.R.C.P. 1028(a)(4)?

Suggest answer: **Yes.**

IV. STANDARD OF REVIEW

The test on preliminary objections is whether it is clear and free from doubt from all of the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right

to relief. Firing v. Kephart, 466 Pa. 560, 563, 353 A.2d 833, 835 (1976). To determine whether preliminary objections have been properly sustained, this Court must consider as true all of the well-pleaded material facts set forth in a complaint and all reasonable inferences that may be drawn from those facts. Pennsylvania Liquor Control Board v. Rapistan, Inc. 472 Pa. 36, 42, 371 A.2d 178, 181 (1976). Bower v. Bower, 531 Pa. 54, 57, 611 A.2d 181, 182 (1992).

Preliminary objections in the nature of a demurrer under Pa. R. Civ. P. § 1028(a)(4) may be sustained under these guidelines when “the law is clear that a plaintiff is not entitled to recovery based on the facts alleged in the complaint.” HCB Contractors v. Liberty Place Hotel Associates, 652 A.2d 1278, 1279 (1995). However, the court need not consider “conclusions of law, unwarranted inferences from facts, opinions, or argumentative allegations.” Wiernik v. PHH U.S. Mortgage Corp., 736 A.2d 616, 619 (Pa. Super. 1999). For purposes of considering the dismissal of a complaint based upon preliminary objections in the nature of a demurrer, conclusions of law in the Complaint are disregarded. Shick v. Shirey, 716 A.2d 1231, 1232-33 (Pa. 1998).

Moreover, “. . . the right to amend is not absolute. Where the initial pleading reveals that the complaint’s defects are so substantial that amendment is not likely to cure them, and that the *prima facie* elements of the claim or claims asserted will not be established, the right to amend is properly withheld.” McGrath v. Ohio Casualty, 2001 Phila. Ct. Com. Pl. LEXIS 101, *3, (2001) *citing* Spain v. Vicente, 461 A.2d 833, 837 (Pa. 1983), Behrend v. Yellow Cab, 271 A.2d 241, 243 (Pa. 1970).

V. ARGUMENT

1. Philadelphia Is Barred from Filing Suit under the Uniform Firearms Act

In Pennsylvania, the Uniform Firearms Act, 18 Pa.C.S.A. § 6101 *et seq.* (“UFA”) regulates the possession and use of firearms and UFA unequivocally deprives Philadelphia of the power to bring this suit against gun dealers. Section 6120(a) of the UFA specifically states,

(a) General rule.-- No county, municipality, or township may in any manner regulate the lawful ownership, possession, transfer, or transportation of firearms, ammunition, or ammunition components when carried or transported for purposes not prohibited by the laws of the Commonwealth.

(a.1) No right of action.-- No political subdivision may bring or maintain an action at law or in equity against any firearms or ammunition manufacturer, trade association or dealer for damages, abatement, injunctive relief or any other relief or remedy resulting from or relating to either the lawful design or manufacture of firearms or ammunition or the lawful marketing or sale of firearms or ammunition to the public.

...

“Dealer.” The term shall include any person engaged in the business of selling at wholesale or retail a firearm or ammunition.

...

“Political subdivision.” The term shall include any home rule charter municipality, county, city, borough, incorporated town, township or school district.

18 Pa.C.S.A. § 6120.

Plainly stated, outside of limited exceptions (which are inapplicable here), the UFA prohibits Philadelphia from bringing or maintaining an action at law or equity against firearms dealers for “damages, abatement, injunctive relief or any other relief or remedy resulting or relating to ... the lawful marketing or sale of firearms or ammunition to the public” *Id.* It could not be any clearer, this suit is prohibited under the UFA and, in light of *City of Philadelphia v. Beretta U.S.A., Corp.*, Philadelphia very well knows that fact.

In *Beretta*, a case nearly identical to the one at hand, Philadelphia filed a complaint asserting the very same claims of public nuisance, negligence, and negligent entrustment against numerous firearms manufacturers. Philadelphia in fact made nearly the same factual pleadings in *Beretta* as in the case at hand,

[t]he plaintiffs' core allegation is that the defendants' marketing and distribution schemes are responsible for placing guns where they do damage to residents of the City. Plaintiffs allege that the defendants know, or willfully avoid knowing, that their distribution channels allow guns to fall into the hands of criminals and children. First, the plaintiffs allege that some individuals, who have passed a background check by the Pennsylvania Police, lawfully purchase one or more firearms. These buyers, called "straw buyers" by the plaintiffs, then resell their weapons to felons and others unable to legally obtain or possess firearms. The plaintiffs accuse the gun manufacturers of knowing which federally licensed dealers are more likely to sell guns to straw buyers. They seek to fault the gun manufacturers for failing to monitor and supervise federal firearms licensees.

