

IN THE COURT OF COMMONWEALTH OF PENNSYLVANIA
COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT

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S. GILLIAM



CITY OF PHILADELPHIA	:	PHILADELPHIA COUNTY
	:	COURT OF COMMON PLEAS
Plaintiff	:	
	:	No. 230702394
v.	:	
	:	
TANNER OPERATIONS, ET AL.	:	
	:	
Defendants	:	
	:	
	:	

ORDER

AND NOW, this ____ day of _____, 2023, upon consideration of the preliminary objections of defendant, Frank's Gun Shop & Shooting Range LLC, and any response in opposition thereto, it is hereby **ORDERED** that the preliminary objections are **SUSTAINED**, and the amended complaint is **DISMISSED WITH PREJUDICE**.

BY THE COURT:

, J.

Wally Zimolong, Esquire
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Attorney I.D. #320497
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Villanova, PA 19085
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To the plaintiff:

You are hereby notified to file a written response to the enclosed preliminary objections within twenty (20) days from service hereof or a judgment may be entered against you.

Walter S. Zimolong
Attorney for Defendant

CITY OF PHILADELPHIA	:	PHILADELPHIA COUNTY
	:	COURT OF COMMON PLEAS
Plaintiff	:	
	:	No. 230702394
v.	:	
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TANNER OPERATIONS, ET AL.	:	
	:	
Defendants	:	
	:	
	:	

PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT

Defendant, Frank’s Gun Shop & Shooting Range LLC, files preliminary objections to the amended complaint of plaintiff and avers as follows:

Procedural History

1. On or about July 25, 2023, plaintiff, city of Philadelphia, filed a complaint against defendant, Frank’s Gun Shop & Shooting Range LLC (“Frank’s”) and others.
2. On or about October 11, 2023, Frank’s filed preliminary objections to the complaint because Frank’s has immunity from plaintiff’s claims under the

Pennsylvania Uniform Firearms Act, 18 Pa.C.S.A. § 6101, et. seq., and plaintiff had otherwise failed to state a claim against Frank's as a matter of law.

3. Rather than addressing the substantive legal issues Frank's raised in its preliminary objections, particularly the immunity the Pennsylvania Uniform Firearms Act confers on Frank's, on or about November 1, 2023, plaintiff filed an amended complaint that made very minor edits to some of the factual allegations.

4. Because that amended complaint does nothing to address the substantive legal defenses Frank's maintains to the plaintiff's claims, Frank's again raises preliminary objections.

Introduction

1. Defendant, Frank's Gun Shop & Shooting Range LLC ("Frank's") is a local "Mom and Pop" federally licensed firearms dealer who engages in the sale of firearms in Philadelphia. Am. Compl., ¶ 13.

2. The city of Philadelphia claims that Frank's is directly responsible for the city being "awash in illegal guns" and the resultant societal ills that follow gun violence. Am. Compl., ¶¶ 1-7.

3. Based on the sale of 48 firearms over a three-year period, the city claims Frank's has created a "public nuisance." It seeks an "any abatement order" enjoining Frank's from continuing to sell firearms and requiring Frank's to "adopt and enforce written policies to prevent further sale (sic) to straw purchasers." It also seeks damages to cover "the cost [the city] has thus far expended for abating the nuisance of

illegal guns,” and for “an abatement fund to address continuing harms caused by guns unlawfully sold by [Frank’s].” Am. Compl., ¶ 10.

4. The city brings claims against Frank’s for public nuisance (Count 1), negligence per se (Count 2), negligence (Count 3), negligent entrustment (Count 4), and violation of 18 Pa.C.S.A. § 6111(g) (Count 5).

5. First and foremost, the Pennsylvania Uniform Firearms Act, the Uniform Firearms Act, 18 Pa.C.S. § 6101, et. seq. (“UFA”), bars all the city’s claims and deprives this Court of subject matter jurisdiction over them.

6. For that reason alone, the Court should dismiss the complaint with prejudice.

7. Still, even if the UFA did not apply (it does), each of the city’s claims is legally insufficient as a matter of law and should be dismissed.

8. Accordingly, Frank’s Gun Shop & Shooting Range LLC files preliminary objections to the complaint.

PRELIMINARY OBJECTION I

Lack of Subject Matter Jurisdiction and Legal Insufficiency (Demurrer) Pa. R. Civ. P. 1028(a)(1); Pa. R. Civ. P. 1028(a)(4)

9. Frank’s incorporates the previous paragraphs by reference.

10. The UFA divests the city of any authority to maintain any of its claims against Frank’s and divests the Court of subject matter jurisdiction.

11. In Pennsylvania, the UFA regulates the use and possession of firearms.

12. Under section 6120(a) of the UFA, 18 Pa.C.S.A. § 6120(a), “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.”

13. Under section 6120(a.1) of the UFA, “[n]o 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.”

14. The UFA “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.” *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000), *aff’d*, 277 F.3d 415 (3d Cir. 2002) (“*Beretta*”)

15. Accordingly, the Court should sustain Frank’s preliminary objections.

WHEREFORE, defendant, Frank’s Gun Shop & Shooting Range LLC, respectfully requests that the Court sustain its preliminary objections to the complaint, dismissing the same with prejudice and award Frank’s Gun Shop & Shooting Range LLC all necessary and appropriate relief.

PRELIMINARY OBJECTION II
Legal Insufficiency (Demurrer)
Pa. R. Civ. P. 1028(a)(4)
Count 1 – Public Nuisance

16. Frank’s incorporates the previous paragraphs by reference.

17. In Count 1 of the complaint, the city brings a claim against Frank's for public nuisance. Compl., Count 1, ¶¶ 91-105.

18. A public nuisance is "an unreasonable interference with a right common to the *general public*." *Atl. Richfield Co. v. Cnty. of Montgomery*, 294 A.3d 1274, 1285 (Pa. Commw. Ct. 2023) (emphasis added)

19. "Whether a right is *public* is a question of law." *Id.* (emphasis original).

20. "The manufacture and distribution of products, rarely, if ever, causes a violation of a public right as that term as been understood in the law of public nuisance." *Id.* (quoting Donald G. Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. CIN. L. REV., 741, 817 (2003)).

21. "Idyllic and desirable though it may be, there is no [] right to be free from guns and violence." *Beretta*, 126 F. Supp. 2d at 909.

22. Furthermore, as with all torts, the alleged public nuisance must be the proximate cause of the alleged harm. *Atl. Richfield Co.*, 294 A.3d at 1285.

23. The city's public nuisance claim is based on the allegation that "straw purchasers," who buy firearms from Frank's then "sell or give" the firearm to others, who then commit crime. Am. Compl., ¶¶ 2, 8, 111.

24. The city provides a series of generalized statistics that highlight the harm that gun violence causes. *Id.*, ¶¶ 18-22.

25. The city goes on to claim that the city's gun violence problem is being driven by straw purchasers who create an illegal secondary market for guns. *Id.*, ¶ 27.

26. The city claims “Frank’s has sold at least 48 guns to at least 15 different straw purchasers between April 2018 and December 2021” *Id.*, ¶ 3, and is therefore largely responsible for the city’s gun violence problems.

27. The city does not state whether those 48 guns were used to commit crimes or whether they were just sold or given to third parties on the secondary market.

28. Indeed, the city makes no averment tying any of those 48 guns to a specific act of gun violence.

29. Where, as here, a firearm is sold to a person and then resold or given to a third party, who then uses that firearm to commit a crime “the causal chain is too attenuated to make out a public nuisance claim.” *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 422 (3d Cir. 2002).

30. Accordingly, the Court should dismiss Count 1 of the complaint.

WHEREFORE, defendant, Frank’s Gun Shop & Shooting Range LLC, respectfully requests that this Court sustain its preliminary objections to the complaint, dismissing it entirely with prejudice, and awarding it any other appropriate relief.

PRELIMINARY OBJECTION III
Legal Insufficiency (Demurrer)
Pa. R. Civ. P. 1028(a)(4)
Count 2 – Negligence

31. Frank’s incorporate the previous paragraphs by reference.

32. In Count 2, the city brings a claim against Frank’s for common law negligence.

33. “The primary element in any negligence cause of action is that the defendant owes a duty of care to the plaintiff.” *Althaus ex rel. Althaus v. Cohen*, 756 A.2d 1166, 1168 (Pa. Super. Ct. 2000).

34. Whether a legal duty of care exists is a question of law. *Walters v. UPMC Presbyterian Shadyside*, 187 A.3d 214, 221 (Pa. 2018)

35. A seller of a product *owes no duty* to a party who is injured when a third party uses the seller’s product wrongfully, criminally, or unlawfully. *Sherk v. Daisy-Heddon, a Div. of Victor Comptometer Corp.*, 450 A.2d 615 (Pa. 1982).

36. This rule applies no differently to the seller of firearms, like Frank’s. *Berretta*, 126 F.Supp.2d at 898.

37. A seller of firearms, like Frank’s, owes no duty of care to the city when the guns it sells are used to commit crime. *Id.* (collecting cases); see also *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015).

38. Moreover, even if Frank’s owed the city a legal duty, the city cannot recover on a theory of negligence because “their injuries are too remote from [Frank’s] alleged wrongful conduct.” *Berretta*, 126 F.Supp.2d at 903.