City of Philadelphia v. Beretta U.S.A., Corp., 126 F.Supp.2d 882, 888 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002) (internal citations omitted).

The District Court, upon analyzing the UFA held that, "[t]he clear meaning of the UFA Amendment prohibits home rule municipalities such as Philadelphia from suing gun manufacturers for the production and distribution of firearms, with limited exclusions for contract or warranty actions specified in the second paragraph. *See* UFA § 6120(a.1)." *Id.* at 890. Logically therefore, the clear meaning of the UFA would prohibit home rule municipalities such as Philadelphia from suing gun dealers such as Delia's for the marketing and sale firearms and this Court, like the District Court before it should dismiss the Complaint at hand as it is statutorily barred by the UFA.

Even without the clear holding of *Beretta*, Philadelphia knew Section 6120(a) of the UFA forecloses this action as previously told to it by the Pennsylvania Supreme Court in *Ortiz*, stating, "the General Assembly has denied all municipalities the power to regulate the ownership,

possession, [and] transfer of firearms Thus, regulation of firearms is a matter of concern in all of Pennsylvania, not merely in Philadelphia and Pittsburgh, and the General Assembly, not city councils, is the proper forum for the imposition of such regulation. *Ortiz v. Com.*, 681 A.2d 152, 156 (Pa. 1996). As a dealer, Delia engages in the “transfer” of firearms and is therefore exempt from actions such as the instant one. Furthermore, Philadelphia admitted as much in *Crawford v. Com.*, pleading, “the Firearm Preemption Statutes ‘block them from protecting themselves from gun violence with local regulations.’” *Crawford v. Com.*, 277 A.3d 649, 673 (Pa. Cmwlth. 2022) (plurality), *on appeal*, No. 19 E.A.P 2022 (Pa., filed Jul. 21, 2022); *See also Schneck v. City of Philadelphia*, 383 A.2d 227 (Pa. Cmwlth. 1978) (striking down City’s local licensing scheme). “[A] party to litigation must establish as a threshold matter that he or she has standing to bring an action.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016).

With the filing of this lawsuit, seeking the imposition of damages and wide-ranging injunctive relief, Philadelphia unquestionably once again impermissibly and in bad faith seeks to regulate the sale of firearms via litigation and once again blatantly disregards the clear directive of the General Assembly that lawsuits like this one are prohibited to Philadelphia. As stated in *Beretta*,

[w]hat the City cannot do by act of the City Council it now seeks to accomplish with a lawsuit. The United States Supreme Court has recognized that the judicial process can be viewed as the extension of a government's regulatory power. As the court explained, “[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit,” as by regulation or ordinance. Similarly, the City’s instant action seeks to control the gun industry by litigation, an end the City could not accomplish by passing an ordinance. Under Pennsylvania law and by unequivocal Pennsylvania Supreme Court precedent, the power to regulate firearms within the state now lies exclusively with the state legislature.”

Beretta, 126 F.Supp.2d at. 889–90.

Presumably, Philadelphia, as they have in prior unsuccessful suits seeking to preempt the UFA, will claim the UFA only bars suits related to the “lawful” activity and because they seek to abate illegal activity they are somehow exempt from the UFA. However, when presented with this argument, both the District Court, the Third Circuit (in affirming the District Court) and the Commonwealth Court have found no such carve out in the UFA. The *Beretta* court held:

[t]he City argues that the statute only precludes suit for the “lawful” manufacture of firearms and permits the City’s suit because it alleges unlawful conduct. However, the drafters of the UFA Amendment chose to withdraw contract and warranty actions from the UFA Amendment's ambit, UFA § 6120(a.1)(2), but left no separate exclusion for suits alleging "unlawful" conduct. Therefore, the plain language of the UFA Amendment bars this suit.

Id. at 890.

In *National Rifle Association v. City of Philadelphia*, Philadelphia had sought to enact several firearms regulations including a “Straw Purchaser Ordinance,” which prohibited any person when purchasing a handgun from acting as a straw purchaser and rendered it unlawful for a purchaser to purchase more than one handgun within any 30-day period, except for any person who is not a straw purchaser. Upon challenge, Philadelphia asserted that Section 6120(a) of the UFA, by its own language, only prohibited municipalities from regulating the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components and since the underlying activity the City seeks to regulate is unlawful, i.e., illegal straw purchases, it contended it was not precluded from enacting the challenged ordinances. *Nat’l Rifle Ass’n v. City of Philadelphia*, 977 A.2d 78, 81-82 (Pa.Cmwlth. 2009) (*en banc*), overruled on other grounds by *Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497 (Pa.Cmwlth. 2019).