39. Accordingly, the Court should dismiss the city’s negligence claim (Count 2).

WHEREFORE, defendant, Frank’s Gun Shop & Shooting Range LLC, respectfully requests that the Court sustain its preliminary objections to the complaint, dismissing Count 2 with prejudice, and awarding it any other appropriate relief.

PRELIMINARY OBJECTION IV
Legal Insufficiency (demurrer)
Pa. R. Civ. P. 1028(a)(4)
Count 3 - Negligence per se

40. Frank's incorporate the previous paragraphs by reference.

41. In Count 3, the city brings a separate claim for negligence per se.

42. "Negligence per se is not a separate cause of action, but is instead a theory of liability that supports a negligence claim." *Simmons v. Simpson House, Inc.*, 224 F. Supp. 3d 406, 417 (E.D. Pa. 2016) (Pappert, J.) *Zaborowski v. Hosp. Care Ctr. of Hermitage, Inc.*, 60 Pa. D. & C.4th 474, 498 (Com. Pl. 2002) ("Since negligence per se is not a separate cause of action, however, the court will not address this argument at this time. As such, Zaborowski may file an amended complaint repleading the allegations of negligence per se as part of his cause of action for negligence.")

43. Accordingly, the Court should dismiss the city's negligence per se claim (Count 3) as duplicative of its negligence claim (Count 2).

44. The city's negligence per se claim is also legally insufficient.

45. To sustain a claim a claim for negligence based on a claim of negligence per se, the city must allege that the purpose of the statute violated was designed "at least in part, to protect the interest of a group of individuals, as opposed to the public generally." *Wagner v. Anzon, Inc.*, 684 A.2d 570, 574 (Pa. Super. Ct. 1996).

46. Each of the statutes that the city alleges Frank's violated are general criminal statutes designed to benefit the public at large not a specific group to which the city belongs.

47. Accordingly, the Court should sustain Frank's preliminary objections to Count 3 and dismiss it with prejudice.

WHEREFORE, defendant, Frank's Gun Shop & Shooting Range LLC, respectfully requests that the Court sustain its preliminary objections to Count 3 of the complaint, dismissing Count 3 with prejudice, and awarding it any other appropriate relief.

PRELIMINARY OBJECTION V
Legal Insufficiency (Demurrer)
Pa. R. Civ. P. 1028(a)(4)
Count 4 - Negligent entrustment

48. Defendants incorporate the previous paragraphs by reference.

49. In Count 4, the city brings a claim against Frank's for negligent entrustment.

50. Regarding a claim for negligent entrustment, Pennsylvania has adopted the Restatement (Second) of Torts § 308, which states

“It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.”

Berretta, 126 F. Supp. 2d at 902-03 (citing *Ferry v. Fisher*, 709 A.2d 399, 403 (Pa.Super.Ct.1998) (quoting Restatement (Second) of Torts § 308 (1979)).

51. As the city did in *Berretta*, it does has not alleged that Frank's “directly entrust[s] their weapons to individuals who are likely to use them in a negligent or criminal way.” *Id.* at 903.

52. The City does not allege Frank's sold firearms to person that used the firearms *himself* in a manner involving unreasonable risk of physical injury.

53. Rather, the City alleges that third parties used the firearms in a criminal or unlawful manner. Am. Compl., ¶¶ 65-80.

54. Accordingly, the Court should dismiss Count 4 with prejudice.

WHEREFORE, defendant, Frank's Gun Shop & Shooting Range LLC, respectfully requests that the Court sustain its preliminary objections to the complaint, dismissing Count 4 with prejudice, and awarding it any other appropriate relief.

PRELIMINARY OBJECTION VI
Legal Insufficiency (Demurrer)
Pa. R. Civ. P. 1028(a)(4)
Count 5 – Violation of 18 Pa.C.S.A. § 6111(g)(6)

55. Defendants incorporate the previous paragraphs by reference.

56. Finally, in Count 5, the city brings a cause of action under 18 Pa.C.S.A. § 6111(g)(6).

57. Under 18 Pa.C.S.A. § 6111(g)(6), a 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.”

58. The City alleges that Frank's made firearms sales in violation of 18 Pa.C.S.A. 6111(g)(6). Am. Compl., ¶¶ 139-140.

59. The City further alleges that Frank’s “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.” *Id.*

60. However, liability under 18 Pa.C.S.A. § 6111(g)(6) requires Frank’s to act knowingly *and intentionally*.

61. The city fails to allege Frank’s acted intentionally and fails to unequivocally state that Frank’s knew that the sales were of firearms that would be used to commit a crime.

WHEREFORE, defendant, Frank’s Gun Shop & Shooting Range LLC, respectfully requests that the Court sustain its preliminary objections to the complaint, dismissing Count 5 with prejudice, and awarding it any other appropriate relief.