An *en banc* panel of the Commonwealth Court disagreed and concluded,

while we may agree with the City that preemption of 18 Pa.C.S. § 6120(a) appears to be limited to the *lawful* use of firearms by its very

terms, we believe, however, that the crystal clear holding of our Supreme Court in *Ortiz*, that, “the General Assembly has [through enactment of § 6120(a)] denied all municipalities the power to regulate the ownership, possession, transfer or [transportation] of firearms,” precludes our acceptance of the City's argument...”

Id. at 82 (emphasis in original). The Commonwealth Court held that section 6120(a) of the UFA preempted the “Straw Purchaser Ordinance,” irrespective of the fact that it sought to outlaw and punish activities already declared unlawful by the General Assembly. This Court similarly should find that the UFA continues to preempt Philadelphia’s latest bad faith attempt to re-hash its illegal conduct argument, again attempting to circumvent the clear language of the UFA and the holdings of at least three separate state and federal courts. Philadelphia now asserts against Defendants the same claims on the same basis, which claims have been refused by courts on three separate occasions. Thus, in addition to the statutory bar, Philadelphia is barred by the doctrine of non-mutual collateral estoppel from again asserting these same theories against Defendants.

Subject to certain explicit exceptions, none of which are applicable to the case at hand, the UFA is a clear, unequivocal barrier to this suit and the Complaint therefore must be dismissed in its entirety.

2. The Doctrine of Collateral Estoppel Bars the City from Asserting Claims for Public Nuisance, Negligence and Negligent Entrustment in connection with Gun Violence.

More than twenty (20) years ago, Philadelphia unsuccessfully litigated identical claims against members of the gun industry for public nuisance, negligence and negligent entrustment. The City’s efforts failed in 2002 in *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002). The district court in *Beretta* dismissed the identical causes of action as legally insufficient under Rule 12(b)(6), and the Third Circuit affirmed. *Id.* at 426. The doctrine of

collateral estoppel prohibits the City from re-litigating the same claims more than two decades later.

“Collateral estoppel ‘forecloses re-litigation in a later action, of an issue of fact or law which was actually litigated and which was necessary to the original judgment.’” *Sheils as Tr. for Smith & Morris Holdings, LLC v. Bartles*, 295 A.3d 302, 308 (Pa. Cmwlth. 2023), *reargument denied* (June 29, 2023) (quoting *City of Pittsburgh v. Zoning Bd. of Adjustment of City of Pittsburgh*, 559 A.2d 896, 901 (Pa. 1989) (citation omitted)). “Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citation omitted). The doctrine of collateral estoppel, together with *res judicata*, “relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication.” *Id.*; *Sheils*, 295 A.3d at 309. Collateral estoppel applies when the following five (5) elements are satisfied.

(1) the issue decided in the prior case is identical to the one presented in the later action; (2) there was a final adjudication on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment.

Office of Disciplinary Counsel v. Kiesewetter, 889 A.2d 47, 50-51 (Pa. 2005) (citation omitted).

Delia’s may assert collateral estoppel as a bar to Philadelphia’s claims, even though it was not a party to the *Beretta* litigation:

There is no requirement that there be an identity of parties in the two actions in order to invoke the bar. Collateral estoppel may be used as either a sword or a shield by a stranger to the prior action if the party against whom the doctrine is invoked was a party or in privity with a party to the prior action.

Mellon Bank v. Rafsky, 535 A.2d 1090, 1093 (Pa. Super. 1987). A litigant who was not a party to the original case *may* use collateral estoppel in a second lawsuit “against the party who lost on the decided issue in the first case[.]” *Allen*, 449 U.S. at 95 (citing *Blonder–Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971)). Moreover, the U.S. Supreme Court has explained, “[t]he federal courts generally have also consistently accorded preclusive effect to issues decided by state courts.” *Id.* (citation omitted). Accordingly, collateral estoppel “not only reduce[s] unnecessary litigation and foster[s] reliance on adjudication, but also promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system.” *Id.* at 95-96.

As discussed above, Philadelphia brought the same tort actions in *Beretta*, 126 F. Supp. 2d at 888, in order to redress “harm to its citizens and municipal costs related to gun violence.” Philadelphia in *Beretta* made the same allegations in *Beretta* as it asserts in the instant matter: (a) “that the defendants kn[e]w, or willfully avoid[ed] knowing, that their distribution channels allow guns to fall into the hands of criminals and children[;]” and (b) that the defendants should be held responsible for the “straw” purchases, which enabled perpetrators of gun violence to obtain firearms. *Id.*

For claims of negligence and negligent entrustment, the district court held that “no legal duty exists ... to protect citizens from the deliberate and unlawful use of their [firearm] products[.]” and the lack of proximate causation likewise serves as an independent bar to recovery. *Id.* 898. Similarly, the district court determined that the City failed to state a claim for public nuisance, explaining “[i]dyllic and desirable though it may be, there is no similar [public] right to be free from guns and violence.” *Id.* at 909. On appeal, the Third Circuit affirmed the district court’s

determination that the City's causes of action were legally insufficient under Pennsylvania law. See *Beretta*, 277 F.3d at 422, 426.

All five (5) of the elements for collateral estoppel are satisfied in the instant matter. First, the City's claims here in the instant matter are identical to those claims asserted in *Beretta*: (1) public nuisance; (2) negligence; and (3) negligent entrustment. Second, the district court in *Beretta* entered a final judgment that the Third Circuit affirmed on appeal. Third, the City of Philadelphia appeared as the plaintiff in both the instant matter and in *Beretta*. Fourth, the City had a full and fair opportunity to litigate the issue on merits in the prior proceeding. And finally, the district court's determination that the identical three tort causes of action failed to state a claim for relief was "essential" to the judgment in *Beretta*.¹

In affirming the district court's ruling, the Third Circuit concluded that the City sought to expand the cause of action for public nuisance well beyond the boundaries currently permissible under Pennsylvania law. "Pennsylvania precedent does not support the public nuisance claim plaintiffs advance here," the Third Circuit held, "and we cannot predict that the Pennsylvania Supreme Court will choose to expand state public nuisance law in the manner plaintiffs urge." *Beretta*, 277 F.3d at 421. "The [Pennsylvania] courts traditionally have limited the scope of nuisance claims to **interference connected with real property or infringement of public rights.**" *Id.* at 420 (emphasis added). The Third Circuit found, "the causal chain is too attenuated to make out a public nuisance claim." *Id.* at 422. The Court of Appeals reasoned that the requisite "degree of control by the defendant over the source of the interference" was lacking. *Id.* In

¹ Defendant Delia's notes that the district court also found that the City's lawsuit in *Beretta* was proscribed by the UFA; however, on appeal, the Third Circuit only addressed and affirmed the district court's decision as to the legal sufficiency of the City's tort claims. We recognize, "whenever an appellate court affirms on an alternative ground, 'issue preclusion no longer attaches to the ground on which the trial court decided the case, and instead attaches to the alternative ground on which the appellate court affirmed the judgment.'" *Pogue v. Principal Life Ins. Co.*, 979 F.3d 534, 536 (6th Cir. 2020) (quoting *Jennings v. Stephens*, 574 U.S. 271, 278 (2015)).

particular, the Third Circuit emphasized, “[t]he defendants are not in control of the guns at the time they are misused[.]” *Id.* at 422. In other words, the defendants in *Beretta* had no control over the firearms when criminals used those weapons as instruments of gun violence. The same facts are present in the instant case.

The Third Circuit relied, in part, upon the fact that gun manufacturers were not involved in the direct purchase of firearms between consumers and federal firearms licensees. However, the primary distinction rested upon (i) the lawful conduct of the gun industry in placing firearms for sale within the marketplace and (ii) the criminal conduct of individuals who illegally obtain firearms and misuse the weapons for gun violence. *Id.* at 420-422. A claim for public nuisance requires the defendant maintain the “requisite control over the interference with a public right[.]” *Id.* at 422. The Third Circuit’s holding in *Beretta* makes clear that only the perpetrators of gun violence maintain the necessary level of control over the interference with the asserted public right – not manufacturers who make a legal product, and not gun dealers who sell their product to customers after performing the necessary background checks.

Similarly, in affirming the district court’s decision, the Third Circuit recognized that proximate causation prohibited the City’s negligence and negligent entrustment claims. *Id.* at 422-423. Ultimately, the City could not “establish some direct relation between the injury asserted and the injurious conduct alleged,” thus “fail[ing] to plead a key element for establishing proximate causation, independent of and in addition to other traditional elements of proximate cause.” *Id.* at 423 (internal quotation and citations omitted). Aside from the remote nature of the injuries and additional costs alleged to the City’s public infrastructure – the same injuries alleged in the instant case – the Third Circuit noted, the City’s “claims were entirely derivative of [those of] others who would be more appropriate plaintiffs[.]” *Id.* at 423 (citation and quotations omitted). “[T]he fact

that some of [the City's] damages are different from the damages suffered by direct victims of gun violence makes them no less derivative." *Id.* at 425. The Third Circuit also concluded, "[i]n the negligence context ... **a defendant has no duty to control the misconduct of third parties.**" *Id.* at 425-426. (quoting *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001)) (emphasis added).