Respectfully submitted,

Dated: November 21, 2023

/s/Walter S. Zimolong
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	:	
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	:	
	:	

**MEMORANDUM OF LAW IN SUPPORT OF
PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT**

I. MATTER BEFORE THE COURT

Preliminary objections to amended complaint.

II. STATEMENT OF QUESTIONS INVOLVED

1. In *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000), aff'd, 277 F.3d 415 (3d Cir. 2002), a case identical to the one before the Court, the district court held that the Pennsylvania Uniform Firearms Act unequivocally prohibits the city from suing gun manufactures for claims based on public nuisance and negligence. The provisions of the UFA relied upon by the district court in *Beretta* remain unchanged. Does the UFA prohibit the city from suing Frank's?

Suggested answer: yes.

2. A public nuisance is “an unreasonable interference with a right common to the general public.” *Atl. Richfield Co. v. Cnty. of Montgomery*, 294 A.3d 1274, 1285 (Pa. Commw. Ct. 2023) (emphasis added). “Idyllic and desirable though it may be, there is no [] right to be free from guns and violence.” *Beretta*, 126 F. Supp. 2d at 909. Should the Court sustain Frank’s preliminary objections and dismiss the city’s public nuisance claim because there is no public right to be free from crime, guns, and violence?

3. The same causation rules applied to all tort claims apply to public nuisance claims. The city alleges that Frank’s sells guns to persons who in turn sell or give those guns to third parties, who then commit crimes with those guns. As Third Circuit held, when the city claims firearms dealers permit firearms to find their way to straw purchasers who then sell or give the firearms to criminals, is the “the causal chain is too attenuated to make out a public nuisance claim?” *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 422 (3d Cir. 2002)

Suggested answer: yes.

4. A seller of a product owes no duty to a party who is injured when a third party uses the seller’s product wrongfully, criminally, or unlawfully. *Sherk v. Daisy-Heddon, a Div. of Victor Comptometer Corp.*, 450 A.2d 615 (Pa. 1982). Does a seller of firearms, like Frank’s, owe a duty to the city when a third party uses that firearm to commit a crime?

Suggested answer: No.

5. Are the city's injuries likewise too remote from the conduct of Frank's to support a claim for negligence because the city cannot show they are the proximate cause of the epidemic of gun violence the city complains of?

Suggested answer: Yes.

6. Should the Court dismiss Count 3 of the complaint for negligence per se because there is no separate cause of action for negligence per se that is distinct from a common law negligence claim?

Suggested answer: Yes.

7. Should the Court dismiss Count 4 of the complaint for negligent entrustment because the person to whom Frank's sold its firearms is not the person committed a crime with the firearm?

Suggested answer: Yes.

8. Should the city dismiss the city's claim based on 18 Pa.C.S.A. § 6111(g)(6) because the city does not allege that Frank's acted knowingly and intentionally in selling firearms to alleged straw purchasers?

Suggested answer: yes.

III. PROCERURAL AND FACTUAL BACKGROUND

Frank's is a local "Mom and Pop" gun store located in Holmesburg. Am. Compl., 13. On July 25, 2023, the city, through its Washington D.C. and New York based activist lawyers and their billionaire backed public interest law firm, filed a complaint against Frank's seeking to hold it liable for all gun violence that plagues the city. Frank's filed preliminary objections to the complaint because it maintains immunity

from the plaintiff's claims under the Pennsylvania Uniform Firearms Act and because plaintiff's claims are otherwise legally insufficient. Rather than responding to the preliminary objections, the city tried to avoid addressing the substantive legal issue raised in the preliminary objections by filing an amended complaint that made only minor – at best – edits to the factual allegations in the complaint. But the song remains the same.

The city claims that 48 guns Frank's sold over a three-year period have caused the city to be "awash in illegal guns," Am. Compl., ¶ 1, and the city's gun violence problem are based on a "deliberate choice" by Frank's to "engage in practices that supply the illegal and secondary market for guns." Am. Compl., ¶ 2. Based on theories of public nuisance, negligence, negligence per se, negligent entrustment, and violation of 18 Pa.C.S.A. § 6111(g)(6), the city seeks an abatement order enjoining Frank's from continuing to sell firearms and requiring Frank's to adopt practices over and above those already required by federal and state law. It also seeks damages for the "the costs [the city] has thus far expended in abating the nuisance of illegal guns" and for "an abatement fund to address the continuing harms caused by guns unlawfully sold" in the city. *Id.*, ¶ 10.