In the instant case, the City's claims for public nuisance, negligence and negligent entrustment present the same issues as the Third Circuit decided in *Beretta*. Accordingly, the City should be collaterally estopped from attempting to re-litigate the identical claims in the instant matter over two decades after losing in federal court. The City's tort claims suffer from the same legal insufficiencies that the Third Circuit described in 2002.

Accordingly, the Court should dismiss the Plaintiff's claim for public nuisance, negligence and negligent entrustment.

3. Count I – Public Nuisance Is Legally Insufficient

As explained by the Commonwealth Court:

- 1) A public nuisance is an unreasonable interference with a right common to the general public.
- 2) *Circumstances that may sustain a holding that an interference with a public right is unreasonable* include the following:
 - a) [w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience;
 - b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
 - c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Callowhill Neighborhood Ass'n v. City of Philadelphia Zoning Bd. of Adjustment, 118 A.3d 1214, 1229 (Pa.Cmwlth. 2015) (quoting *Muehlieb v. City of Philadelphia*, 133 Pa.Cmwlth. 133, 574 A.2d 1208, 1211 (1990) (quoting Restatement (Second) of Torts § 821B) (emphasis in original).

Plaintiff makes no allegations of knowledge or intent, because it cannot, that Defendants knowingly sold a firearm to an individual who Defendants knew intended to use the firearm illegally. Rather, Plaintiff's make unsubstantiated and unsupported claims that Defendants' mere conduct in selling firearms in violation of federal and/or Commonwealth law has together created, contributed to, and maintained a public nuisance in Philadelphia. *Cmpl. at 105*. This is nothing more than a patently false baseless assertion. Defendants' sale of the firearms, at the time of sale was legal and in compliance with the applicable laws. Philadelphia has not alleged that any firearms were delivered by Defendants without completing the required background checks in compliance with state and federal laws and Defendants assert that no firearms ever were delivered without completing the required background checks in compliance with state and federal laws. The selling of a legal product to an individual who can legally purchase that item cannot be the basis for a public nuisance. "The manufacture and distribution of products, rarely, if ever, cause a violation of a public right as that term as been understood in the law of public nuisance..." *Atl. Richfield Co. v. Cnty. of Montgomery*, 294 A.3d 1274, 1285 (Pa.Cmwlth. 2023) (quoting Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV., 741, 817 (2003)).

It was only after the legally compliant sale by Defendants that the alleged "straw purchase" actually became apparent with the subsequent transfer of each firearm to an allegedly illegal user from the firearm's initial purchaser. It is based on the actions of this third person in the chain of

title that Philadelphia asserts a public nuisance against Defendants. This chain is too attenuated to reach the Defendants.

Here, much like in *Beretta*, the injurious acts with their harmful consequences are not created by the dealers, but by criminals and others unlawfully in possession of firearms. Dealers do not wrongfully “use” their products; in fact, the products sold in due course by licensed dealers are per se legal. Dealers complete these sales in compliance with the regulatory process required under state and federal law. Thus, their distribution practices cannot be said to be unreasonable or unlawful in nature, which would be elemental to a charge of nuisance. *See City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F.Supp.2d 882, 910 (E.D. Pa. 2000), aff’d, 277 F.3d 415 (3d Cir. 2002)

Furthermore, a claim for public nuisance is specifically barred under the UFA and to interpret the word “lawful” in § 6120(a.1) otherwise to permit tort suits for “unlawful” conduct would – as the *Beretta* Court correctly observed – render the statute meaningless. The plain language of the § 6120(a.1) bars actions “for damages, *abatement*, injunctive relief or any other relief or remedy.” 18 Pa.C.S.A. § 6120 (emphasis added). As the *Beretta* Court concluded,

There is a presumption of legitimacy of statutes, and in its absence of an ambiguity, a statute is to be given its plain meaning. *See* 1 PA. CONS.STAT.ANN. § 1921(b) (West 1995); *Commonwealth v. Stanley*, 498 Pa. 326, 446 A.2d 583 (1982). The statute prohibits cities from bringing or maintaining suits against the gun industry. The statute clearly refers to **nuisance actions because it mentions “abatement.”** UFA § 6120(a.1).² The City argues that the statute only precludes suit for the “lawful” manufacture of firearms and permits the City’s suit because it alleges unlawful conduct. However, the drafters of the UFA Amendment chose to withdraw contract and warranty actions from the UFA Amendment’s ambit, UFA § 6120(a.1) (2), but left no separate exclusion for suits alleging “unlawful” conduct. Therefore, the plain language of the UFA Amendment bars this suit.

Id. at 890. (emphasis added).

² “Abatement is a remedy traditionally available in nuisance actions.” *Id.* at 890 n.5.

Thus, it is clear the General Assembly acted within its prerogative, secured by constitutional text, to restrict Philadelphia's *parens patriae* power to prosecute firearms manufacturers, trade associations or dealers for damages of public nuisance. *Id.* at 893–94 (citing Pa. Const, art. IX § 2; *Ortiz v. Commonwealth*, 545 Pa. 279, 681 A.2d 152, 156 (1996)).

Accordingly, the Court should dismiss the Plaintiff's claim for public nuisance.

4. Plaintiff's Negligence Counts (Counts II, III and IV) Are Legally Insufficient

As with Plaintiff's claims for public nuisance, Plaintiff's claims for negligence, negligence per se and negligent entrustment must fail for lack of proximate cause. *See Vattimo v. Lower Bucks Hosp.*, 465 A.2d 1231, 1233 (Pa. 1983) (requiring proximate cause for negligence claim); *Kote v. Bank of New York Mellon for Certificateholders CWABS, Inc., Assetbacked Certificate Series 2006-20*, 169 A.3d 1103 (Pa. Super. 2017) (requiring proximate cause for negligence per se claim); *Frey v. Smith*, 685 A.2d 169, 173 (Pa. Super. 1996) (requiring proximate cause for negligent entrustment claim).

Here as in *Beretta*, Philadelphia cannot recover under claims of negligence because their injuries are too remote from the Defendants' alleged wrongful conduct. "Generally, a plaintiff must allege that the defendant's negligence was the legal cause, i.e., the proximate cause, of his or her injuries. As an initial matter, proximate cause is a factual matter to determine whether the defendant's conduct played a substantial factor in the plaintiff's injury." *Beretta*, 126 F.Supp.2d at 903. (internal citations omitted). As described by Philadelphia, a firearm passes from a lawful dealer, to a purchaser, then to another third party illegally. That third party then commits a crime with that firearm which Philadelphia alleges causes it to expend resources. The use of those Philadelphia resources, Philadelphia alleges, are then somehow compensable by the lawful dealer.

Philadelphia's theory of injury is simply too attenuated. *See Id. at 904*); *See also Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 439 (3d Cir. 2000).

Further, Plaintiff attempts to conjure a new legal duty for firearms dealers for injuries committed by criminals with firearms where no such duty currently exists. Pennsylvania generally refuses to impose a duty on a defendant to prevent harm caused by even foreseeable criminal acts of third parties, where the defendant had no relationship with and no control over those third parties. "The wrongful actions of a third party are not deemed to be foreseeable by a negligent actor merely because he or she could have speculated that they might conceivably occur." *Mahan v. Am-Gard, Inc.*, 841 A.2d 1052, 1061 (Pa. Super. 2003); *See Mathis v. United Engineers & Constructors, Inc.*, 554 A.2d 96, 100 (Pa. Super. 1989). Defendants had no relationship or control over the third-party criminals and without such had no duty to Plaintiff's regarding the criminals' conduct.

Finally, and this applies equally to all of Plaintiff's claims, the recovery which Plaintiff's seek (i.e., payment into an abatement fund) is barred by the UFA, for the reasons stated above, or is barred by the Municipal Costs Recovery Rule. *See Beretta*, 126 F.Supp.2d at 895. "[A] municipal corporation may not recover as damages the costs of services the provision of which was an important reason for its creation and maintenance by the people. The cost of public services for protection from a safety hazard is to be borne by the public as a whole, not assessed against a tortfeasor whose negligence creates the need for the service. *City of Pittsburgh v. Equitable Gas Co.*, 512 A.2d 83, 84 (Pa. Cmwlth. 1986) (internal citations omitted) (affirming dismissal of lawsuit by city to recover costs of providing police and emergency services in response to natural gas line explosion), *appeal denied*, 520 A.2d 1386 (Pa. 1987).

Accordingly, the Court should dismiss Plaintiff's claims for negligence, negligence per se and negligent entrustment.