IV. ARGUMENT

A. THE PENNSYLVANIA UNIFORM FIREARMS ACT UNEQUIVOCALLY BARS THE CITY CLAIMS.

The Pennsylvania Uniform Firearms Act, the Uniform Firearms Act, 18 Pa.C.S. § 6101, et. seq. ("UFA"), regulates the sale and use of firearms in

Pennsylvania. The UFA bars the city from bringing any of its claims and, accordingly, deprives this Court of subject matter jurisdiction.

Under section 6120(a) of the UFA, 18 Pa.C.S.A. § 6120(a), “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 no prohibited by the laws of the Commonwealth.” Moreover, under section 6120(a.1) of the UFA, “[n]o 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.” In *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000), *aff’d*, 277 F.3d 415 (3d Cir. 2002), in a case identical to the one presently before the court, the district court held that the UFA unequivocally prohibits the city from suing those involved with the sale or manufacture of firearms for claims based on public nuisance, negligence, and negligent entrustment. *Id.* (The UFA “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.”)

In *Beretta*, the city brought an identical claim to the one presently before the Court against a firearms manufacturer and dealers. There, like here, the city claimed that the defendants’ distribution practices allowed “straw buyers” to purchase

firearms for others who use those firearms to commit crimes. *Id.* at 888. Like here, the city claimed the manufacturers should have done more to assure their firearms do not make their way into the hands of straw buyers. *Id.* Finally, like here, the city invoked claims of public nuisance, negligent entrustment, and negligence to recover from Berretta. *Id.* The district court held that the UFA barred the city's claims.

The district court held that the UFA unequivocally barred the city's claims for two reasons. First, the district court noted that the Supreme Court of Pennsylvania has ruled that under 18 Pa.C.S.A. § 6120 the city cannot regulate firearms within city limits. *Id.* at 889 (citing *Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996)). The district court rightly held that "what the City cannot do by act of the City Council" it cannot accomplish through litigation. *Id.* Here, there is no doubt that the city seeks to regulate firearms through its current litigation and to do "what [it] cannot do by act of City Council." The city's relief could not make its aims clearer. The city requests that the Court regulate Frank's by imposing on Frank's a plan that would require Frank to adopt "practices," over and above any state and federal requirements, to prevent straw purchasers from buying firearms. Am. Compl., ¶ 10, prayer for relief.

Second, the district court held that Section 6120(a.1) of the UFA "deprives the city of the power to sue because it specifically bars a variety of municipal suits against gun manufacturers." *Id.* at 890. The district court held that the plain meaning of the UFA divested the city of the power to sue. The district court noted that the city was a "political subdivision" as defined by the UFA because the term "political subdivision" included home rule municipalities like Philadelphia. *Id.* (citing 18 Pa.C.S.A. §

6120(b)). The district court further properly held that the UFA prohibits the city from maintaining any “action at law or equity” that requests “damages, abatement, injunctive relief or any other relief or remedy” relating to the “sale or firearms.” *Id.* Accordingly, the district court held that the “plain language bars [the city’s] suit.” *Id.* at 890

Here there is no question that the city’s present suit fails within the UFA. It is a suit in law and equity. It expressly requests “damages, abatement, and injunctive relief.” Am. Compl., ¶ 10; prayer for relief. And it relates to Frank’s sale of firearms.

Undoubtedly, the city will claim, as it did in *Berretta*, that the UFA only bars suits related to the “lawfully” sale of firearms. Like the district court did in *Berretta*, this Court should be unpersuaded by such an argument.

First, as the district court in *Berretta* noted, that theory is foreclosed as a matter of statutory construction. It noted that “[t]he 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.” *Id.* This rationale aligns with holdings of the Pennsylvania Supreme Court who has consistently maintained that in discerning the meaning of statutes, “[t]he omission of language . . . speaks volumes Under the doctrine of *expressio unius est exclusio alterius*, ‘the inclusion of a specific matter in a statute implies the exclusion of other matters.’” *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020) (citing *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1223 (Pa. 2002)).

The district court’s holding is also consistent with the interpretation of statutes that similarly apply to certain “lawful” conduct. For example, the Pennsylvania

statute of repose bars all suits against any person “**lawfully** performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property” that are commence more than 12 years after the completion of the improvement. 42 Pa.C.S. § 5536(a) (emphasis added). In *Johnson v. Toll Brothers*, ___ A.3d ___, 2023 WL 6067414 (Pa. Super. Ct. 2023), the Superior Court addressed the term “lawful” as it used in that statute. In that case, the plaintiff alleged that a home builder had violated the building code in constructing a residence and, therefore, the statute of repose did not apply because the builder did not act lawfully in constructing the residence. *Id.* The Superior Court rejected this interpretation and held the term “lawful” referred to whether the actor was authorized by Commonwealth law to engage in the conduct. *Id.* at * 4. In that case, it was construction of homes, which the defendant was undoubtedly authorized to do.