5. Count V – Violation of 8 PA.C.S.A. § 6111(G)(6) Is Legally Insufficient

Under 18 Pa.C.S.A. § 6111(g)(6), any licensed firearms dealer who “knowingly and intentionally sells or delivers a firearm in violation of this chapter who has reason to believe that the firearm is intended to be used in the commission of a crime or attempt to commit a crime shall be liable in the amount of the civil judgment injuries suffered by any person so injured by such crime or attempted crime.” Thus, in order to be liable under § 6111(g)(6) Defendants had to **knowingly and intentionally** sell a firearm to someone they believed would use it in a crime. *See Com. v. Scolieri*, 571 Pa. 658, 813 A.2d 672 (2002) (Inclusion of “knowingly” and “intentionally” in criminal statute indicates legislative intent to include those mens rea requirements as necessary ingredients of the offense.) Plaintiff makes no such allegation. Plaintiff merely asserts, based entirely on speculation, that Defendants’ “knew, had reason to believe, or deliberately avoided knowing that such firearms acquired by straw purchasers would be used in the commission or attempted commission of crimes.” *Cmpl.* ¶ 134.³ Such speculation is legally insufficient.

Thus, Plaintiff's Count V is deficient on its face as it fails to plead, let alone establish the required mens rea of the violation and must therefore be dismissed.

³ Philadelphia attempts to sidestep the clear defect of their claim by simply stating “Delia’s sales to these individuals were knowing and intentional.” *Id.* This assertion of course omits the critical portion necessary to establish a violation of § 6111(g)(6), which is, Delia’s knowingly and intentionally sold a firearm *to someone they believed would use it in a crime.*

VI. CONCLUSION

For all the foregoing reasons, Defendants respectfully requests that this Honorable Court enter the attached Order dismissing the Amended Complaint with Prejudice.

Respectfully submitted,

GOLDSTEIN LAW PARTNERS, LLC

Dated: _____



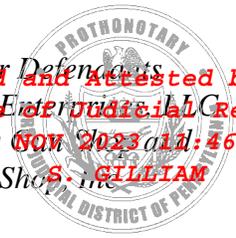
Britain R. Henry, Esq.

Jonathan S. Goldstein, Esq.

Attorneys for Defendants Mad Minute Enterprises, LLC d/b/a Delia's Gun Shop and Delia's Gun Shop, Inc.

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Attorney I.D # 314279
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Hatfield, PA 19440
(610) 949-0444

Attorneys for Defendants
Filed and Attested by the
Minute Office of Judicial Records
d/b/a Delia's Gun Shop
S. GILLIAM
JUN 20 2023 11:46 am



IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA

City of Philadelphia	:	CASE NO.: 230702394
	:	
<i>Plaintiff</i>	:	CIVIL DIVISION
	:	
v.	:	
	:	
Tanner Operations, LLC, <i>et. al.</i>	:	
	:	
<i>Defendants</i>	:	

NOTICE TO PLEAD

TO: PLAINTIFF:

You are hereby notified to file a written response to Defendant's Preliminary Objections to the Plaintiff's Amended Complaint within twenty (20) days from service hereof or a judgment may be entered against you.

Respectfully submitted,

Date: _____



Britain R. Henry, Esquire
Attorney for Defendants Mad Minute
Enterprises, LLC d/b/a Delia's Gun Shop
And Delia's Gun Shop, Inc.

PROTHONOTARY
Filed and Attested by the
Office of Judicial Records
21 NOV 2023 11:46 am
S. GILLIAM
DISTRICT OF

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA

City of Philadelphia : CASE NO.: 230702394
 :
 Plaintiff : CIVIL DIVISION
 :
 v. :
 :
 Tanner Operations, LLC, *et. al.* :
 :
 Defendants :

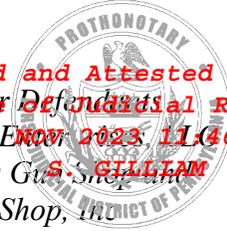
ORDER

AND NOW, this _____ day of _____, 20____, in consideration of the Defendants’ Preliminary Objections to the Plaintiff’s Complaint and any response thereto it is hereby **ORDERED** and **DECREED** that the Defendant’s Preliminary Objections to the Plaintiff’s Amended Complaint are **SUSTAINED**, and the Complaint is **DISMISSED** with **PREJUDICE**.

By the Court:

J.

Britain R. Henry, Esq.
 Attorney I.D # 314279
 Jonathan S. Goldstein, Esq.
 Attorney I.D # 201627
 Goldstein Law Partners, LLC
 11 Church Road
 Hatfield, PA 19440
 (610) 949-0444



 Filed and Attested by the
 Attorney for Defendants
 Mad Minute Enterprises, LLC
 d/b/a Delia's Gun Shop, Inc.
 S. GILLIAM
 22 Nov 2023 11:46 am

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA

City of Philadelphia	:	CASE NO.: 230702394
	:	
<i>Plaintiff</i>	:	CIVIL DIVISION
	:	
v.	:	
	:	
Tanner Operations, LLC, <i>et. al.</i>	:	
	:	
<i>Defendants</i>	:	