The Court in *Johnson* pointed to a similar result that was reached in *Branton v. Nicholas Meat, LLC*, 159 A.3d 540 (Pa. Super. Ct. 2017). In that case, the Court considered whether neighboring landowners could maintain a private nuisance action against a meat processing facility located on a farm. The farm claimed the claim was barred under the statute of repose found in the Right to Farm Act. That act imposed a similar bar to claims against “an agricultural operation which has **lawfully been in operation** for one year or more.” *Id.* at 546 (citing 3 P.S. § 954(a)) (emphasis added). The plaintiffs contended that the act did not apply because the farms operations were not “lawful” pointing to violations the farm had received from the Department of Environmental Protection. *Id.* at 548. But the Superior Court rejected that

theory as well and noted that the term lawful related operations that were authorized by law.

Here, the city cannot dispute that, like the homebuilder in *Johnson* and the farm in *Branton*, Frank's is authorized to operate as a seller of firearms under state and federal law. Compl., ¶ 13 ("Defendant Frank's Gun Shop & Shooting Range LLC *holds a Type 1 (dealer) federal firearms license* and operates as a retail dealer in firearms.") (emphasis added) Moreover, the city admits that the initial firearm sale is done in compliance with federal and state law. Indeed, the city concedes that the firearms Frank's sells enters the stream of commerce legally. However, the straw buyer "diverts firearms from *legal commerce*—where gun sales are subject to a background check and other public safety requirements and must be recorded in a licensed dealer's books and records—into the unregulated criminal market." *Id.*, ¶ 23. Accordingly, Frank's operates lawfully, as the term is used in the UFA.

The city's amended complaint also suggests that it believes the UFA's immunities apply only to gun manufacturers. Am. Compl., ¶ 103 ("No defendant is licensed to manufacture firearms.") Any suggestion is baseless. The sweep of the UFA is clearly much broader. The text of the UFA plainly states the city may not maintain a suit against any "manufacturer, trade association *or dealer.*" 18 Pa.C.S.A. § 6120(a) (emphasis added). The city patently admits that Frank's is a licensed firearms dealer. Am. Compl., ¶ 13. So the city cannot escape the UFA by claiming Frank's is not a manufacturer of firearms.

In sum, the UFA divests the city of any authority to maintain its claims. The Court should dismiss the complaint.

B. THE CITY CANNOT MAINTAIN A CLAIM FOR PUBLIC NUISANCE BECAUSE IT DOES NOT SEEK TO PROTECT A PUBLIC RIGHT AND ITS DAMAGES ARE TOO REMOTE FROM FRANK’S CONDUCT.

Even if the Court were to find that the UFA did not bar the city’s claims, it should still find that each of the city’s claims are legally insufficient. To begin, the Court should dismiss the city’s public nuisance claim because it does not seek to protect a public right and, in all events, its damages are too remote to be attributed to Frank’s conduct.

A public nuisance is “an unreasonable interference with a right common to the general public.” *Atl. Richfield Co. v. Cnty. of Montgomery*, 294 A.3d 1274, 1285 (Pa. Commw. Ct. 2023) (emphasis added) “Whether a right is *public* is a question of law.” *Id.* (emphasis original). “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.” *Id.* (quoting Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV., 741, 817 (2003)). Furthermore, “[i]dyllic and desirable though it may be, there is no [] right to be free from guns and violence.” *Beretta*, 126 F. Supp. 2d at 909.

Moreover, as with all torts, the alleged public nuisance must be the proximate cause of the alleged harm. *Atl. Richfield Co.*, 294 A.3d at 1288. The city’s public nuisance claim is based on the allegation that “straw purchasers” buy firearms from Frank and then “sell or give” the firearm to others, who then commit crimes of

violence. Am. Compl., ¶¶ 2, 8, 93. But as the district court explained in *Beretta*, this theory could not support a public nuisance claim because “the injurious acts with their harmful consequences are not created *by the manufacturers*, but by criminals and others unlawfully in possession of firearms.” *Id.* at 910. The Third Circuit affirmed the district court’s rationale and held that where, as here, a firearm is sold to a person and then resold or given to a third party, who then uses that firearm to commit a crime “the causal chain is too attenuated to make out a public nuisance claim.” *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 422 (3d Cir. 2002). Moreover, the Third Circuit noted that a public nuisance claim requires the defendant to exercise a degree of requisite control over the instrument of the nuisance. *Id.* at 422. In the case of gun violence perpetuated by straw purchasers, the firearms dealers are not in control of the firearms at the point they are used to commit gun crimes. *Id.*

Here, the city does not claim that Frank’s committed acts of gun violence itself or that it is in control of the firearms at the scene of the crime. Rather, as in *Beretta*, it is the criminal who unlawfully acquired firearms originally sold by Frank’s that commits the crime. Contrary to the city’s allegations, it is not the deliberate choice of Frank’s that causes gun violence. It is the deliberate choice of the person, in whose hands the straw buyer placed the firearms, to commit an act of gun violence. At the scene of the crime, that person had control of the firearm and complete agency over whether to use the firearm to commit a crime.

Accordingly, the Court should dismiss the city’s claim for public nuisance.

C. THE COURT SHOULD DISMISS THE CITY’S NEGLIGENCE CLAIM BECAUSE FRANK’S OWES NO DUTY TO THE CITY AND FRANK’S CONDUCT IS NOT THE PROXIMATE CAUSE OF THE CITY’S INJURIES.

The Court should dismiss the city’s negligence claim because a firearms seller owes no duty of care to a municipality when a firearm it sells used by a third party to commit a crime, in all events, the city’s damages are too remote from Frank’s conduct to support a claim for negligence.

“The primary element in any negligence cause of action is that the defendant owes a duty of care to the plaintiff.” *Althaus ex rel. Althaus v. Cohen*, 756 A.2d 1166, 1168 (Pa. Super. Ct. 2000). Whether a legal duty of care exists is a question of law. *Walters v. UPMC Presbyterian Shadyside*, 187 A.3d 214, 221 (Pa. 2018). A seller of a product owes no duty to a party who is injured when a third party uses the seller’s product wrongfully, criminally, or unlawfully. *Sherk v. Daisy-Heddon, a Div. of Victor Comptometer Corp.*, 450 A.2d 615 (Pa. 1982). This rule applies no differently to the seller of firearms, like Frank’s. Accordingly, a seller of firearms, like Frank’s, owes no duty of care to the city when the guns its sells are used to commit crimes. *Id.* (collecting cases); *Beretta*, 277 F.3d at 425 (“the district court also properly concluded that the gun manufacturers are under no legal duty to protect citizens from the deliberate and unlawful use of their products.”); *see also Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015).

The city claims that Frank’s owed it a duty to assure that it does not sell firearms to straw purchasers who will, in turn, sell or give the firearms to criminal actors. This theory is no different than saying a car dealer owes the city a duty to assure that

it does not sell cars to individuals the car dealer knows will operate the car negligently, carelessly, or in violation of the motor vehicle code. Or that a car dealer owes the city a duty to assure that cars are not sold to buyers who will in turn sell, lend, or give their car to *others* who will operate the car in a criminal manner. The Court would never impose such a duty.

Still, even if Frank's owed the city a legal duty, the city cannot recover on a theory of negligence because, as with their claims for public nuisance, "their injuries are too remote from [Frank's] alleged wrongful conduct." *Berretta*, 126 F.Supp.2d at 903. While the city complains that the city is "awash in illegal guns" because of a straw purchasers, who contribute to a thriving unregulated secondary market for firearms, Am. Compl., ¶¶ 1-2, "[s]traw purchases are not the only means by which guns allegedly reach the 'illegal market.'" *Beretta*, 277 F.3d at 424. The city fails to acknowledge the host of other sources for firearms entering the illegal market not only from other firearms stores but from all other sources, such as theft, or purchases from other criminals far removed from Frank's.

Moreover, while the city provides a series of generalized statistics that highlight the harm that gun violence causes, Am. Compl., ¶¶ 18-22, which the city theorizes is caused by straw purchasers who create an illegal secondary market for guns. *Id.*, ¶ 27, it never ties the specific conduct of Frank's to the generalized harm. Nor does the city state how these statistics would be any different but for Frank's alleged wrongful conduct. The city claims "Frank's has sold at least 48 guns to at least 15 different straw purchasers between April 2018 and December 2021" *Id.*, ¶ 3, and is

therefore largely responsible for the city's gun violence problems. But the city does not state whether those 48 guns were used to commit crimes or whether they were just sold or given to third parties on the secondary market. Indeed, the city makes no averment that any of 48 guns to a specific act of gun violence or that any of these guns contributed to the generalized ills caused by gun violence.¹

Finally, as in *Beretta*, the city's negligence claim fails because it is speculative "as it would be difficult to calculate how many incidents could have been avoided had the gun manufacturers adopted different policies." *Beretta*, 277 F.3d at 425. As Third Circuit noted in *Beretta*, "for each individual injury, independent factors obviously come into play, such as criminal conduct, drug or alcohol abuse, or other misconduct by the owner." *Id.* Finally, "any effort to compensate [the city] would require the expenditure of enormous judicial resources to determine which defendants should bear what percentage of liability." *Id.* As in *Beretta*, the city does not explain how its requested relief would cause the generalized harms it identifies in paragraphs 18 through 26 to be mitigated in a material way. Accordingly, its negligence claims is speculative and should be dismissed.