DEFENDANTS' PRELIMINARY OBJECTIONS TO PLAINTIFF'S AMENDED COMPLAINT

Defendants, Mad Minute Enterprises, LLC d/b/a Delia's Gun Shop and Delia's Gun Shop, Inc.'s (hereinafter collectively "Delia's" or "Defendants") by and through their undersigned counsel Goldstein Law Partners, LLC, files Preliminary Objections to Plaintiff's Amended Complaint pursuant to Pursuant to Pa. R.C.P 1028 as set forth below:

1. On October 31, 2023, Plaintiff filed an Amended Complaint ("Complaint") against Defendants alleging claims of public nuisance, negligence, negligence per se, negligent entrustment, and violation of 18 Pa.C.S.A. § 6111(g)(6), for the acquisition and misuse of firearms by third-party criminals beyond Defendants' control.

2. In support of its claims, Plaintiff attempts to lay at Defendants' feet through baseless claims, generalizations and broad statics, essentially the entirety of the City of Philadelphia's

scourge of gun violence based on 31 alleged straw purchases over a three-year period. *Compl.*, ¶¶ 1, 2 and 3.

I. PRELIMINARY OBJECTION TO THE COMPLAINT PURSUANT TO Pa.R.C.P. 1028(a)(4) (Demurrer).

3. Defendants incorporates by reference the paragraphs above as if fully set forth at length herein.

4. Plaintiff's Complaint is legally insufficient, fails to state facts that could sustain the relief requested, is barred by the doctrine of non-mutual collateral estoppel and is barred by section 6120(a) of Pennsylvania Uniform Firearms Act, 18 Pa.C.S. § 6101, *et. seq.* ("UFA") and must be dismissed for the reasons set forth in the Defendants' accompanying Memorandum of Law.

II. PRELIMINARY OBJECTION TO COUNT I – PUBLIC NUISANCE PURSUANT TO Pa.R.C.P. 1028(a)(4) (Demurrer).

5. Defendants incorporates by reference the paragraphs above as if fully set forth at length herein.

6. Count I of the Complaint is legally insufficient, fails to state facts that could sustain the relief requested, is barred by the doctrine of non-mutual collateral estoppel and is barred by section 6120(a) of the UFA and must be dismissed for the reasons set forth in the Defendants' accompanying Memorandum of Law.

III. PRELIMINARY OBJECTION TO COUNT II – NEGLIGENCE, COUNT III – NEGLIGENCE PER SE, AND COUNT IV – NEGLIGENT ENTRUSTMENT PURSUANT TO Pa.R.C.P. 1028(a)(4) (Demurrer).

7. Defendants incorporates by reference the paragraphs above as if fully set forth at length herein.

8. Counts II, III and IV of the Complaint are legally insufficient, fail to state facts that could sustain the relief requested, is barred by the doctrine of non-mutual collateral estoppel and

is barred by section 6120(a) of the UFA and must be dismissed for the reasons set forth in the Defendants' accompanying Memorandum of Law.

IV. PRELIMINARY OBJECTION TO COUNT V – VIOLATION OF 18 Pa.C.S.A. §6111(g)(6) PURSUANT TO Pa.R.C.P. 1028(a)(4) (Demurrer).

9. Defendants incorporates by reference the paragraphs above as if fully set forth at length herein.

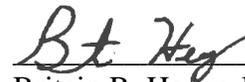
10. Count V of the Complaint is legally insufficient, fails to state facts that could sustain the relief requested, is barred by the doctrine of non-mutual collateral estoppel and is barred by section 6120(a) of the UFA and must be dismissed for the reasons set forth in the Defendants' accompanying Memorandum of Law.

WHEREFORE, Defendants respectfully urges this Court to enter an Order in a form similar to the proposed order attached hereto.

Respectfully submitted,

GOLDSTEIN LAW PARTNERS, LLC

Dated: _____



Britain R. Henry, Esq.

Jonathan S. Goldstein, Esq.

Attorneys for Defendants Mad Minute Enterprises, LLC d/b/a Delia's Gun Shop and Delia's Gun Shop, Inc.

VERIFICATION

The undersigned does hereby verify under penalty of perjury that he is Legal Counsel for Defendants and that he is duly authorized to make this Verification because he, not the Defendants, has sufficient knowledge or information pertaining to the facts set forth in the foregoing PRELIMINARY OBJECTIONS, and that said facts are true and correct to the best of his knowledge or information and belief after a reasonable investigation.

The undersigned understands that the statements therein are made subject to the penalties of 18 Pa.C.S.A §4909 relating to unsworn falsification to authorities.

Date: _____



Britain R. Henry, Esq.