D. THE COURT SHOULD DISMISS THE CITY CLAIM FOR NEGLIGENCE PER SE.

The Court should dismiss the city's negligence per se claim, Count 3, because it is duplicative of its negligence claim. The Court can further dismiss the claim

¹ The city does claim that "PPD traced . . . 264 crime guns to Frank's," Am Compl., ¶ 28, it does not claim that the 264 guns recovered where from straw purchaser. The city also does not explain what it means by "crime guns" and it does not clarify whether the firearm was simply recovered as part of a law enforcement activity or whether it was used to commit a crime of violence. Furthermore, regarding the specific straw purchases the city alleges occurring through sales at Frank's, the city does not claim that any of those sales resulted in the gun sold being used to commit a violent crime. *Id.*, ¶¶ 65-71.

because the statutes on which the city relies to support its claim are statutes of general applicability.

“Negligence per se is not a separate cause of action, but is instead a theory of liability that supports a negligence claim.” *Simmons v. Simpson House, Inc.*, 224 F. Supp. 3d 406, 417 (E.D. Pa. 2016) (Pappert, J.) *Zaborowski v. Hosp. Care Ctr. of Hermitage, Inc.*, 60 Pa. D. & C.4th 474, 498 (Com. Pl. 2002) (“Since negligence per se is not a separate cause of action, however, the court will not address this argument at this time. As such, Zaborowski may file an amended complaint repleading the allegations of negligence per se as part of his cause of action for negligence.”) Accordingly, the Court should dismiss the city’s negligence per se claim (Count 3) as duplicative of its negligence claim (Count 2).

Still, to sustain a claim a claim for negligence based on a claim of negligence per se, the city must allege that the purpose of the statute violated was designed “at least in part, to protect the interest of a group of individuals, as opposed to the public generally.” *Wagner v. Anzon, Inc.*, 684 A.2d 570, 574 (Pa. Super. Ct. 1996). However, each of the statutes that the city alleges Frank’s violated are general criminal statutes designed to benefit the public at large not a specific group to which the city belongs.

Accordingly, the Court should sustain Frank’s preliminary objections to Count 3 and dismiss it with prejudice.

E. THE COURT SHOULD DISMISS THE CITY’S NEGLIGENT ENTRUSTMENT CLAIM.

Regarding a claim for negligent entrustment, Pennsylvania has adopted the Restatement (Second) of Torts § 308, which states

“It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.”

Berretta, 126 F. Supp. 2d at 902-03 (citing *Ferry v. Fisher*, 709 A.2d 399, 403 (Pa.Super.Ct.1998) (quoting Restatement (Second) of Torts § 308 (1979)). As the city did in *Berretta*, it does not allege that Frank’s “directly entrusts their weapons to individuals who are likely to use them in a negligent or criminal way.” *Id.* at 903. Rather, the City alleges that third parties, who acquired the firearms from straw purchasers, used the firearms in a criminal or unlawful manner. Am. Compl., ¶¶ 65-78. Accordingly, the Court should dismiss the city’s negligent entrustment claim.

F. THE COURT SHOULD DISMISS THE CITY’S CLAIMS UNDER 18 PA.C.S.A. § 6111(g)(6).

Under 18 Pa.C.S.A. § 6111(g)(6), a 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.” The City alleges that Frank’s made firearms sales in violation of 18 Pa.C.S.A. 6111(g)(6). Am. Compl., ¶ 139-140. The city further alleges that Frank’s “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.” *Id.* However, liability under 18 Pa.C.S.A. § 6111(g)(6) requires Frank’s to act knowingly *and intentionally*. The city fails to allege Frank’s acted intentionally and fails to unequivocally state that Frank’s knew that the sales were of firearms that would be used to commit a crime. Accordingly, the Court should dismiss the city’s claims under 18 Pa.C.S.A. § 6111(g)(6).

V. CONCLUSION

Based on the foregoing, Frank’s respectfully requests that the Court sustain its preliminary objections and dismiss all claims against it with prejudice.

Respectfully submitted,

Dated: November 21, 2023

/s/Walter S. Zimolong
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CERTIFICATE OF SERVICE

I, Walter S. Zimolong, hereby certify that on the date set forth below, in accordance with Pa.R.Civ.P. 205.4(g)(1)(ii), the foregoing was electronically filed with the Philadelphia County Court of Common Pleas electronic filing system website and is available for review on the Philadelphia County Court of Common Pleas electronic filing system's website, which filing constitutes proper service upon counsel of record.

Dated: November 21, 2023

/s/ Walter S. Zimolong